Neutral Citation Number [2021] EWHC 2965 (Ch)

CR-2017 003604

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF BORDER CONTROL SOLUTIONS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 15/11/2021

Before :

ICC JUDGE BARBER

- -

Between :

JOSEPH VIJAY KUMAR

Appellant

- and –

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) THE OFFICIAL RECEIVER

Respondents

- -

Mr Matthew Abraham and Mr Paul Fradley (instructed by Fieldfisher LLP) for the **Appellant**
Ms Janet Hallamore for the **Second Respondent**

Hearing date: 22 September 2021

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m on 15 November 2021

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ICC Judge Barber

1. On 22 September 2021, I allowed the Appellant's appeal under Section 205(4) of the Insolvency Act 1986 ('the 1986 Act') against a deferral of the dissolution of Border Control Solutions Limited ('the Company') to 13 May 2025. I did so on the basis that written reasons would follow. This judgment sets out my reasons for allowing the appeal.

Introduction

2. This is an appeal brought by Mr Joseph Vijay Kumar ('the Appellant'), the sole director and shareholder of the Company, under section 205(4) of the 1986 Act, against the decision of the Secretary of State to defer the dissolution of the Company to 13 May 2025 ('the Deferral'). But for the Deferral, dissolution would have occurred on 2 February 2021.

3. The Official Receiver originally sought the Deferral in order to allow time for further investigations to take place. By March 2021, however, all investigations had concluded. As a result, since March 2021, the Deferral has served no useful purpose. The Official Receiver maintains that there is no way of bringing the dissolution forward without the assistance of the court.

4. Counsel for the Appellant have been unable to find any case law directly addressing the nature of an appeal under section 205(4) or the issue of who has standing to bring such an appeal.

Background

5. The Company was incorporated in 2015 with the aim of providing border management services to the UK government. Following the Brexit referendum and the change in government, the project was no longer a priority and its backers lost interest. The Company entered into liquidation on 31 January 2018.

6. Following the Company's entry into liquidation, the Appellant cooperated with the Official Receiver as liquidator of the Company; attending a meeting in March 2018, providing documentation relating to the Company in August 2019 and spending a day with investigation officers in August 2019 to provide further records. By August 2019, the Appellant believed that no further action was under consideration.

7. In December 2020, however, following notification of a filing at Companies House, the Appellant became aware that the Official Receiver had obtained the Deferral. The Appellant attempted to contact the Official Receiver to understand why this had occurred, but was unable to do so for some time, because the Official Receiver's department had changed its contact details. It was not until March 2021 that the Appellant managed to speak to the Official Receiver and ascertained that the reason for the Deferral was to allow further time for investigations. Shortly thereafter, on 29 March 2021, the Official Receiver wrote to confirm that the investigations were complete and that no directors' disqualification proceedings were proposed.

8. Unsurprisingly, the Appellant's solicitors, Fieldfisher LLP, then enquired into whether the Deferral could be lifted. By letter dated 20 April 2021, the Official Receiver replied, explaining that, whilst investigations into the Company's affairs had concluded and there was no further action to be taken in relation to the Company or the Appellant as its sole director,

> '[u]nfortunately the deferral of dissolution date cannot be shortened and must run its course until its dissolution date'

9. Fieldfisher wrote again, inviting the Official Receiver to bring an appeal, subject to the Appellant paying the costs. The Official Receiver did not take up that invitation, but on 5 August 2021 confirmed that if the Appellant wished to bring such an appeal himself, the Official Receiver would not oppose the same.

Section 205 IA 1986: legislative backdrop

10. Prior to the passing of the 1986 Act, an order of the court was required to dissolve a company which was in compulsory liquidation: see generally section 568 of the Companies Act 1985 and prior to that, section 274 of the Companies Act 1948. These provisions do not appear to have been considered by the court in any reported decision; largely, it would seem, because in practice they were ignored. As explained by Wynn-Parry J in Re Belmont & Co [1952] Ch 10 at p.14:

> 'It is true, as was pointed out by Mr Berkeley on behalf of the applicants, that the practice since 1890, notwithstanding the various Companies Acts which have been in force between that date and the present time, has been not to make any such application, but for the Registrar of Companies two years after the liquidator's release to make enquiry of the official receiver whether there is any reason why the company should continue to be regarded as being alive and, if no reason is shown, then to take the necessary steps'.

