Neutral Citation Number: [2020] EWHC 3350 (Ch)

Claim No: CR-2020-LDS-000831

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (CH D)

IN THE MATTER OF ARL O09 LIMITED (Co. No. 11113979)
AND IN THE MATTER OF ARL 011 LIMITED (Co. No. 11121147)
AND IN THE MATTER OF BRK 001 LIMITED (Co. No. 11243276)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Date: Wednesday, 9 December 2020

Before:

Mr Andrew Sutcliffe QC, sitting as a Judge of the High Court

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BETWEEN:

STRATEGIC ADVANTAGE SPC
for and on behalf of ARLINGTON 1 SP and ARLINGTON 3 SP

Applicant

and

(1) ARL O09 LIMITED
(2) ARL 011 LIMITED
(3) BRK 001 LIMITED

Respondents

Ms Lexa Hilliard QC, Mr Hugo Groves and **Mr Matthew Maddison** (instructed by **Walker Morris LLP**) for the Applicant

Mr Matthew Smith (instructed by **TLT LLP**) for the Respondents

Mr Adam Deacock (instructed by **Walker Morris LLP**) for the Proposed Administrators, interested parties

Mr Olivier Kalfon and Ms Hannah Ilett (instructed by **Blake Morgan LLP**) for AIL Administrators, interested parties

Ms Hilary Stonefrost (instructed by Michelmores LLP) for IMVA Limited, an interested party

Hearing date: 3 December 2020

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JUDGMENT

MR ANDREW SUTCLIFFE QC:

Introduction

1. This is an application by Strategic Advantage SPC (the **Applicant**) for administration orders in relation to each of the Respondents (the **Companies**) pursuant to paragraphs 10 to 13 of Schedule B1 to the Insolvency Act 1986 (**Schedule B1**). The grounds relied on by the Applicant are that (1) it is a creditor of the Companies, (2) the Companies are or are likely to become unable to pay their debts and (3) the orders are reasonably likely to achieve the purpose of administration.

2. The Companies oppose the application. They contend that the Applicant is not a creditor, that they are not insolvent and that the application imperils their survival as going concerns. The application is also opposed by the Companies' parent and sole shareholder, Arlington Infrastructure Limited (**AIL**) which is already in administration, and by one of AIL's creditors, IMVA Limited.

3. The hearing took place remotely before me on Thursday, 3 December 2020. Ms Lexa Hilliard QC, Mr Hugo Groves and Mr Matthew Maddison appeared for the Applicant and Mr Matthew Smith appeared for the Companies. I gave permission pursuant to rule 3.12(1)(j) of the Insolvency Rules 2016 for three further parties be heard on the application. Mr Olivier Kalfon and Ms Hannah Ilett appeared for AIL, acting by its administrators, Simon Campbell and Andrew Watling of Quantuma Advisory Limited (the **AIL Administrators**), Ms Hilary Stonefrost appeared for IMVA Limited and Mr Adam Deacock appeared for Ben Woolrych, Paul Allen and Jason Baker of FRP Advisory Trading Limited (the **Proposed Administrators**).

4. A large amount of evidence has been filed on both sides. I shall refer to some of it. I have read all of the witness statements filed and the exhibits where relevant and I have taken it all into account in reaching my conclusions.

Background

5. The Applicant is a segregated portfolio company incorporated as an exempted company in the Cayman Islands on 28 March 2018. It carries on business providing secured term loan facilities. Such facilities are almost exclusively funded by Korean blue-chip investors. It has created a number of "segregated portfolios" for the purpose of its business activities including Arlington 1 SP and Arlington 3 SP through which it made loans to AIL. The Applicant's current directors are Heesuk (Shawn) Jee (**Mr Jee**) (who has made two statements on the Applicant's behalf), Huan Koh, Annemarie Levin and John Lynden.

6. The Applicant provided loans in the total sum of approximately £39 million to AIL pursuant to facility agreements dated 13 September 2018 (as amended) and 7 March 2019 (the **Facility Agreements**). By clause 3.1.2 of the Facility Agreements, one of the purposes of the lending was for AIL to lend money by inter-company loans to the Companies (referred to in the Facility Agreements as the "Project Companies"). The AIL Administrators' solicitors have stated in a letter to the Applicant's solicitors dated 2 October 2020 that the sums borrowed by AIL from the Applicant were "*cascaded down*" from AIL to the Companies by way of "*informal undocumented inter-company loans*".

7. The Applicant has the following security: (1) a debenture dated 13 September 2018 (comprising fixed charges and a floating charge) over all AIL's assets including a fixed charge over AIL's shares in the Companies (the **AIL Debenture**) and (2) debentures dated 13 September 2018, 21 September 2018 and 7 March 2019 (comprising fixed and floating charges) over all of the assets of the Companies (the **Company Debentures**).

8. By clause 2 of each of the Company Debentures, each Company covenanted to *"… on demand, pay to the Lender [the Applicant] and discharge the Secured Liabilities when they become due for payment and discharge in accordance with the terms of the Facility Agreement"* (the **covenant to pay**). Clause 1 defines "*Secured Liabilities*" as *"all present and future obligations and liabilities of the Borrower [AIL] to the Lender [the Applicant], whether actual or contingent and whether owed jointly or severally as principal or surety or in any other capacity, under or in connection with the Facility Agreement or this deed …."*.

9. A group of lenders including IMVA Limited and the directors of AIL (the **Senior Creditors**) loaned approximately £5 million (the **Senior Debt**) to AIL pursuant to a loan agreement dated 20 September 2019, which is secured by a debenture comprising fixed and floating charges over the assets of AIL, but not over the Companies. Accordingly, the only lender with fixed and floating security over the assets of the Companies and AIL is the Applicant.

10. By clause 2.3 of a deed of priority also dated 20 September 2019 (the **Deed of Priority**) between the Senior Creditors, the Applicant and AIL (but not the Companies), the Senior Creditors' security interests rank to the extent of the Senior Debt in priority to the security interests of the Applicant in respect of the sums loaned by the Applicant to AIL (defined as the **Junior Debt**). Clause 10 of the Deed of Priority has the effect that the Senior Debt ranks ahead of the Junior Debt.

11. On 17 August 2020 the Senior Creditors made an out of court appointment of the AIL Administrators pursuant to paragraph 14 of Schedule B1. The appointment of administrators over AIL constituted an Event of Default under clause 17.7.4.3 of the Facility Agreements.

12. On 28 September 2020, the Applicant filed notices for the out of court appointment (again pursuant to paragraph 14 of Schedule B1) of the Proposed Administrators as joint administrators of the Companies.

