Neutral Citation Number: [2024] EWHC 1601 (Ch)

Case No: CH-2023-000130

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
APPEAL AGAINST DECISION OF ICC JUDGE JONES 25.5.2023
CASE REF. CR-2022-000092

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

Date: 25/06/2024

Before :

SIR ANTHONY MANN

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Between :

Daniel McAteer	**Applicant**
- and -	
(1) Hat & Mitre Plc (in Creditors' Voluntary Liquidation)	
(2) Richard Toone (3) Jason Maloney (as Joint Liquidators of Hat & Mitre Plc)	**Respondents**

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Stefan Ramel (instructed by **Knights Professional Services**) for the **Applicant**
Joseph Curl KC (instructed by **Ashfords LLP**) for the **Joint Liquidators/Respondents**

Hearing date: Friday, 17th May 2024

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Approved Judgment

This judgment was handed down remotely at 10 am on 25th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives and other websites.

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SIR ANTHONY MANN

Sir Anthony Mann :

1. This is an appeal from a decision and order of ICCJ Jones delivered and made on 25th May and 31st May 2023 respectively. In that decision the judge dismissed an application by the applicant and present appellant, Mr McAteer, for relief which sought the intervention of the court in the liquidation of Hat & Mitre plc ("the company"). He dismissed it on the footing that Mr McAteer lacked standing to bring the application. On 17 October 2023 Joanna Smith J directed that there be a wrapped up hearing in relation to this appeal, so that there was to be an inter partes hearing of the permission to appeal application with the appeal to follow if permission were granted. She also directed that the appellant constitute a proper appeal bundle with all relevant documents. The appellant has patently not done the latter because key documents on which he actually relies, which have been put in a bundle by the respondents, were not added to the appeal bundle by the appellant. Without the respondents' bundle it would not have been possible to dispose of this appeal properly.

2. On this appeal Mr McAteer (who appeared in person below though assisted by a barrister McKenzie friend) was represented by Mr Stefan Ramel, and the respondent liquidators were represented by Mr Joseph Curl KC, both of whom conducted this appeal with conspicuous efficiency and clarity, for which I am grateful.

3. The background to this matter is the conduct of the administration and liquidation of the company. Until it was sold by the liquidators, the respondents to this appeal, the company owned a very substantial property (eventually sold for over £7 million). The property was an office block which was let to a sister company. It was placed into administration as a result of a resolution of the board on 19 December 2018 on the footing that it was cash-flow insolvent. At the time the board was controlled by minority shareholders, including a Mr Young against whom criticism was levelled for doing so by two shareholders constituting the majority, namely a Mr Kebbell (51%) and a Mr Kitchen (17%). Mr Kebbell's two children each had 1%. The remainder of the shares were held by six other shareholders, including Mr Young (10%) and Mr Richard Thoburn (a small stake). The share capital of the company is 50,000 £1 shares. The administrators at the time became the current liquidators when a liquidation ensued.

4. The administration was challenged by Mr Kebbell and Mr Kitchen and that challenge was heard by Trower J who dismissed it in decisions dated 8th and 28th October 2020. In the latter decision he also awarded indemnity costs against Mr Kebbell and Mr Kitchen. Mr McAteer was acting as an adviser to Mr Kebbell and Mr Kitchen and in April 2020 (before the hearing before Trower J) he, Mr Kitchen and Mr Kebbell

signed a Memorandum of Understanding ("MOU") which conferred certain rights of pre-emption over the shares of the company. Mr McAteer was not a shareholder at all at this stage, and I will come to its terms in due course. This is (chronologically) the first document which Mr McAteer relies on as giving rise to his standing to make the application which the judge below dismissed.