Section 205 IA 1986

11. With the passing of the 1986 Act, a new regime for dissolutions was introduced. Section 205 now governs the process for dissolving a company in compulsory liquidation. It provides as follows:

> '(1) This section applies where the registrar of companies receives
>
> (a) a final accounts and statement sent under section 146(4) (final account);
>
> (b) a notice from the Official Receiver that the winding up of a company by the court is complete.
>
> (2) The registrar shall, on receipt of the final account and statement or the notice and any statement under section 146(7) or 146A(2), forthwith registered them or it; and, subject as follows, at the end of the period of 3 months beginning with the date of the registration of the final account or notice, the company shall be dissolved.
>
> (3) The Secretary of State may, on the application of the Official Receiver or any other person who appears to the

> Secretary of State to be interested, give a direction deferring the date at which the dissolution of the company is to take effect for such period as the Secretary of State thinks fit.
>
> (4) An appeal to the court lies from any decision of the Secretary of State on an application for a direction under subsection (3)…'

Standing

12. It will be noted that section 205(4) does not expressly address the issue of who has standing to bring an appeal. Counsel for the Appellant submit that, as a matter of principle, it must (at the very least) encompass those who have standing to apply to the Secretary of State for a direction deferring the date of dissolution. Under section 205(3) of the 1986 Act, it is provided that an application to defer may be made by 'the Official Receiver or any other person who appears to the Secretary of State to be interested'.

13. This, however, simply begs the question of who might appear to the Secretary of State to be interested.

14. Counsel for the Appellant went on to submit that some guidance may be drawn from the approach of the courts to (since-repealed) provisions allowing the court to declare the dissolution of a company void. This approach is supported by the editors of Bailey & Groves: Corporate Insolvency – Law and Practice, at paragraph 19.5. Under section 651 of the Companies Act 1985 (as with its predecessor, section 352 of the Companies Act 1948), an application to the court could be made by 'the liquidator of the company or by any other person appearing to the court to be interested'.

15. A similar provision, in the context of an application to restore a company to the register, appears in section 1029(2) of the Companies Act 2006. This provides that an application to restore may be made, inter alios, by 'any.. person appearing to the court to be interested'.

16. The concept of a 'person interested' was considered by Megarry J in Re Roehampton Swimming Pool Ltd [1968] 1 WLR 1693, 1698:

> 'the word 'interest' is, of course, susceptible of more meanings than one; and like so much of the English language, its meaning often has to be discerned from the context. In relation to making an order for the revival of a defunct company, it seems to me to be more probable that the word refers to a pecuniary or proprietary interest than that it embraces all matters of curiosity or concern. After all, those who are interested in companies are nearly always interested financially or in a proprietary way; the whole field is dominated by finance. I cannot conceive that Parliament intended that a man who felt a lifelong concern for dissolved companies should be free to gratify his passion by reviving them under section [352], however deep and genuine his feelings, and whether his affections were spread among all

> such unfortunates, all concentrated on one favoured corporation.'

17. Counsel also referred me to the case of Re BCB Environmental Management Ltd (In Liquidation) [2020] EWHC 1561 (Ch), [2020] 2 BCLC 525, a case in which I considered the authorities on the meaning of a 'person interested' in the context of an application to restore a number of companies to the register under s.1029(2) CA 2006 and concluded as follows:

> '21. That said, I do not accept the authorities relied upon by Ms Kyriakides as laying down a hard and fast rule that a pecunariy/proprietary interest or pre-existing statutory duties must be shown either.
>
> 22. Overall, whilst there is guidance in existing case law, highlighting various factors considered relevant to the issue of standing, in my judgment it would be wrong to treat the reported cases as providing a comprehensive checklist of factors which must be present to establish standing. What may be a sufficient factor for the purposes of establishing standing in one case should not be treated as a necessary factor in another. The court should be slow to attempt to legislate on the scope of a provision which Parliament has deliberately left open. The issue of who may or may not qualify as a 'person … interested' must always depend on consideration of the actual circumstances of each case.
>
> 23. From existing case law, however, what is clear is that the Claimants must identify some interest in the 'matter' of restoration beyond idle (or officious) curiosity: Roehampton Swimming Pool [1968] 1 WLR 1693. As put by Hoffmann J, albeit in a different statutory context: 'not everyone who volunteers himself as interested … will be a person "interested"…': Bradshaw v University College of Wales [1988] 1 WLR 190.'