13. By application issued on 27 October 2020, AIL (acting by the AIL Administrators) and Mark Agrasut (the Security Trustee for the Senior Creditors) applied for a declaration that the appointment of the Proposed Administrators as joint administrators of the Companies was invalid because the Applicant's floating charges were "not enforceable" at the relevant time within the meaning of paragraph 16 of Schedule B1 (the **Paragraph 16 Application**). The ground on which AIL and the Senior Creditors contended that the Applicant's qualifying floating charges over the Companies were not enforceable was that, by clause 9.1.4 of the Deed of Priority, the Applicant had agreed with the Senior Creditors that it would not (except with the prior written consent of the Senior Creditors) *"take any step to enforce any Junior Security Interest, whether by appointing a Receiver, exercising its power of sale or otherwise"*.

14. The Paragraph 16 Application was heard by me on 13 November 2020 and I handed down judgment on 19 November 2020 ([2020] EWHC 3123 (Ch)). I held that the appointment of the Proposed Administrators as joint administrators of the Companies was invalid because (1) the requirement in clause 9.1.4 of the Deed of Priority for the Applicant to obtain the written consent of the Senior Creditors prior to filing an out of court appointment of administrators was a condition precedent to the enforcement of the Applicant's qualifying floating charges and (2) the Senior Creditors' written consent had not been sought or provided. I gave the Applicant permission to appeal and, upon the Applicant undertaking to issue this application (which it did that afternoon), I granted a stay of the declaration of invalidity pending the hearing of the appeal or this application, whichever occurred first.

15. Notwithstanding the fact that the Companies' directors had offered undertakings on 24 November 2020 not to take any steps other than steps relating to the day-to-day operation of the Companies pending the hearing of this application on 3 December 2020, the Applicant applied on short notice on 26 November 2020 to appoint the Proposed Administrators as interim managers. That afternoon Marcus Smith J dismissed the Applicant's application and lifted the stay, such that the directors were placed back in control of the Companies subject to undertakings to take no steps other than to operate the day-to-day business of the Companies until the hearing of this application.

The relevant statutory provisions

16. The requirements for making an administration order in respect of the Companies are as follows:

    (1) the Applicant must be a creditor of the Companies. A creditor for these purposes can be an actual creditor or a contingent or prospective creditor: sub-paragraphs 12(1)(c) and 12(4) of Schedule B1;
    (2) the court must be satisfied that the Companies are or are likely to become unable to pay their debts: paragraph 11(a) of Schedule B1. By paragraph 111(1) of Schedule B1, the term *"unable to pay its debts"* has the meaning given by s. 123 of the Insolvency Act 1986, in other words, insolvent on either a "cash-flow" or a "balance sheet" basis;
    (3) the court must also be satisfied that the administration orders are reasonably likely to achieve the purpose of administration: paragraph 11(b) of Schedule B1. The test is whether the court is satisfied that there is a "real prospect" that one or

more of the statutory purposes might be achieved: *In Re Harris Simons Construction Ltd* [1989] 1 W.L.R. 368; (1989) 5 B.C.C. 11, per Hoffmann J;

(4) the court must then consider whether in all the circumstances and in the exercise of its discretion it is appropriate to make the administration orders: paragraph 11 of Schedule B1.

Is the Applicant a creditor?

17. The first issue I have to decide is whether the Applicant is a creditor.

18. The Applicant submits that it is an actual, as well as a prospective or contingent, creditor of the Companies. It is not disputed that the Applicant has advanced approximately £39 million to AIL pursuant to the Facility Agreements. There is also no doubt that Events of Default as set out in the Facility Agreements have arisen by reason of (1) the appointment of the AIL Administrators and (2) the non-payment by AIL of interest due on 7 March 2020 (in respect of which non-payment the Applicant served a notice of default on AIL on 24 July 2020). Sub-clause 17.13.1.2 of the Facility Agreements provides that on and at any time after the occurrence of an Event of Default which is continuing the Applicant may declare that all amounts owing by AIL shall be immediately due and payable, whereupon they shall become immediately due and payable.

19. As indicated in paragraph 8 above, clause 2 of each of the Company Debentures includes a separate covenant to pay by each Company in respect of the Secured Liabilities (as defined in clause 1) owed by AIL to the Applicant.

20. The following sums (excluding default interest) have fallen due for payment by AIL under the Facility Agreement dated 13 September 2018:

    (1) £12,058,200 due on 7 August 2020 (being Tranche 1, comprising part of the capital advanced to AIL by the Applicant pursuant to a draw down request dated 13 September 2018, together with interest thereon);
    (2) £12,698,358.20 due on 14 August 2020 (being Tranche 2, comprising the remaining part of the capital advanced by the Applicant pursuant to a draw down request dated 13 September 2018, together with interest thereon);
    (3) £7,274,298.49 due on 2 November 2020 (comprising the capital advanced by the Applicant pursuant to a draw down request dated 2 November 2018, together with interest thereon).

21. The following sums (excluding default interest) have fallen due under the Facility Agreement dated 7 March 2019:

    (1) £470,748.30 interest due on 7 March 2020 in respect of the sum of £4,707,483 advanced by the Applicant to AIL pursuant to a draw down request dated 7 March 2019;
    (2) £511,194.80 interest due on 22 March 2020 in respect of the sum of £5,111,948 advanced by the Applicant to AIL pursuant to a draw down request dated 22 March 2019.

22. On 17 November 2020, the Applicant made a demand on each of the Companies pursuant to the covenant to pay. Accordingly, the Applicant contends that since at least 17 November 2020 it has been an actual creditor of the Companies. The fact that the Applicant has agreed with the Senior Creditors pursuant to clauses 2.3 and 10 of the Deed of Priorities that the Junior Debt owed by AIL to the Applicant ranks and is to be paid after the Senior Debt owed to the Senior Creditors by AIL does not have the consequence that the Junior Debt is not due. The only consequence is that the Senior Debt must be paid first.

23. Alternatively, the Applicant contends that, if (contrary to its primary submission) it is not an actual creditor, it is a prospective or contingent creditor of the Companies and has been since at least 17 August 2020 when AIL went into administration. It submits that the amounts due to it under the Companies' covenants to pay are prospective or contingent liabilities. The liabilities are prospective or contingent because if AIL does not discharge liabilities owed to the Applicant (which it cannot do), the Companies are required to do so.

24. Subject to the Companies' arguments relating to the provisions of clause 15.3 of the Facility Agreements (see below), I am in no doubt that the Applicant is an actual creditor of each of the Companies, essentially for the reasons the Applicant gives. I do not therefore need to consider the further submission made by the Applicant relying upon *Hammonds (a firm) v Pro-fit USA Ltd* [2007] EWHC 1998 (Ch) (per Warren J at [53]) that it has standing to make an application for an administration order because it has a good arguable case that it is a creditor of the Companies. Mr Smith argued forcefully on behalf of the Companies that the *Pro-Fit* decision (which has not yet been considered other than tangentially at appellate level) was wrong and should not be followed. Since the Applicant does not need to rely upon the *Pro-Fit* decision for the purposes of this application, this is not the time to address Mr Smith's arguments which I confess I found compelling, relying as they did on a distinction between section 8(3) of the original 1986 regime on the one hand and paragraph 3 of schedule B1 which came into force from 2003 onwards on the other.