5. On 16th April 2021 Mr Kebbell apparently signed a stock transfer form in respect of 10 of his shares in favour of Mr McAteer. The validity and force of that transaction is not necessarily accepted by the liquidators (or Mr Kebbell) but it is assumed for the purposes of this appeal that it is a valid document. Mr McAteer was not registered as a shareholder in respect of those shares. So far as it confers an interest it is an interest in 0.02% of the shareholding, a fact which is very much relied on by Mr Curl in this appeal. On the same day Mr McAteer submitted a rescue plan to the administrators, with the support of Mr Kebbell and Mr Kitchen, in respect of the company. The liquidators rejected that plan on 19th April 2021, a matter which is a considerable source of criticism and complaint by Mr McAteer. On the same day (19th April) the company entered into creditors voluntary liquidation. The administrators became the liquidators. The company was heavily balance sheet solvent, owning the property worth millions of pounds and with creditors of, at most, a few hundred thousand pounds.

6. On 14th October 2021 Mr McAteer and Mr Kebbell entered into an option agreement (the "Option Agreement") conferring on the former an option to purchase the remaining shares (26,990) of the latter. Again, the precise terms are important and I will come to them in due course. This document, too, is relied on by Mr McAteer as giving him standing to make his present application.

7. The liquidators were proposing to sell the property. Mr McAteer, and Mr Kebbell and Mr Kitchen opposed that sale, and on 12th January 2022 Mr McAteer (but not the other shareholders) issued an application which, inter alia, sought an injunction restraining the sale. Despite that, Mr McAteer never sought an injunction restraining the sale. At that stage the application sought the following relief as against the liquidators (so far as material to this appeal):

   (a) An order that the liquidators be directed to direct qualifying decision procedures to be instigated forthwith to ascertain the wishes of the contributories and creditors as to whether Mr McAteer's rescue plan or the liquidators' sale plan should be adopted or whether the liquidators' proposed sale should go ahead.

   (b) A stay of the liquidation pending the determination of the application.

(c) In the alternative, further or other relief, including an injunction restraining the sale pending the determination of the application.

(d) Disclosure of the accepted price for the property.

8. By about 30th March 2022 the property had been sold for just over £7m. The liquidators proposed an interim distribution and Mr McAteer did not oppose that distribution. In due course it took place. The liquidators have made a significant retention to allow for future costs and expenses. The amounts paid to Mr Kitchen and Mr Kebbell were, I was told, adjusted to reflect claims for misfeasance that the liquidators had made against them. Subject to finalisation of costs and expenses, and (presumably) when the liquidators are satisfied enough that they are not going to have to face future litigation, there may be a final distribution to come.

9. It is necessary to understand the procedural history of this matter in order to deal with one procedural point said to arise out of this appeal. The application underlying this appeal came before ICCJ Barber on 13th June 2022. At that hearing the liquidators indicated that they challenged the application on the basis of lack of standing and on the basis that the relief sought was inappropriate given the intervening sale of the property. It was anticipated that Mr McAteer might wish to amend and the judge made an order that he serve any application notice for permission that he might want to issue by 29th June 2022, with a witness statement setting out his material for saying (as he did) that he had acquired a share in the company during administration and prior to liquidation. A further directions hearing was to be fixed.

10. Mr McAteer next made the first of two applications to amend the substantive application. These proposed amendments retained the proposal for a direct qualifying decision procedure but in the main body it removed the originally proposed question about the rescue plan. The restraint on sale proposal was also removed. It added a proposal for an indefinite stay of the liquidation and the removal of the liquidators, or that the liquidation be converted into a members voluntary liquidation. A continuation sheet sought a direction as to a qualifying decision procedure to consider whether "Antecedent claims" (apparently misfeasance claims) should be pursued, whether the liquidators should be removed and whether the company should be dissolved or alternatively exit liquidation "for example through a CVA". On 12th December 2022 the matter came before ICCJ Jones for the first time, and he adjourned it part heard.

11. The matter was restored before Judge Jones on 25th April 2023 at which point he had before him a further iteration of the proposed amendments. In this form the application now sought the following relief:

(a) the removal and replacement of the liquidators. The original application had not sought this.

(b) Alternatively an indefinite stay of the liquidation. The original application had sought a stay only pending the determination of the application under section 195.

(c) Alternatively, its conversion into a members voluntary liquidation. This was not in the original application.