18. In the present case, however, section 205 IA 1986 does not identify the category of person who may bring an appeal. In such a case the court must resort to more fundamental principles when considering the issue of locus. In this regard I find of greater assistance a decision of the Privy Council, Deloitte & Touche AG v Johnson [1999] 1 WLR 1605, to which I was referred.

19. In Deloitte, the Privy Council considered an application to remove liquidators brought by a defendant to proceedings instituted by the liquidators on behalf of the company. A key question considered was whether the defendant, who was a stranger to the liquidation, had locus to apply to remove the liquidators from office. At p1611A-G, delivering the advice of the Board, Lord Millett reasoned as follows:

> 'In their Lordships' opinion two different kinds of cases must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint…. It is …. incumbent on the court to consider not only whether it has jurisdiction to make the order but [also] whether the applicant is a proper person to invoke the jurisdiction.
>
> Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see In re Corbenstoke (No 2) [1990 BCLC 60…
>
> The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of persons who may make the application. The plaintiff, therefore, does not lack a statutory qualification to invoke the section. But the question remains whether it has a legitimate interest in the relief which it seeks.'

20. In the case of Deloitte, as in the present case, there was no statutory qualification for those seeking to avail themselves of the relief sought. There, as here, the question was not one of jurisdiction but of judicial restraint.

21. The issue of locus before me therefore turns on whether the Appellant can demonstrate a 'legitimate interest' in the relief sought.

22. In the present case, Mr Kumar addresses his interest in the relief sought by his appeal at paragraphs 30 to 34 of his witness statement. These provide as follows:

’30. As set out above, I am the sole director and shareholder of the Company and the status of the suspended dissolution is having a significant impact on my ability to start a new business.

31. I am embarking on a new business venture to develop a ‘High Security’ global management system that will involve working with international Government agencies. In particular, while the previous project was based on checking on passengers exiting and entering the country based on the physical travel documents, the new project is based on a novel system without the need for a physical passport for travel.

32. As noted, the project entails working with international Government agencies and I anticipate [that] the Company’s existence being in limbo until 2025 will raise further questions and/or actions by the various authorities before the projects could be progressed. Given the high level of security required to deal with the sensitive nature of the information and data dealt with (both in respect of national security but also data protection) by this new business there can be no shadow on my conduct in the running of previous businesses (namely the Company).

33. The particular difficulty that I face is that I cannot provide an explanation to Government agencies and investors as to why the dissolution of the Company has been deferred. Although I have explained the winding up of the Company to such third parties there is no good reason as to why the Company has [not] yet been dissolved. My inability to explain the rationale for it being so raises questions as to whether there is in fact some kind of investigation ongoing, with the inference being that I am not disclosing the full extent of the matter.The reality however is that even the Official Receiver has not been able to provide any explanation as to why such a long period was sought or any reason for the deferral to remain in place. Further, as already noted above the Official Receiver has no issue with the immediate dissolution of the Company as it does not oppose this appeal. In the circumstances, the dissolution of the Company will assist the project immensely by clearing up the issues surrounding the liquidation of the Company.

34. I also anticipate hurdles from the investment community more generally. It is very difficult to open a business account for my new venture due to the Company’s current status. My banker advises me that the underwriters have raised concerns in respect of the ability to raise credit whilst this issue remains live. To have to wait a further four years for the dissolution of the Company would have a catastrophic impact on my ability to

> work in this sector and mean that the work to date to develop the specialist software would be out of date.'