Clause 15.3 of the Facility Agreements: Companies' submissions

25. The Companies' principal submission is that the Applicant has no standing to make this application because it is not a creditor of the Companies. They submit that the Applicant is under a contractual obligation to release the Company Debentures by virtue of the provisions of each of the Facility Agreements relating to "Permitted Disposals".

26. Clause 15.3 of the Facility Agreements provides:

> "*15.3.1 The Borrower* [AIL] *shall not sell, assign, lease, transfer or otherwise dispose of in any manner (or purport to do so) all or any part of, or any interest in, its assets other than:*
>
> *15.3.1.1 a Permitted Disposal*
>
> *15.3.1.2 trading stock in the ordinary course of business*
>
> *15.3.1.3 assets exchanged for other assets comparable or superior as to type, value and quality, and*

15.3.1.4 assets whose market value is worth less than £100,000 (one hundred thousand pounds) or its equivalent in another currency or currencies) in any financial year.

15.3.2 For disposal in accordance with clauses 15.3.1.1 to 15.3.1.4 (including but not limited to a Permitted Disposal) the Lender [the Applicant] *shall promptly release any Security existing over the Security Asset and do all such acts or execute all such documents (including any deeds of release or partial deeds of release) as the Borrower and/or a Project Company* [i.e. one of the Companies] *may specify to aid, action and/or perfect the disposal.*

15.3.3 The Borrower is not permitted to make a Permitted Disposal to an Affiliate for an amount which is for less than the amount outstanding under the Finance Documents without the consent of the Lender.

15.3.4 The Borrower and/or a Project Company may use any proceeds resulting from a Permitted Disposal for its general working capital.

15.3.5 For the purposes of this clause 15, a "Permitted Disposal" is a disposal by the Borrower of some or all of the shares in one or more Project Companies or a disposal by a Project Company of one or more of its assets if, in the opinion of the Borrower (acting in its sole [discretion[1]]) it is an optimal time to make such a disposal."

27. The Facility Agreements contain the following relevant definitions in clause 1:

"*Security*" is defined as *"any mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect."*

"*Security Asset*" is defined as "*all of the assets of the Borrower or a Project Company which from time to time are, or expressed to be, the subject of the Transaction Security."*

"*Security Document*" is defined as "*the Debenture, the Project Company 1 Debenture, the Project Company 2 Debenture, the Share Charge or any other document designated as such by the Lender and the Borrower."*

"Transaction Security" is defined as "*the Security created or evidenced, or expressed to be created or evidenced under the Security Documents."*

28. The Companies submit that by clause 15.3:

(1) AIL has agreed not to sell, assign, lease, transfer or otherwise dispose of any interest in its assets, other than (amongst other things) by a Permitted Disposal.
(2) A Permitted Disposal includes a disposal by AIL of some or all of the shares in one or more of the Companies or a disposal by a Company of one or more of its

[1] "Direction" must be a typographical error for "discretion"

assets if, in the opinion of AIL acting in its sole discretion, it is an optimal time to make such a disposal.

(3) In the case of a Permitted Disposal, the Applicant agreed that it would promptly release any charge or security interest existing over the Companies' shares or assets and do all such acts or execute all such documents including any deeds of release or partial deeds of release as AIL and/or one of the Companies might specify to aid, action and/or perfect the disposal.

29. The Companies further submit that the Permitted Disposal mechanism permits AIL to sell the shares in the Companies free from the effects of the Company Debentures, subject to the proviso that in the sole opinion of AIL it is an optimal time to make the sale. They say this makes commercial sense since (1) the Applicant has the benefit of its charge over AIL to secure the proceeds of the sale and (2) no purchaser could be expected to buy such shares if the Companies or their assets were to remain charged in favour of the Applicant for a debt owed to it by the vendor (AIL) or if the Companies remained indebted to the Applicant after the sale.

30. In addition to the Companies' submission that their construction of clause 15.3 makes commercial sense in the context of the arrangements between the parties, they suggest that their construction is supported by a detailed analysis of the relevant provisions. Clause 15.3 requires the Applicant to release "*Security*" over "*the Security Asset*". They argue that the latter is widely defined to include (in the present context) not just the Applicant's security over the shares in the Companies but also its security over assets belonging to the Companies. It follows that the requirement in clause 15.3.2 for the Applicant to "*do all such acts or execute all such documents (including any deeds of release or partial deeds of release) as [AIL] and/or [one of Companies] may specify to aid, action and/or perfect the disposal*" would (in the case of an intended share sale) encompass releasing security over the assets of the Companies as well as the Applicant's security over AIL's shares in the Companies.

31. The Companies rely upon the following matters:

(1) the wide definition of "*Security Asset*";

(2) the fact that clause 15.3.2 refers in parentheses to any deeds of release or partial deeds of release in the plural, such that more than one release is contemplated in respect of any given Permitted Disposal;

(3) the width of clause 15.3.2, which requires the release of Security and also the doing of all acts and executing of such documents as AIL or one of the Companies may specify to aid, action and/or perfect the disposal. They point to the fact that the release of the security over the Companies is liable to aid the disposal of the shares;

(4) the fact that clause 15.3.3 specifically anticipates that the disposal could be made (although not to an Affiliate) at a price less than the debt outstanding at the time. In effect, the Applicant took the risk by agreeing to clause 15.3 that it would lose security on a Permitted Disposal;

(5) as a matter of commercial practicality, the Companies say that the sale of the shares in the Companies is only feasible if the security is released. Without such release, it seems considerably less likely that there could be a valuable Permitted Disposal. They submit that where the parties have made specific provision for it,

the court ought to give it an interpretation that will allow the clause to have a real meaning in practice;

(6) the Facility Agreements and the Security are set up based on the group structure. The Permitted Disposal mechanism permits AIL to sell the shares in the Companies and also permits the Companies to dispose of assets. In effect, what a sale of the shares does is enable both the shares and the Companies' assets to be removed from the group.