(d) Alternatively an order under section 195 of the Insolvency Act 1986 directing a qualifying decision procedure to consider whether the liquidators should be removed, whether the company should be dissolved or whether it should exit the liquidation "(for example through a CVA)". Those matters were not in the original application. The reference to considering "Antecedent claims" was removed as was the reference to considering the plan that Mr McAteer had proposed.

(e) An order that the liquidators disclose details of cash balances and liabilities. This does not seem to have been in issue by the time the matter finally arrived before Judge Jones.

This was the application for amendment that was technically before him and which the opening paragraph of his judgment describes as being the issue before him. His order, when made, dismissed that application to amend but it also dismissed the whole application. His judgment in effect dealt only with the dismissal of the whole application; it does not dwell on the substance of the amendment application. There never was a formal application by the liquidators to dismiss the whole of the application. That gives rise to a procedural point on this appeal which will be the first question with which I shall deal.

The decision of the judge below

12. The reasons for dismissal of the whole application can at this stage be summarised shortly. In his section F the judge below pointed out:

(a) That the company had no assets (other than the retention by the liquidators) unless there were causes of action that the liquidators had not identified or had wrongly rejected.

(b) That absent an intervention by the court the next step in the liquidation would be the dissolution of the company.

(c) He found that Mr McAteer no longer had the support of Mr Kebbell and Mr Kitchen, a support which he claimed to have previously enjoyed. Nor did any other contributory support him (para 38(iii)).

(d) He considered that there was a point on standing to be addressed, and accepted that there was at least an arguable case that Mr McAteer had the beneficial ownership in the 10 shares apparently transferred by Mr Kebbell (apparently that was potentially disputed by Mr Kebbell).

13. He then went on to consider the question of Mr McAteer's standing to bring his overall application, which he obviously considered to be the real question before him, and found that he did not qualify under any of the provisions of the Insolvency Act 1986 ("the Act") on which he relied. Where those provisions required the applicant to be a "contributory" Mr McAteer did not qualify because he was not registered as a shareholder and was therefore not a "contributory". Where the provisions did not require that qualification he nonetheless lacked standing because he did not have a legitimate or sufficient interest. While beneficial ownership of the 10 shares might give him some sort of interest in that respect, his views would inevitably be "drowned" by the other shareholdings, none of whom supported his proposals. So far as Mr McAteer relied on his interests under the MOU and the Option Agreement, the former failed because on its true construction the right of pre-emption had not arisen, and the option line failed because on its true construction the period during which it was exercisable had not arrived, and it was unlikely to arrive in the foreseeable future (para 70) if ever. In the circumstances Mr McAteer had not established an arguable case that he had standing to make his application.

The grounds of appeal

14. As Mr Curl pointed out, the Grounds of Appeal were somewhat wider-ranging than the points that were ultimately taken on his behalf in this appeal by Mr Ramel. Mr Ramel did not seek to go beyond the points that appeared in his skeleton argument, save for the procedural point with which I am about to deal, and I shall confine myself similarly.

A procedural point – dismissing the whole application

15. As I have pointed out, what may have been technically before the judge below was the application to amend. If that application were to be dismissed then it would leave the original application intact, albeit containing a lot of relief that had become

irrelevant and little relief that Mr McAteer probably wanted or needed. However, the judge went further and dismissed the whole application.

16. Paragraph 6 of the Grounds of Appeal takes that point and complains that the judge went too far in treating the whole application as being before him and dismissing it. However, it is right to observe that the point was not taken or argued in Mr Ramel's main skeleton argument. Nor was it taken in a supplemental skeleton argument which was expressly geared to procedural irregularities. It only arose at the hearing when I questioned how the situation had come about and after Mr Ramel had taken some significant instructions on the point, and then told me he was instructed to take it. It is fair to say that the point emerged in this appeal as something of an afterthought.