23. On the evidence before me, I am satisfied that the Appellant has standing to bring this appeal. As sole director and sole shareholder of the Company, he is clearly (and indeed, potentially uniquely) affected by the continuance of the Deferral. The Deferral to 2025 has affected and will continue to affect his ability to pursue new business ventures. On the evidence before me it is clear that he has a legitimate interest in the relief sought by this appeal. To adopt the language of Lord Millett in Deloitte, he is, in my judgment, a 'proper person' to bring the appeal.

Is Permission to Appeal required?

24. It is the Appellant's primary position that he does not require permission to appeal.

25. CPR rule 52.3(1) provides that:

> 'An appellant or respondent requires permission to appeal
>
> (a) where the appeal is from a decision of a judge in the County Court or the High Court, or to the Court of Appeal from a decision of a judge in the family court, except where the appeal is against –
>
> (i) a committal order;
>
> (ii) a refusal to grant habeus corpus; or
>
> (iii) a secure accommodation order made under section 25 of the Children Act 1989 or section 119 of the Social Services and Well-being (Wales) Act 2014; or
>
> (b) as provided by Practice Directions 52A to 52E.
>
> (Other enactments may provide that permission is required for particular appeals)'.

26. The Appellant maintains that he is not appealing from a judicial decision and that no provision is made in the Practice Direction, IR 2016 or the 1986 Act requiring permission. In such circumstances, he contends that CPR 52.3 does not apply.

27. I am reminded that this was the approach adopted by the Court of Appeal in Banga (T/A Banga Travel) v Secretary of State for Transport [2008] EWCA Civ 188, [4]-[7], in relation to an appeal from the Transport Tribunal. In Banga, the Court held that permission was not required.

28. At paragraphs [4] to [7] of Banga, Keene LJ (Ward LJ concurring) reasoned as follows:

> '[4] There appears to have been some uncertainty, at least at some point, as to whether permission to appeal is required for

> an appeal to this court from the Transport Tribunal. Paragraph 14(3) of Schedule 4 provides that:
>
> "An appeal shall not be brought except in conformity with … rules of court"
>
> But the relevant rule in the Civil Procedure Rules is Rule 52.3(1), which only requires permission to appeal where the appeal is from a decision of a judge in a county court or the High Court and makes no reference to statutory appeals from a tribunal. That same provision states that:
>
> "Other enactments may provide that permission is required for particular appeals",
>
> but the fact is that no enactments does so provide in the case of appeals from the Transport Tribunal.
>
> [5] The arguments concerning statutory appeals were thoroughly considered by this Court in the case of Colley v the Council for Licensed Conveyancers [2001] EWCA Civ 1137 where it was concluded that there was no general requirement for permission to appeal deriving from the CPR or the Practice Direction under Part 52, so far as statutory appeals from tribunals were concerned.
>
> [6] That is certainly the approach this court has already taken on at least one occasion in the past where the appeal was from the Transport Tribunal. In Alison Jones t/a Shamrock Coaches v Dept of Transport Welsh Traffic Office [2005] EWCA Civ 58, Smith LJ, with whom the other two members of the court agreed, referred to the relevant provisions of the Transport Act 1985 and simply stated this:
>
> "1 …. By reason of those provisions the appeal is a statutory appeal for which permission to appeal to this Court is not required."
>
> [7] That appears to me to be correct in law….'

29. In my judgment, the position is no different in the present case. This appeal is not from a decision of a judge and so does not fall within CPR 52.3(1)(a). None of the Practice Directions referred to in CPR 52.3(1)(b) require permission to appeal in this case. As confirmed by the Court of Appeal in Colley, there is no general requirement for permission to appeal deriving from the CPR or the Practice Directions under Part 52, so far as statutory appeals are concerned. No provision is made in the 1986 Act or IR 2016 requiring permission.

30. Accordingly, permission to appeal is not required. The Appellant does, however, require an extension of time for filing his appeal.

Extension of Time for Filing Appeal

31. Rule 12.62 of the Insolvency (England and Wales) Rules 2016 ('IR 2016') states that:

> 'an appeal under the Act or these Rules against a decision of the Secretary of State or the OR must be brought within 28 days of delivery of notice of the decision'.