32. The Companies then assert that the Applicant's obligation in clause 15.3.2 to execute a deed of release must have the effect of requiring the Applicant to release the covenant to pay contained in clause 2. They submit that this covenant is, effectively, a guarantee contained within the Company Debentures, amounting to "*Security*" (as defined in the Facility Agreements), and therefore stands to be released with other Security, or is merely intended to be ancillary such that it stands to be released whenever the Security is released. They say that commercial common sense dictates that clause 15.3 should be read as referring also to the covenant to pay because the purpose of clause 15.3 is to permit the sale of the Companies and, as a practical matter, no purchaser would buy them if, even though the security over the Companies' assets was removed, the Companies were still liable for a substantial unsecured debt. It follows that clause 15.3 must be read as including the release of the covenant to pay so that, where the shares of the Companies are sold, clause 15.3 requires the release of the Company Debentures as a whole. To construe the clause otherwise would deprive it of much practical effect.

33. The Companies also refer to the recitals in the Company Debentures which state that "*under this Deed, the Chargee* [sic: plainly this should read *Chargor*] *provides Security to the Lender to secure the payment and discharge of the Secured Liabilities"*. They submit that this recital does not suggest that a free-standing obligation to guarantee the debts of AIL had been created which would survive the release of the security.

34. The Companies then seek to rely upon extracts from the following textbooks to support their submissions on the construction of clause 15.3:

(1) Rowlatt on Principal and Surety (6th edition) begins: "*1-01 Definition. A surety may be defined as one who contracts with an actual or possible creditor of another to be responsible to him by way of security, additional to that other, for the whole or part of the debt"* (emphasis added). The Companies say this supports their submission that the release of "any Security" in clause 15.3 includes the release of the covenant to pay.

(2) Jowitt's Dictionary of English Law defines security as: "*Something which makes the enjoyment or enforcement of a right more secure or certain. A security may be a personal security; or a security on property (called in jurisprudence a real security); or a judicial security. A personal security consists in a promise or obligation by the debtor or another person, in addition to the original liability or obligation intended to be secured…"* (emphasis added). Again, the Companies say this supports their submission that the release of "any Security" in clause 15.3 includes the release of the covenant to pay.

(3) Westlaw's Practical Law Debenture: third party security wording document says this in relation to the covenant to pay: "*A document creating third party security will usually include a covenant to pay principal and interest. This is because, if the security provider is not under an obligation to pay, the lender may find it*

difficult to know how to make a valid demand and there may be uncertainty as to how the lender's right to foreclose arises. A lender might, therefore, prefer to be able to make demand for repayment from the security provider, rather than move straight to exercising its enforcement rights. However, a third party mortgage that excludes all personal liability to pay by the security provider is still valid… Additionally, if a document creating third party security is executed as a deed and includes a covenant to pay, the limitation period will be extended to 12 years from the date demand is made." The Companies say this supports their submission that, far from being intended to be a stand-alone guarantee, the covenant to pay was ancillary to, and part of, the Security.

(4) Practical Lending & Security Precedents (eds. Hardwick & Lawrence) says at B-083 "*The covenant to pay establishes the time when the security becomes exercisable and from which the limitation period will run."* The Companies say this supports their submission that the covenant to pay does not survive the release of the security.

(5) Westlaw's Practical Law Precedent - Deed of Release: Deed of Full Release contains a clause releasing the company from all its liabilities and obligations under the security agreement. The Companies submit that had the Applicant been willing to execute the documents reasonably required of it, it would have executed a document in similar form which would have made clear that the Companies were released from the covenant to pay as just such an ancillary obligation.

35. The Companies submit that, on the proper construction of clause 15.3, the Applicant is subject to a (specifically enforceable) contractual obligation to release the Company Debentures and, in those circumstances, the Companies are released from the only relevant obligation which they undertook to the Applicant, namely the covenant to pay contained within clause 2 of the Debentures, with the result that the Applicant is not a creditor of the Companies and the application must therefore be dismissed.

36. By their solicitors' letter of 10 September 2020, the AIL Administrators informed the Applicant that, in the light of AIL's administration, it was the optimal time for a disposal. AIL therefore sought the Applicant's confirmation that it would provide deeds of release of the Applicant's security over its shares in the Companies and the Companies' assets. The Applicant did not provide the confirmation sought. Instead, it took steps to appoint administrators in respect of the Companies which (as I have found) were taken in breach of the terms of the Deed of Priority and at a time when its security was not enforceable.

37. The Companies submit that there has been a valid activation of the Permitted Disposal mechanism and a valid request (with which the Applicant is required to comply) for the prompt release of, amongst other things, its debentures over the assets of ARL O09 Limited and ARL 011 Limited which they say are the only source of any relevant obligation owed by the Companies to the Applicant. They say that the Applicant is now seeking to rely on the Companies' covenant to pay contained in clause 2 of the Company Debentures which it should already have released had it complied with its own contractual obligations.

Clause 15.3 of the Facility Agreements: Applicant's submissions

38. The Applicant has the following responses to the Companies' Permitted Disposal arguments.

(1) First, the Permitted Disposal provisions are comprised in the Facility Agreements between AIL and the Applicant and it is not open to the Companies to seek to invoke the provisions when they are not parties to the Facility Agreements.
(2) Second, on the proper construction of clause 15.3 of the Facility Agreements, the Permitted Disposal provisions have no application after AIL has entered administration since the parties plainly intended them only to apply while AIL continues as a going concern and is actively trading.
(3) Third, the requirement to release its Security only arises at the point when a binding agreement for the disposal of the shares has been reached between AIL and a purchaser. There can be no pre-emptive activation of the Permitted Disposal provisions by AIL serving notice on the Applicant that it considers an "optimal time" to make a disposal has arisen since the obligation to release "any Security" under clause 15.3.2 arises only once a Permitted Disposal has been made, and not before. It is common ground that AIL has not made a Permitted Disposal of its shares in the Companies.
(4) Fourth, even if the Applicant was required to release its Security in order to "*aid, action and/or perfect*" the Permitted Disposal, clause 15.3 does not require it to release the covenant to pay. The consequence, therefore, of a Permitted Disposal is that the Companies would still have to comply with the covenant to pay the Applicant £39 million even if the Applicant had released its charges over the shares in and assets belonging to the Companies. The covenant to pay does not fall within the definition of "Security", nor can it be said that the covenant to pay is "over" a Security Asset. It is not an asset of AIL or any of the Companies over which Security is held. It is a liability of the Companies, a contractual promise to make payment to the Applicant in the terms specified, and does not by itself create any proprietary right in favour of the Applicant over the assets of the Companies.

39. In the context of this fourth submission, the Applicant submits that the Company Debentures are not themselves mortgages or charges and refer to *Levy v Abercorris Slate and Slab Company* (1888) L.R. 37 Ch. D. 260 at 264 where Chitty J says: "*In my opinion, a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a "debenture"*". The Applicant submits that the Company Debentures create mortgages and charges by clause 3. The covenant to pay contained in clause 2 is not "*Security*" within the meaning of the Facility Agreements. Clause 2 creates an entirely separate obligation on the Companies to discharge the liabilities of AIL which survives any Permitted Disposal.