17. It is apparent from looking at the way the matter developed at previous hearings that dealing with the application itself, bearing in mind the attack on it, was appropriate and, indeed, foreshadowed. At the hearing before ICCJ Barber Mr Curl submitted that it would be right to deal with the whole application in the circumstances and that standing was firmly in issue. He submitted that the appropriate order that day was dismissal of the application (Transcript p11). Judge Barber acknowledged the force of Mr Curl's points but felt that a summary disposal of the kind proposed by him was not right and she said she would make directions to enable the "standing" point to be decided. She observed that it was clear that Mr Curl would be seeking "final disposal" on the next hearing (Transcript p14). It is quite clear that by the end of the hearing the fate of the whole application was going to be in play when the matter resumed. Evidence was deployed by both sides accordingly.

18. There is therefore nothing in this procedural point. Both sides seem to have approached the main hearing below on the footing that standing was in issue and was capable of determining the fate of the whole application. It is too late to go back on that now.

A procedural point – the admission of documents in evidence at the hearing

19. Mr Ramel took other procedural irregularity points. In that context he accepted, rightly, that it was not sufficient to demonstrate an irregularity (or more than one irregularity). He had to go on and establish that as a result the subsequent decision was unjust – *Hayes v Transco plc* [2003] EWCA Civ 1261; *Dunbar Assets plc v Dorcas Holding Ltd* [2013] EWCA Civ 864.

20. The first challenge with which I will deal is one based on the court's admission of documents into evidence. The original challenge to the administration came from Mr Kebbell and Mr Kitchen. At that stage Mr McAteer was only their adviser. Then he acquired his shares, and the three men were apparently on the same "side" in their attempts to get the property out of the hands of the insolvency practitioners. However, in due course they seem to have fallen out (I was not privy to the details of how a change of stance came about, if indeed it was in evidence at all) and by the time of the hearing before Judge Jones it was the case of the liquidators that all the shareholders other than Mr McAteer himself opposed Mr McAteer's application in terms of the relief sought. The judge confirmed that in paragraph 10 of his judgment. In paragraph 11 he observed that Mr McAteer (who was acting in person though with the assistance of a barrister McKenzie friend) objected to the "very last minute production of the documentation to and from the members of the Company" and in paragraph 13 he said he found the late production of this correspondence to be unsatisfactory but recorded that the "letters are what they are, and the members have expressed their views which clearly oppose Mr McAteer's Application".

21. The material to which the judge referred was a clip of pro forma letters in which the other shareholders were invited to indicate whether they supported the application or would rather have a distribution. All the other members indicated that they did not support it and would rather have a distribution. What the judge does not record is the circumstances in which the documents were produced. They were as follows.

22. At the hearing the judge observed that he had not seen any documents in the bundle which supported submissions to the effect that the other shareholders supported the liquidation coming to an end (Transcript p 44) and when counsel indicated that he had copies that he could hand up the judge observed:

> "I will certainly have a look at them."

Counsel was thereby acceding to an implicit invitation, rather than presenting last minute evidence. When Mr McAteer objected that he had not seen them Judge Jones indicated that he would look at them and see what he wanted to do. The documents were then produced to him (7 short documents in effectively identical form).

23. It is said on this appeal that that was a serious irregularity. The judge ought to have asked Mr McAteer if he objected to those documents and asked him if he wanted an opportunity to make contact with the shareholders himself; but he did not do so. It is also said that later at the hearing the judge headed off an application to adjourn to consider the point by telling Mr McAteer (wrongly) that if he wanted an adjournment he would have to pay the costs thrown away.

24. I will deal with the latter point first. It is clear that the judge pointed out to Mr McAteer that if he wanted an adjournment to deal with what had emerged in Mr Curl's argument then he would be likely to have to pay the costs, and Mr McAteer did not pursue the question of an adjournment. However, it is not at all clear that the late production of these documents was what Mr McAteer had in mind in this part of the debate (Transcript p70-71). He would seem to be referring to something in relation to the option agreement about which he had "not had time and an opportunity to consider a reply to it". This part of the transcript (like other parts) is rendered hard to follow because of recorded inaudibilities, but doing the best I can it does not seem to me that this part of the transcript is referring to the production of the shareholder responses. Accordingly, I do not think that the judge below wrongly headed off an adjournment point by mis-stating costs consequences.