32. This time limit expired on 30 November 2020, being 28 days after 2 November 2020.

33. On the principles to be applied when considering an application for permission to appeal out of time, I was referred to the guidance of the Court of Appeal in R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633. At [36], Moore-Bick LJ held that an application for an extension of time to appeal should be equated with an application for relief from sanctions and that the Mitchell/Denton principles should be applied. Moore-Bick LJ summarised these principles at [37]-[38], as follows:

> '37. In paragraphs 40-41 of its judgment in Mitchell the court provided guidance on the approach to be adopted to applications for relief from sanctions. The most relevant parts of that guidance to be found in those and certain other paragraphs of the judgement can be summarised for present purposes as follows:
>
> (i) if the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly;
>
> (ii) if the failure is not trivial, the burden is on the defaulting party to persuade the court to grant relief;
>
> (iii) the court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted, but merely overlooking the deadline is unlikely to constitute a good reason;
>
> (iv) it is necessary to consider all the circumstances of the case before reaching a decision, but particular weight is to be given to the factors specifically mentioned in rule 3.9.
>
> 38. In Denton the court affirmed the guidance given in paragraphs 40-41 of Mitchell, but explained the approach in more detail as follows:
>
> '24. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court

> is unlikely to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'
>
> It is this more detailed guidance to which judges should now be looking when considering applications under CPR 3.9 and applications for extensions of time for filing a notice of appeal made after the time for doing so has expired.'

34. In my judgment, this is an appropriate case in which to grant relief from sanctions and allow the Appellant to bring the appeal out of time.

35. Whilst I do not accept the Appellant's argument that the breach 'is not serious and significant when considered in the context of the length of the liquidation (nearly 3 years) and the length of the deferral period (nearly 5 years)', in my judgment the Appellant has demonstrated good reasons why the appeal was not brought in time. In summary

    (a) The Appellant only became aware of the Deferral in December 2020 and at that stage sought to engage with the Official Receiver to understand the situation. The delay in making contact with the Official Receiver was caused by the Official Receiver's change of contact details.

    (b) It only became apparent that a court application would be required when the Appellant received an email from the Official Receiver on 20 April 2021 stating that there was nothing that the Official Receiver could do (administratively) to shorten the deferral. Until that point, the Appellant had hoped to achieve an out-of-court resolution of the matter.

    (c) There was further delay in bringing the appeal while the Appellant waited for the Official Receiver to confirm whether he would bring the appeal or, alternatively, what his position on the appeal would be. The Official Receiver did not respond on this issue until 5 August 2021.

36. I am further satisfied that it is just in all the circumstances to grant relief from sanctions in this case. In reaching this conclusion I take into account the matters summarised in Paragraph 35 of this judgment. I also take into account the following matters:

    (a) There is no prejudice to the Official Receiver in granting relief from sanctions in circumstances where he has confirmed that the reasons for the Deferral have fallen away and he does not oppose the appeal. There has been no suggestion of any prejudice to third parties.

    (b) The bringing of the appeal is the only means by which the Appellant may challenge the Deferral.

(c) The Deferral is having, and unless successfully challenged will continue to have, a significant negative impact on the future business endeavours of the Appellant.

(d) The Appellant had no prior warning of the Deferral and was given no opportunity to make representations about the Deferral (or its length) before it was implemented.

(e) This is not a case where the Appellant has demonstrated a deliberate disregard for court rules or procedure. The Appellant did not become aware of the Deferral for at least a month after it had been made. Even at that stage, he was unaware that he would be required to make a court application to resolve the issue and did not know that he had a short period in which to appeal.

37. For all these reasons, I shall grant the extension sought.

The Nature of the Appeal

38. I turn next to consider the nature of the appeal.

39. There is no indication in section 205(4) of the 1986 Act as to how the court should approach an appeal or the grounds on which an appeal may be brought. The accompanying rule (rule 7.119 IR 2016) gives no guidance either.

40. Counsel have informed me that there does not appear to be any reported decision of a court considering an appeal under section 205(4). The leading academic works, such as Gore-Browne, McPherson & Keay, Palmer and Loose & Griffiths, do not offer any guidance on such an appeal.