40. The Applicant also refers to a passage in Sir Nicolas Browne-Wilkinson V-C's judgment in *Bristol Airport Plc*. *v Powdrill* [1990] Ch. 744 at 760:

> *"Mr. Crystal, for the administrators, submitted the following description of a security: "Security is created where a person ('the creditor') to whom an obligation is owed by another ('the debtor') by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains*

rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor.

Whilst not holding that that is a comprehensive definition of "security," in my judgment it is certainly no wider than the ordinary meaning of the word." (emphasis added)

41. The Applicant therefore argues that, even if it were obliged to release its fixed charge over AIL's shares in the Companies as a result of AIL entering into a Permitted Disposal, clause 15.3 does not require the Applicant to release the Companies' covenant to pay. The consequence would be that if there was a binding agreement for the sale of AIL's shares in the Companies, the Companies would remain liable to the Applicant to discharge all liabilities owed by AIL. In the circumstances, the Applicant says, it is no surprise that any interest in the acquisition of the shares in the Companies has not been pursued. Any purchaser, properly advised, would not wish to acquire companies saddled with in excess of £39 million of debt.

42. Finally, the Applicant contends that clause 15.3 cannot override the statutory oversight of the court contained in paragraph 71 of Schedule B1 which permits the court to make an order allowing an administrator to dispose of fixed charge assets only if the court thinks that the disposal of the property would be likely to promote the purpose of the administration in respect of the company in question.

Discussion in relation to clause 15.3 of the Facility Agreements

43. Mr Kalfon on behalf of the AIL Administrators submits that since AIL is not a party to this application, it would not be right for the court to make a final determination as to the meaning and effect of the Permitted Disposal provisions of clause 15.3. I accept that my conclusions on this issue will not be binding on AIL. However, as Mr Kalfon accepted, since I have to determine the issue of whether or not the Applicant is a creditor and therefore has standing to make this application, I have to consider whether or not the Companies' submissions in relation to the proper construction of clause 15.3 are correct since their submissions go to the heart of their opposition to this application. As all parties accepted, this is not a matter where the court will be assisted by further evidence. It is a matter of construction which needs to be determined now in the context of this application.

44. My conclusions can be shortly stated:

    (1) I am in no doubt that the Applicant's submissions in relation to the construction of clause 15.3 and the meaning of "Security" and "Security Asset" in the Facility Agreements are correct as regards the covenant to pay contained in clause 2 of the Company Debentures. The Companies' covenant to pay does not constitute "Security" or a "Security Asset" which the Applicant is bound to release by clause 15.3.2. It is not a "*mortgage, charge …, pledge, lien, assignment by way of security or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.*" Mr Smith sought to argue that the covenant to pay was an "*agreement or arrangement having a similar effect*" to a charge or other security interest securing AIL's obligation to pay its indebtedness to the Applicant. I cannot accept this. The Companies'

covenant to pay does not by itself create any security interest or other proprietary right in favour of the Applicant over the assets of the Companies. Indeed, the covenant to pay is not an asset of AIL or any of the Companies at all. It is a liability of the Companies, a contractual promise to make payment to the Applicant in the terms specified. It is not security (whether as defined in the Facility Agreements or according to the natural and ordinary meaning of that word) held by the Applicant.

(2) Nor do any of the textbook references to which I was taken by Mr Smith provide any assistance on this construction issue. None of them supports the submission that the release of security inevitably has the effect of releasing a freestanding obligation to pay a third party's debts. My conclusions on this point are fortified by the authorities relied on by the Applicant referred to above. The Company Debentures are not in themselves security. As stated by Chitty J in *Levy* they have the effect of creating or acknowledging a debt. Equally, as indicated by the Vice-Chancellor in the *Bristol Airport* case, the Companies' promise to discharge AIL's obligation in clause 2 of the Company Debentures is not itself security; it is in addition to the charges created by clause 3 of the Company Debentures.

(3) I also consider it to be strongly arguable that, objectively construed, the parties to the Facility Agreements intended the provisions of clause 15.3 only to be capable of being relied on by the Borrower (AIL) before (i) an Event of Default arises and/or (ii) AIL enters into some form of insolvency process. In other words, I am inclined to agree with the Applicant's submission that on the proper construction of clause 15.3, the Permitted Disposal provisions have no application after an Event of Default has arisen and/or AIL has entered administration. The references to selling or otherwise disposing of trading stock in the ordinary course of business (clause 15.3.1.2) and exchanging assets for other comparable or superior assets (clause 15.3.1.3) as well as the ability conferred on AIL and/or one of its subsidiary companies by clause 15.3.4 to use any proceeds resulting from a Permitted Disposal for its "*general working capital*" (combined with the definition of a "Permitted Disposal" in clause 15.3.5 which refers to AIL disposing of some or all of its shares in one or more of the Companies and to a Company disposing of one or more of its assets) all suggest that the parties intended the provisions of clause 15.3 would only apply while AIL and the Companies continued as going concerns and remained actively trading. However, I accept that I have not heard full argument on this point and do not need to express a final view for the purposes of this application, so I do not do so.

(4) If I am wrong in my provisional view that the Permitted Disposal provisions in clause 15.3 are not capable of being exercised after an Event of Default has arisen or AIL has entered administration, I agree with the Companies' submission that the combined effect of clauses 15.3.1, 15.3.2 and 15.3.5 is to require the Applicant, upon a Permitted Disposal, to release its security as constituted by the Applicant's charges over the Companies' assets. In other words, I do not accept Ms Hilliard's submission that the reference in clause 15.3.1 to AIL disposing of "*its assets*" has to be construed as only requiring the Applicant to release its charge over AIL's shares in the context of a Permitted Disposal. There is nothing in the definition of "*Security*" or "*Security Asset*" which requires clause 15.3 to be given this narrow construction. If AIL or the Companies were to make a

Permitted Disposal, the Applicant would be required to release such security as was required to "*aid, action and/or perfect the disposal*". However, and importantly, the Applicant would not be required to release the Companies from their covenant to pay AIL's debt. The prospective purchaser would therefore need to take account of this continuing debt when making any proposal to purchase AIL's shareholding in the Companies. This makes good commercial sense since, although the Applicant would not be able to prevent the sale of AIL's shares, it would at least be entitled to require the Companies to pay off AIL's indebtedness under the Facility Agreements.

(5) Whilst this point is likely to be academic as a result of my conclusion that the Permitted Disposal provisions in clause 15.3 do not require the Applicant to release the Companies from their obligation to pay AIL's debt, I accept the Applicant's submission that, on the proper construction of clause 15.3, its obligation to release its security over AIL and/or the Companies only arises at the time a Permitted Disposal actually takes place. Accordingly, the Applicant has not acted in breach of clause 15.3 by ignoring the AIL Administrators' solicitors' letter of 10 September 2020 which indicated that their clients considered it an optimal time to make a Permitted Disposal and asked for the Applicant's confirmation that "*at the appropriate time, [it] will sign the relevant deeds of release*".