25. So far as the first point is concerned, in the circumstances there was no need to adjourn the matter so that Mr McAteer could engage in debates with the shareholders about the then current position. If this had been sudden newly tendered evidence which took Mr McAteer by surprise then he might have been entitled to an adjournment so that he could at least consider his position on it, though not necessarily engage in a shareholder debate, but that was not the position. Correspondence which was in the bundle at the time (and therefore known to Mr McAteer) clearly indicated that the liquidators had consulted the other shareholders and ascertained that they did not support the application and that they wanted a distribution. They told Mr McAteer that in a letter of 3rd March 2023, though they did not disclose the terms of their inquiry to shareholders. In his response in correspondence Mr McAteer said he was happy for there to be a distribution save to the directors (or perhaps some of them). In a letter dated 13th March 2023 the liquidators stated that the other shareholders refused to communicate with Mr McAteer. In response (email dated 13th March 2023) Mr McAteer said:

> "I note your comment that the shareholders have refused to communicate with me. This is of course a matter for them but I do note that you claim to have written to these gentlemen regarding their wishes for a distribution and their attitude to my Court application, but that you refused to disclose that correspondence to me. We call that dirty fighting in Ireland. Let me guess what you asked them;
>
> 1. "Would you like some money now?
>
> 2. Do you support Mr McAteer's application which will delay matters?"

26. In the light of that Mr McAteer cannot really complain that the court deprived him of an opportunity to communicate with shareholders, because they did not wish to hear from him. I also observed that, even though he did not see the questions asked of the other shareholders, his guess was not very far wrong. Despite all that, he had clearly

had the means of communicating with shareholders because he knew their email addresses – an email that he wrote to the liquidators on 16 March 2023 was copied to all of the shareholders except Mr Kebbell's two children, who had a very small holding and who were doubtless being kept informed as appropriate by their father.

27. The production of the clip of formal responses from the shareholders at the hearing has to be seen in that context. Little or nothing was added to the debate and when the judge saw the clip it is understandable that, insofar as he reached a decision that the production did not require an adjournment, that decision was reached. So far as he reached that decision it was a case management decision from which an appellate court should not depart without very good reason. In my view there is no reason why this court should hold the decision was unjustifiable. All that happened was a little flesh was put on bones that were already well enough fleshed out and no injustice was caused to Mr McAteer by what happened. There was no real irregularity; there was a case management decision. And in any event it did not render the decision unjust.

Procedural irregularity – the conduct of the hearing

28. The last procedural irregularity point taken on this appeal is one which was only foreshadowed in the original skeleton argument, without details, because in order to develop it a full transcript was required and that was not available at the time. It was further developed in a skeleton argument prepared by Mr Ramel some weeks later. That delay is understandable in those circumstances.

29. In this second skeleton argument Mr Ramel relied on several "testy" exchanges and some allegedly inappropriate comments by Judge Jones. It would seem that his submission was that Mr McAteer's conduct of the hearing was "unfairly impacted", and Mr Ramel relied, without any apparent evidential basis, on the fact that Mr McAteer had understood that his honesty was to be challenged at the hearing (though in fact it was not), that that concerned him deeply as an honest man, and that affected his approach to the hearing. It is not clear precisely how that was said to work. It seems to me to be of no real significance to this part of the debate.

30. In support of this submission Mr Ramel relied on 13 specific parts of the transcript of the hearing which were said to demonstrate inappropriate behaviour by the judge. Because of shortage of time at the appeal he did not develop any of them at the hearing, and was content for me to look at them and to form a view as to the strength and effect of the submission. I have done that, and I have also read around the specific instances relied on in order to make sure that I understood the context of any isolated remarks relied on. I have come to the clear conclusion that there was no real inappropriate behaviour by the judge, and insofar as they might have manifested a

degree of irritation then that did not impact at all significantly on the way the hearing developed or on the justice of the final decision reached. I shall deal briefly and in turn with each of the instances; it is not necessary to set out the transcript extensively in relation to any of them.

31. Before doing so I observe that there is no allegation of bias made in this matter. It is not said that the material relied on by Mr McAteer demonstrated bias, or hostility, or pre-judging important matters in issue. The case seems to be put at a lower level than that.