41. In Sealy & Milman, the editors direct the reader to the similar role of the courts under section 203(4) of the 1986 Act. In the commentary to section 203(4), the editors opine that the use of the term 'appeal' is 'significant, since it makes it clear that the court may substitute its own decision on the merits of the case that that of the Secretary of State…'. Appeals in the context of section 202 or 203 of the 1986 Act, however, do not appear to have been considered in any reported decision either.

Does CPR 52 apply?

42. In my judgment CPR Part 52 applies to appeals brought under section 205(4) IA 2016. Rule 12.58 IR 2016 provides that CPR Part 52 applies to appeals brought under Chapter 10 of Part 12 of IR 2016 as varied by any applicable Practice Direction. Rule 12.62, which falls within Chapter 10 of Part 12, imposes time limits on appeals from decisions of the Secretary of State and the Official Receiver. The clear implication is that an appeal from a decision of the Secretary of State is subject to CPR Part 52.

43. Moreover, in my judgment the decisions of the Court of Appeal in Dupont de Nemours (EI) & Co v ST Dupont (Note) [2003] EWCA Civ 1368 and Zissis v Lukomski [2006] EWCA Civ 341 (considered below) make clear that CPR Part 52 does apply to appeals which arise from decisions of non-judicial bodies, such as that currently before me. Whilst some of the reasoning contained in the judgment of Chief Registrar Baister in Re Budniok [2017] EWHC 368 (Ch), considered in vacuo, might suggest a different conclusion, it appears that the learned Registrar was not directed to the cases of Dupont and Zissis when reaching his decision.

CPR Part 52

44. I turn then to consider CPR Part 52. CPR rule 52.21(1) provides that:

> 'Every appeal will be limited to a review of the decision of the lower court unless –
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing …'

Review or Re-Hearing

45. In Audergon v La Baguette Ltd [2002] EWCA Civ 10, Jonathan Parker LJ considered an earlier incarnation of CPR rule 52.21(1) (the 'old' CPR 52.11(1)), which was in all material respects identical to the current CPR 52.21(1). At paragraph [83] of his judgment, he explained the approach of the Court when considering whether a rehearing is appropriate. Insofar as material, this provides as follows:

> '1. The general rule is that appeals at all levels will be by way of review of the decision of the lower court.
>
> 2. A decision to hold a rehearing will only be justified where the appeal court considers that in the circumstances of the individual appeal it is in the interests of justice to do so.
>
> 3. It is undesirable to attempt to formulate criteria to be applied by the appeal court in deciding whether to hold a rehearing. There are two main reasons for this. The first reason is that the decision to hold a rehearing must inevitably rest on the circumstances of the particular appeal. The second reason is that any attempt to formulate such criteria would in effect be to rewrite the rule in more specific terms, thereby restricting the flexibility which is inherent in the general terms in which the rule is framed…'

46. In Dupont de Nemours (EI) & Co v ST Dupont (Note) [2003] EWCA Civ 1368, May LJ considered the impact of Part 52 on appeals from non-judicial decisions and when a re-hearing would be appropriate. The material parts of his judgment (at paragraphs [92] to [96]) provide as follows:

> '92. CPR Pt 52 draws together a very wide range of possible appeals. It applies, not only to the Civil Division of the Court of Appeal, but also to appeals to the High Court and county courts. It encompasses, not only appeals where the lower court was itself a court, but also statutory appeals from decisions of

tribunals, ministers or other bodies or persons … Subject to rule 52.1(4) and paragraph 17.1(2) of the practice direction, it applies to a wide variety of statutory appeals where the nature of the decision appealed against and the procedure by which it is reached may differ substantially …

93. It is accordingly evident that rule 52.11 requires, and in my view contains, a degree of flexibility necessary to enable the court to achieve the overriding objective of dealing with individual cases justly. But as Mance LJ said on a related subject in Todd v Adams and Chope (trading as Trelawney Fishing Co) [2002] 2 All ER (Comm) 97, it cannot be a matter of simple discretion how an appellate court approaches the matter.