(6) Finally, I was not attracted by the Applicant's attempt to rely upon the statutory oversight of the court contained in paragraph 71 of Schedule B1. It seems to me that if the construction of clause 15.3 imposed a contractual obligation on the Applicant to release the Companies' covenant to repay, it would not be open to the court effectively to re-write the contract.

Conclusion on the issue of the Applicant's standing to make the application

45. Accordingly, since I have rejected the Companies' submissions in relation to clause 15.3 of the Facility Agreements and have accepted the Applicant's submission that it is an actual creditor of each of the Companies (see paragraph 24 above), I conclude that the Applicant has standing to make this application.

Are the Companies insolvent?

46. The Applicant submits that the evidence clearly establishes that the Companies are, or are likely to become, unable to pay their debts on both a cash flow and balance sheet basis and refers me to the recent summary of the jurisprudence on the interrelationship between cash flow and balance sheet insolvency in *Re Comet Group Ltd (in liquidation)* [2018] EWHC 1378 (Ch) per Sir Nicholas Warren at [99]-[101].

47. As far as the cash flow basis is concerned, the Applicant relies upon the report of the Proposed Administrators dated 4 November 2020 (the **FRP Report**) which provides details of creditors' claims of £2.5 million as at 28 September 2020 (including amounts owed to HMRC in VAT and carbon taxes but excluding the substantial amounts owed to AIL and the Applicant). I was also referred to pages 1057-1061 of the electronic

hearing bundle which were exhibited to the second witness statement of Mr Baker (one of the Proposed Administrators) dated 1 December 2020 which comprise a summary of the "Aged Payables" for each of the Companies at 28 September 2020. These documents indicate that at that time each of the Companies had substantial aged debts in respect of the period prior to 1 July 2020: in the case of ARL O09 Limited, such debts exceeded £411,000; in the case of ARL 011 Limited, such debts exceeded £225,000; and in the case of BRK 001 Limited, such debts were just short of £70,000. Mr Baker has updated these figures to show that some payments were made by the Companies between 28 September 2020 and 26 November 2020 but as he confirms in paragraph 11 of his second statement there is no doubt that the Companies have been unable to pay their debts as and when they fell due at any time since 28 September 2020 (and in fact long before). No real issue has been taken with these figures by the Companies. I am in no doubt that the Companies are insolvent on a cash flow basis.

48. The Applicant also relies upon the fact that, according to their most recent audited accounts as at 31 March 2019, each of the Companies is balance sheet insolvent, again excluding the amounts owed to AIL and the Applicant, and that it has not been suggested the Companies' financial fortunes have improved in the past 18 months. Indeed, in light of the fact that there has been an undoubted Event of Default under the Facility Agreements as a result of AIL having gone into administration, it is obvious that the Companies are substantially insolvent by virtue of their obligation to discharge AIL's indebtedness to the Applicant of some £39 million.

49. Mr Smith realistically accepted on behalf of the Companies that if his clause 15.3 submissions failed, the Companies are, and have been for some time, unable to pay their debts with the result that the Applicant has satisfied the requirement in paragraph 11(a) of Schedule B1. Nor did the AIL Administrators or IMVA Limited seek to argue otherwise.

Will administration orders in respect of the Companies be reasonably likely to achieve the purpose of administration?

50. The Applicant relies on the FRP Report which refers at paragraph 1.25 to preliminary valuations of the businesses and assets of the Companies of between £11.8 million and £17.4 million if sold "as is" and as much as £38.3 million if the developments on the sites are completed and are able to deliver consistent revenue.

51. The Applicant also relies on the evidence of Mr Baker and of Ms Esther Kiddle, a solicitor and engineer who specialises in energy projects and who was retained to advise the Proposed Administrators in relation to the likely impact of administration on the electricity market commitments of the Companies. Ms Kiddle states that she has, in effect, managed the day-to-day operations of ARL O09 Limited and ARL 011 Limited since the purported appointment of the Proposed Administrators on 28 September 2020. She responds to the evidence of Mr Richard Shardlow, one of the Companies' directors, and explains why ARL O09 Limited's ability to sell electricity and obtain income will not be affected as a result of being placed in administration. Ms Kiddle also responds to Mr Shardlow's evidence concerning Smiths who were retained as EPC contractors for ARL O09 Limited and ARL 011 Limited and are substantial creditors of both companies. She exhibits an email from Mr John Smith which corroborates her evidence

and suggests that Mr Shardlow's evidence in relation to the Companies' indebtedness to Smiths is incorrect. I emphasise that I do not make any findings on this point. Nevertheless, I consider Ms Kiddle's detailed evidence to be credible.

52. I was also shown a letter to Mr Baker dated 2 December 2020 from GQS Finance Limited, a loan vehicle owned by Cable Capital Partners Limited, offering to make available a loan facility of £7 million (the **Cable Loan**), the purpose of which would be to repay the Senior Debt.

53. The Applicant submits that if the Companies go into administration, it will be possible for the Proposed Administrators to negotiate a working capital funding loan (whether the Cable Loan or another facility) which will enable the Senior Debt to be repaid and that, whilst the Proposed Administrators accept that it will not be possible to achieve the first hierarchical objective of administration under paragraph 3 of Schedule B1, namely the rescue of the Companies as going concerns, there is a real prospect of the second or third objectives of administration being fulfilled, namely, achieving a better result for the creditors as a whole than would be likely if the Companies were wound up without first being in administration or at least a real prospect of realising property in order to make a distribution to secured and preferential creditors.

54. The Companies submit that AIL's proposed sale of their shares, which they say was frustrated by the invalid appointment of the Proposed Administrators in September 2020, would have ensured, and if the AIL Administrators might be allowed to get on with such sale without the complication of this application, might very well ensure that the Companies continue as going concerns. They further submit that the prospect of the Companies being rescued as going concerns is less likely if the contracts on which the Companies' value depends will be automatically terminated or put at risk of termination following the making of an administration order. However, I consider that these submissions fall at the first fence by reason of my rejection of the Companies' arguments on the Permitted Disposal issue and my conclusion that the Companies are hopelessly insolvent since they remain substantially indebted to the Applicant, as well as to other creditors.

55. I am satisfied that, for the reasons given in Mr Jee's and Mr Baker's evidence, there is a real prospect of the second or third objectives of administration being fulfilled in respect of each of the Companies. I am therefore satisfied that I have jurisdiction to make administration orders. The question remains whether I should exercise my discretion to do so.