32. The specific incidents are as follows:

(a) The first instance relied on is the use the words "It is a ridiculous analogy" in relation to an analogy deployed by Mr McAteer at the hearing. It is plain from the short debate that followed that the judge was concerned about the distastefulness of the analogy, which involved a suggested parallel of walking across a courtroom and punching counsel in the mouth. It was perhaps an understandable reaction to very odd submission; it did not in any way derail the hearing or deflect Mr McAteer in any relevant way from being able to make his case.

(b) Next is a complaint that the judge described the deployment of a recollection at a previous hearing as "a complete waste of time". It is apparent that the judge is making the point that if it was necessary to rely precisely on what occurred at a previous hearing then one should rely on a transcript and not personal recollection. It is apparent from the context that the judge was entirely justifiably trying to get to the bottom of what Mr McAteer's point at the time was. There is nothing wrong in what the judge said here.

(c) A complaint about the use of the words "I doubt it" by the judge. When he used those words he was expressing scepticism as to whether a factual situation was provided for in one of the agreements relevant to this case. Mr McAteer in fact accepted that the factual situation was not provided for. There is absolutely nothing wrong with the use of the words in this context. This complaint about the judge's behaviour should never have been made.

(d) At page 30 the judge is recorded as saying to Mr McAteer: "Will you just please listen." This was said when the judge was trying to explain to Mr McAteer that his complaint of disadvantage in relation to the production of documents was no disadvantage at all. Mr McAteer started to interrupt the judge and the judge was directing him firmly to wait until he (the judge) had stopped speaking. That is a respectable response by any judge when interrupted. It is not an "inappropriate" comment; nor does it evidence a general testiness in approach even if (which does not appear from the transcript) it was said in a testy manner.

(e) Pages 31 and 37 of the transcript are said to demonstrate some sort of undesirable "tit for tat exchange". I simply do not understand the point about page 31 (which I will not set out in extenso); and page 37 merely reflects a vigorous bit of cut and thrust in which the judge was trying to keep Mr McAteer focused on what seemed to be the issues in the case and on resisting false hypotheses. There is nothing in these points of complaint.

(f) At page 69 Mr McAteer, through Mr Ramel, complains about the use of the word "disaster". The judge used this word to describe the effect on his diary of the case going longer than anticipated. Despite that, the judge indicated that he would complete the case by hearing Mr McAteer in reply, which he duly did. I simply do not understand how the use of this word by the judge in any way reflects conduct or an attitude which rendered the conduct of the hearing unjust. He actually went on to hear Mr McAteer for another 18 pages of transcript. This particular point should never have been made on this appeal.

(g) Mr Ramel then complained that pages 74-75 demonstrated "testy exchanges" which themselves demonstrated irritation on the part of the judge. Again, one cannot accurately pick up the tone from mere words on the page, but I would accept that these exchanges may have that testy quality, on both sides. It may also be true to say that the judge was by this point irritated. Unfortunately that happens, but in most cases, and certainly in this one, it does not go far towards demonstrating that the hearing was unjust, and does not amount to injustice in itself.

(h) At page 76 Mr McAteer comments that the judge appeared to be laughing. It is impossible to identify what actually happened here – whether the judge smiled at a surprising submission, or went further. The context certainly does not demonstrate that the judge was laughing (if he was) in a dismissive way.

(i) At page 79 the judge observes that Mr McAteer had not been helpful to the court at all in that afternoon session. Because the preceding remarks are inaudible it is not clear what triggered this observation, but in the light of what follows it is apparent that the judge was observing that Mr McAteer had not been doing what he ought to have been doing, which was replying to Mr Curl's preceding submissions. He was trying to get Mr McAteer on to the right track in his submissions. There is nothing wrong with the remark in context.

(j) At page 82 the judge asked Mr McAteer: "You really do not know what being objective is?". This question was posed in the context of a debate about the objective, as opposed to subjective, approach to the construction of documents. Judging from the transcript, it would appear that this is part of an exchange in which each party was getting irritated with the other. Mr McAteer's response was: "Do not insult my intelligence". However, having said that, the judge's own remark does not demonstrate an unfairness in the conduct of the hearing or support other material (of which there is none) pointing the same way.