94. As the terms of rule 52.11(1) [now CPR rule 52.21(1)] make clear, subject to exceptions, every appeal is limited to a review of the decision of the lower court. A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former rules of the Supreme Court. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multifactorial decisions often dependent on inferences and an analysis of documentary material…. As Mr Arnold correctly submitted, the varying standard of review is discussed in the judgement of Robert Walker LJ in Reef Trade Mark [2003] RPC 101, paras 17-30.

95. As to fresh evidence, under rule 52.11(2) [now rule 52.21(2)], on an appeal by way of review the court will not receive evidence which was not before the lower court unless it orders otherwise. There is an obligation on the parties to bring forward all the evidence on which they intend to rely before the lower courts, and failure to do this does not normally result in indulgence by the appeal court. The principles on which the appeal court will admit fresh evidence under this provision are now well understood and do not need elaboration here. They may be found, for instance, in the judgment of Hale LJ in Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318, 2325D-H. Rule 52.11(2) [now rule 52.21(2)] also applies to appeals by way of rehearing under rule 52.11(1)(b) [now rule

> 52.21(1)(b)], so that decisions on fresh evidence do not depend on whether the appeal is by way of review or rehearing.
>
> 96. …. The circumstances in which an appeal court hearing an appeal from within the court system will decide to hold such a rehearing will be rare, not least because the appeal court has power under rule 52.10(2)(c) to order a new trial or hearing before the lower court. Circumstances in which the hearing of an appeal will be a rehearing are described in paragraph 9 of the Practice Direction supplementing Part 52. This refers to some statutory appeals where the decision appealed from is that of a person who did not hold a hearing or where the procedure did not provide for the consideration of evidence. In some such instances, it might be argued that the appeal would in effect be the first hearing by a judicial process, and that a full rehearing was necessary to comply with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – but see Runa Begum v Tower Hamlets London Borough Council [2003] 2 AC 430. This apart, it will be rare for the court to consider that the interests of justice require a rehearing in the fullest sense of the word. All other appeals to which rule 52.11 applies will be limited to a review capable of extending in an appropriate case to the extent to which I have described …'

47. The provisions of the 'old' Practice Direction 52, para 9.1, referred to by May LJ in Dupont, provided that:

> 'The hearing of an appeal will be a rehearing (as opposed to a review of the decision of the lower court) if the appeal is from the decision of a minister, person or other body and the minister, person or other body –
>
> (1) did not hold a hearing to come to that decision; or
>
> (2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence '

48. In Zissis v Lukomski [2006] EWCA Civ 341, the Court of Appeal considered the application of CPR Part 52 to an appeal against the decision of a surveyor under the Party Wall Act 1996. At paragraph [41], Sir Peter Gibson reasoned as follows:

> 'Paragraph 9.1 of the practice direction specifically recognises that the decision from which the appeal is brought can be one reached without a hearing and that the appeal from it will nevertheless be governed by CPR Pt 52. There are ample powers under rule 52.11 to enable the court to receive evidence,

> and in the exercise of any power or discretion the court will be alive to the overriding objective of dealing with the case before it justly. Given that an award under the 1996 Act is non-speaking and made without a hearing, I would envisage that the appeal by way of a rehearing will ordinarily require the county court to receive evidence in order to reach its own conclusion on whether the award was wrong. The flexibility contained in the provisions of CPR Pt 52 seems to me to defeat the thrust of Mr Bickford-Smith's argument that it would not be right for CPR Pt 52 to apply to an appeal under section 10(17). On the contrary I think it plain that CPR Pt 52 was intended to cover a form of statutory appeal like that under section 10(17) and that the provisions of CPR Pt 52 are amply sufficient to allow justice to be done on such an appeal .'

49. Curiously, the 'old' Practice Direction 52, para 9.1, referred to in authorities such as Dupont and Zissis, no longer appears in the current Civil Procedure Rules. Counsel for the Appellant submit that this is likely to be a simple oversight. In my judgment it would not be prudent to proceed on such a basis, particularly given that PD 52D makes specific provision for a mandatory re-hearing in all cases listed at paragraphs 19, 25 and 29. In my judgment I must proceed on the footing that the 'old' Practice Direction 52, para 9.1, no longer exists. In the absence of any other relevant practice directions requiring a rehearing, it follows that CPR 52.21(1)(a) is not engaged in this case. I turn then to consider to CPR 52.21(1)(b).