Exercise of discretion

56. The Applicant submits that the court should exercise its discretion to make administration orders in respect of the Companies for the following reasons:

    (1) It is by far and away the largest creditor of AIL and the Companies, and will stand to benefit from the maximisation of the value of their assets.

    (2) On the basis of the valuations obtained by the Proposed Administrators, the market value of the assets of the Companies comfortably exceeds the amount required to pay the Senior Creditors in full even if the assets are not sold as part

of a going concern. There is therefore no question of the Senior Creditors being prejudiced if administration orders are made.

(3) According to the FRP Report, the value of the assets of two of the Companies, ARL O09 Limited and ARL 011 Limited, will be maximised if administrators can secure further investment to complete the sites or are at least able to stabilise the situation with the Companies' creditors so that the Companies' assets can be sold for their maximum achievable value. Insolvency practitioners are routinely able to raise funding in administrations in order to maximise value. The Applicant submits that, with its support, there is no reason why administrators would not be able to do so in this case.

(4) The evidence of Mr Gazzard (one of the Companies' directors) that purchasers will be able to play off the AIL Administrators against the Proposed Administrators in order to achieve a suppressed price is misconceived. In the event that the AIL Administrators continue to market AIL's shares (which I accept is unlikely given my conclusion on the Permitted Disposal issue), the Applicant submits that competition between officeholders marketing shares and officeholders marketing assets is likely to increase prices offered, not decrease them.

(5) There are unresolved concerns about the conduct of the directors of AIL (who are also directors of the Companies). Those directors appear (in the words of Mr Campbell, one of the AIL Administrators) to have "shipped out" five subsidiaries of AIL (the **Orphan Companies**) to a company owned and controlled by the directors shortly before AIL entered administration. According to Mr Jee, AIL utilised over £7 million of the monies advanced by the Applicant to AIL to acquire and/or make loans to the Orphan Companies**.** The Orphan Companies were sold for only £1 each on terms that, unless the purchaser (i.e. the company owned and controlled by the directors) sold the Orphan Companies within 3 months, no further consideration would be payable and the debts of the Orphan Companies to AIL would be written off. Mr Campbell has indicated on behalf of the AIL Administrators that they will be investigating the conduct of the directors in this regard. The Applicant submits that, as individuals who are already under separate investigation by the AIL Administrators, the business and assets of the Companies should not be left in the directors' hands.

(6) The Proposed Administrators managed the Companies from 28 September 2020 to 26 November 2020. Placing the Companies into the hands of insolvency practitioners (whether in administration or purported administration) has not had a *"profound impact on the value of the subsidiaries"*, as stated by Mr Campbell in his evidence in support of AIL's application to have the Proposed Administrators' appointment declared invalid. The Proposed Administrators have already established good working relationships with key creditors (e.g. Smiths, Gazprom, Habitat, UK Power Network, North Power Grid) and there is a danger that if administration orders are not made, these key creditors will lose faith in the Companies which will result in them ceasing to be able to operate. There was an automatic termination of one Capacity Market Agreement in respect of ARL 011 Limited which is subject to an appeal under the relevant regulations. Mr Baker has been advised that the appeal will be allowed to the extent that ARL 011 Limited will be granted a cure period of between 6 and 12 months which he says

will give the company sufficient time to allow for the orderly sale of its assets[2]. Mr Baker has given detailed evidence in both his witness statements with regard to the Companies' service suppliers and other counterparties. He points out, whilst entitled in some cases to terminate on grounds of an administration order being made, those parties have not so far terminated their contracts because they perceived that it was not in their commercial interests to do so. Mr Baker also notes that many of the relevant contracts are terminable on insolvency, so there would be a risk of termination whether or not the Companies were in administration.

(7) If placed in administration the Companies will benefit from a moratorium during which time there will be a breathing space to restructure their business and assets and in due course sell the same for maximum value which will benefit not only the Applicant but also other creditors who provide services while the Companies are in administration and are likely to continue to be able to provide services to the buyer after the assets are sold. A sale of the businesses and assets of the Companies as going concerns is the best way of achieving the highest value for creditors. This can only be achieved by an administration of the Companies and is not available as an option to the AIL Administrators who have sought a sale of the shares of the Companies while leaving trading of the Companies in the hands of the directors. The sale of the shares in the Companies is likely to realise significantly less than that which is likely to be achieved by a going concern sale of their businesses and assets.

57. The submissions on behalf of the Companies, the AIL Administrators and IMVA Limited as to why the court should not exercise its discretion in favour of making administration orders were substantially reliant on the success of the Companies' arguments in relation to the Permitted Disposal issue. Having been unpersuaded by those arguments, I am equally unpersuaded by the submission of those parties that the Companies should not be placed into administration and should instead be permitted to trade through their directors. I consider that it is appropriate for the court to exercise its discretion to make administration orders over the Companies essentially for the reasons given by the Applicant as summarised in paragraph 56 above.

Should the Proposed Administrators be appointed as administrators, as opposed to the AIL Administrators?

58. The Applicant submits that the Proposed Administrators should be appointed as administrators of the Companies in preference to the AIL Administrators for a number of reasons.

59. First, the Applicant relies on the fact that the Proposed Administrators are its choice of administrator and submits that the court should have regard to the fact that it is the creditor with by far the largest economic interest in the Companies. As the valuations currently stand, unsecured creditors will not receive a dividend, other than perhaps out of the prescribed part.

[2] The result of the appeal was due to be communicated on 3 December 2020, the day of the hearing, but I was informed by Ms Hilliard late that afternoon that no result had been received at that time.

60. Second, the Applicant points to the fact that the Proposed Administrators have already been in control of the Companies for nearly two months. It relies upon the FRP Report and Mr Baker's evidence as demonstrating that the Proposed Administrators have gained valuable knowledge and information about the Companies during the period of their control, have developed co-operative relationships with creditors and others and would be able to "hit the ground" running if they were appointed. The Applicant says that appointing different officeholders as administrators now would be counterproductive, disruptive and more expensive given the work that the Proposed Administrators have already performed and the relationships that they have already made.

61. Third, the Applicant says that during the period in which the Proposed Administrators had control of the Companies there was no criticism of their conduct and management of the Companies and there is no suggestion that they were aware their appointment might subsequently be found to be invalid.

62. Fourth, the Applicant submits that the suggestion the Proposed Administrators would have a conflict, if they were now appointed administrators, is misconceived. If the Companies sustained any damage as a consequence of the invalid appointments, the party most prejudiced by the invalid appointments is the Applicant itself, which is the largest creditor of the Companies by far. As it is the Applicant which is seeking the appointment of the Proposed Administrators as administrators, there is no or minimal opportunity for conflict. In the unlikely event that the conduct of the Proposed Administrators during the period of their invalid appointment did require investigation, the obvious course would be to appoint a conflict administrator. However, the Applicant submits that, on the basis of the evidence currently before the court, there is nothing to investigate and no appointment of a conflict administrator is necessary.