50. In undertaking the exercise required by CPR 52.21(1)(b) (that is to say, in considering whether, in the circumstances of a given appeal, it would be in the interests of justice to hold a re-hearing), it undoubtedly remains relevant, in my judgment, to consider whether the maker of the decision appealed from held a hearing or considered evidence before arriving at the decision under challenge. The fact that the 'old' Practice Direction 52, paragraph 9 no longer exists simply shifts the focus of the court from CPR 52.21(1)(a) to CPR 52.21(1)(b); it does not negate the significance of such factors for the purposes of CPR 52.21(1)(b).

51. In the present case, it is clear that the decision to defer dissolution until 2025 was an entirely administrative process. On 2 November 2020, a Mr Mahmood Hans of the Insolvency Service signed a notice 'on behalf of the Official Receiver and Liquidator' pursuant to section 205(1)(b) IA 1986, confirming that the winding up of the Company was complete. On the same day, the same individual, Mr Hans, signed a notice 'On behalf of the Secretary of State' pursuant to s.205(3) IA 1986, directing that the dissolution be deferred to 13 May 2025. The process was entirely administrative. The Appellant had no prior warning of the proposed deferral. No hearing took place. No representations from interested parties were invited or considered. No evidence was considered prior to the making of the decision to defer. No consideration of the individual circumstances of the case was undertaken prior to the decision to defer for a period of almost five years. At the hearing before me, Ms Hallamore confirmed that the period of deferral sought by the Official Receiver in such cases is governed by internal guidance, which simply recommends a deferral of five or six years in any case in which more time is required to consider possible

disqualification proceedings and civil recoveries, regardless of the nature or extent of the investigations outstanding at the time of completion of the winding up.

52. Taking all such matters into account, in the circumstances of this appeal, it is in my judgment in the interests of justice to hold a rehearing. The decision to defer was taken by a government official without warning, without consideration of any evidence and without allowing representations from persons clearly affected by the same. Having regard to the overriding objective of dealing with the case before me justly, in my judgment a rehearing is required.

Fresh Evidence

53. For the purposes of the rehearing, in my judgment it is plainly in the interests of justice that fresh evidence should be permitted: CPR 52.21(2); Zissis, per Peter Gibson LJ at [41]. Even if one were to put to one side the fact that there has been no trial on the merits in this case in any event, and were to apply the Ladd v Marshall test as a touchstone of persuasive authority (Sharab v Al-Saud [2009] EWCA Civ 353 at [52]), the requirements of that test would be met. The Appellant had no opportunity to present evidence prior to the decision to defer. The evidence now before the court of the time required by the Official Receiver to complete his investigations clearly demonstrates that the period of deferral decided upon was excessive. The evidence now sought to be relied upon is not only credible but unopposed.

54. For the reasons given, the appeal shall proceed by way of re-hearing and fresh evidence shall be permitted.

Re-Hearing

55. On the evidence before the Court, I am satisfied that the Deferral ought to be brought to an end and the Company dissolved as soon as reasonably practicable.

56. The Deferral serves no useful purpose. According to the Official Receiver, the original purpose of the Deferral was to enable further time to investigate the affairs of the Company. Those investigations took only a few months and are now concluded.

57. I would add that no justification has been put forward for the lengthy nature of the Deferral other than the 'blanket' guidance referred to in paragraph 51 of this judgment. In the absence of any other justification, given the length of time actually taken to conclude investigations, I consider it legitimate to conclude that a period of five years was an unnecessarily and disproportionately long period to allow for those investigations. On the evidence before me it is clear that a deferral of six months would have been more than sufficient.

58. The Official Receiver agrees that the Deferral serves no useful purpose and does not oppose the appeal.

59. There is no indication that any other person objects to the appeal or would be prejudiced by the relief sought. In contrast, the continued existence of the Company until 2025 would cause clear prejudice to the Appellant, for no good reason.

Conclusions

60. For all the reasons given, I shall allow the appeal.

ICC Judge Barber