63. Finally, the Applicant submits that it would not be appropriate to appoint the AIL Administrators as administrators of the Companies because they have made it clear that they would not regard themselves as bound by the conclusions I have reached in this judgment regarding the meaning and effect of clause 15.3 of the Facility Agreements. In those circumstances, the AIL Administrators would have a far more significant conflict or competing interest than any conflict that might conceivably arise in relation to the Proposed Administrators because they would wish to proceed with a proposed sale of the shares relying upon the Companies' arguments that the Companies have been released from their obligation to discharge AIL's liabilities to the Applicant.

64. Essentially for the reasons given by the Applicant as summarised above, I have concluded that the Proposed Administrators are the most suitable officeholders to be appointed as administrators to the Companies. On behalf of IMVA Limited, Ms Stonefrost realistically accepted that there was no prospect of the Companies being rescued as going concerns if they were not released from their obligation to discharge AIL's debt to the Applicant. In view of the fact that IMVA Limited as one of the Senior Creditors will be paid in priority to the Applicant and therefore has a very good prospect of having its loan repaid in full, I consider that it will suffer no or minimal prejudice as a result of the appointment of the Proposed Administrators. Moreover, the

Proposed Administrators will still remain subject to the court's powers to investigate their conduct under paragraphs 74 and 75 of Schedule B1. Indeed, as Ms Hilliard points out, those paragraphs provide an easier route to compensation if any loss has been suffered as a result of their invalid appointment than if they were simply to be treated as trespassers.

Should a retrospective order be made?

65. The Applicant asks that the administration orders be backdated to 28 September 2020 and submits that the court has jurisdiction under paragraph 13(2) of Schedule B1 to make an administration order retrospectively in circumstances where an earlier appointment is found to have been a nullity. The Applicant further submits that in determining whether to make a retrospective order, there is a difference between making the order retrospective (with the effect that any acts done by the Proposed Administrators will be treated as having been done as administrators appointed by the court rather than as trespassers), and ratifying or validating the acts of the Proposed Administrators.

66. The Applicant does not seek an order ratifying or validating the acts of the Proposed Administrators and refers to *Adjei v Law for All* [2011] EWHC 2672 (Ch); [2011] BCC 963, where Norris J made an administration order with retrospective effect, but stated at [19]:

> *"The effect of the order is that the administrators will be treated as having been in office from 28 July 28, 2011. There is no need for the court to "ratify" or "declare valid" the acts of the administrators or to declare that they are "entitled to receive remuneration for their services". Indeed, there is a strong reason why the Court should not do so. I do not know in detail what acts the administrators have done or what remuneration they claim and I should not ratify acts or declare entitlement to remuneration in those circumstances, in case there is someone aggrieved by what has occurred who has a proper ground for challenge or complaint."*

67. The Companies referred to *Re Biomethane (Castle Easton Limited)* [2019] EWHC 3298 (Ch); [2020] BCC 111 where, having cited at [17] his earlier decision in *Adjei* and several other first instance decisions, Norris J said at [18]:

> *"I think the time has come where it must be regarded as settled at first instance (i) that the jurisdiction is available (ii) that extreme caution is required before its exercise and (iii) that frequently, as a matter of discretion, an exercise of the jurisdiction will be withheld. It is undoubtedly the case that the jurisdiction provides a pragmatic and convenient solution to multiple problems which can be occasioned by defective appointments of administrators. There will come a time where the competing arguments are addressed at a full adversarial hearing, either at first instance or on appeal, but until that occurs, I regard the practice is established at first instance that*

we treat the jurisdiction as existing and consider, principally, whether to exercise it or not. That is the approach I intend to take in this case."

68. A similar approach was taken even more recently in *Gregory v A.R.G. (Mansfield) Limited* [2020] EWHC 1133 (Ch) by His Honour Judge Davis-White QC (sitting as a Judge of the High Court) who conducted an extensive review of the authorities and stated at [122] in relation to appointments found to have been a nullity:

> *"As regards the question of the appointment being retrospective: the jurisdiction to make a retrospective appointment, though it has been questioned, has now been relied upon (and exercised) consistently for many years. I agree with Mann J in the Bradford Bulls case that if there is to be a challenge to the existence of that jurisdiction, such challenge should now be raised in the Court of Appeal."*

Having referred to the decision of Norris J in *Adjei*, Judge Davis-White QC continued at [123]:

> *"There is a difference between making the acts and decisions ones quae administrators, and in that sense validating them, and going beyond that and saying that the acts and decisions have been correctly made."*

69. The Applicant submits that the court should make the administration orders sought with retrospective effect because the facts have not materially changed since 28 September 2020, the date on which (as a consequence of my judgment handed down on 19 November 2020) the Proposed Administrators were found to have been invalidly appointed as administrators. It follows that if the court is satisfied that Proposed Administrators should be appointed on 3 December 2020, the court would have been so satisfied on 28 September 2020 had the application been made on that day. There is, therefore, every reason to make the administration orders retrospective because there was clearly a case for the Companies to go into administration on 28 September 2020.

70. The Applicant also submits that there are practical reasons for making the administration orders retrospective. AIL's application for a declaration that the appointment of the Proposed Administrators on 28 September 2020 was invalid was made a month after their appointment and not determined until 19 November 2020. Creditors and others during this period dealt with the Companies as if they were administration. Although there will have been a short hiatus between 26 November 2020 and the handing down of this judgment when the Companies were not under the control of the Proposed Administrators, if administration orders are made as a result of this judgment, the Applicant submits that the sensible and logical course would be to make an order that the administration orders take effect from 28 September 2020 so that the Companies effectively continue to operate in administration.

71. Whilst I am mindful of Norris J's warning in the *Biomethane* case that it is necessary to exercise extreme caution in deciding whether to make an administration order retrospective, and having given the matter very careful consideration, I am persuaded

that for the reasons given by the Applicant it is appropriate on the facts of this case to make the administration orders retrospective so that they commence on the date on which the invalid appointment of the Proposed Administrators was made, namely 28 September 2020. I emphasise that the effect of such an order is not to ratify or validate the acts of the Proposed Administrators between 28 September 2020 and the date of their appointment as a result of this application. The sole effect of making the order retrospective is that any act done by the Proposed Administrators in this intervening period will be treated as having been done as administrators appointed by the court rather than as trespassers.

Conclusion

72. For the above reasons I grant this application. I have been provided with a draft order by the Applicant. Unless one or more of the parties requests a hearing in order to determine the final form of order and issues relating to costs, I anticipate that those matters can be resolved following receipt of written submissions.