33. The conclusion from this is that the material relied on by Mr Ramel does not begin to demonstrate that the hearing was conducted in such a way as to be unjust to Mr McAteer or to demonstrate that the final decision was unjust. I accept, of course, that one does not judge matters by reference to single incidents. If there are more than one incidents said to give rise to unfairness then they have to be taken together, because the overall picture is important. However, the matters relied on by Mr Ramel in his skeleton argument do not, taken cumulatively, amount to any more than they do individually. As I have indicated, I have looked at the context of the remarks complained of, and that does not improve Mr Ramel's case. I have also looked more widely at the transcript and it is quite apparent that Mr McAteer had ample opportunity to advance his case (assisted as he was by a senior junior barrister as his McKenzie friend). There was no unfairness at the hearing.

The statutory provisions and standing

34. I can now turn to the substance of the appeal. Various provisions of the Act need to be invoked by Mr McAteer and they have differing requirements for status or standing. Section 112, which permits applications to the court to have questions determined, requires specified statuses, which includes that of contributory, which Mr McAteer claims to be:

> "112(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court".

This would be the provision relevant to the application to turn the liquidation into a members' voluntary winding up but that was not much of a target on this appeal.

35. Again, in order to be able to apply for a stay Mr McAteer needs to be a contributory. That is because the jurisdiction to stay is under section 147 via section 112:

> "147(1) The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed or sisted, make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit."

36. There has been no order for winding up in this case, but section 112 enables an application for a stay to be made in a voluntary winding up by permitting the court to exercise similar powers. So a contributory in the present winding up can apply for a stay of the winding up.

37. By contrast, the two other sections which Mr McAteer's application invokes are sections in which there is no particular status specified. Section 108(2) deals with the application for the removal and appointment of liquidators:

> "108(2) The court may, on cause shown, remove a liquidator and appoint another."

Similarly section 195, which governs the application for directions about qualifying decisions, is not expressly limited to any technical standing:

> "195(1) The court may –
>
> (a) as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories (as provided to it by any sufficient evidence), and
> (b) if it thinks fit, for the purpose of ascertaining those wishes, direct qualifying decision procedures to be instigated or deemed consent procedure to be used in accordance with any directions given by the court, and appoint a person to report the results to the court.
>
> …
>
> (c) In the case of contributories, regard shall be had to the number of votes conferred on each contributory."

Mr McAteer as contributory

38. ICCJ Jones considered the claims that Mr McAteer was a contributory by virtue of the three transactions propounded by Mr McAteer – the unregistered transfer of his 10 shares in the company, the MOU and the option agreement. He held that only a person with a registered shareholding is a contributory for the purposes of the sections requiring that status, not a person with the beneficial interest (paragraph 41). Accordingly, he held that Mr McAteer could not claim to be a contributory because he held no more than a beneficial interest.

39. On this appeal Mr Ramel sought to overturn the decision so far as it concerned the 10 shares which he acquired (via the unregistered transfer) from Mr Kebbell. He did so by relying on the transfer and submitted that by following the chain of statutory definitions through from member to contributory it was apparent that a transferee such as Mr McAteer was a contributory for the purposes of the sections where that was required for locus to make an application. His skeleton argument did not seek to make a case for saying that Mr McAteer's rights under the MOU and the option agreement gave him that status; nor did his oral submissions. That would seem to me to be a correct stance; the terms of those two agreements were not such as to give Mr McAteer even a beneficial interest for these purposes even if the transfer did. I will come to those terms later.

40. So the question in this part of the appeal is whether the judge was right to say that Mr McAteer's 10 shares did not confer on him the status of contributory. He reached that conclusion by relying on section 74 of the Act and holding that:

"…. it is the legal owner of the 10 full[y] paid up shares, the member as defined by section 112, who is a contributory not a person with a beneficial interest. Mr McAteer is not a member 'liable to contribute' with a liability of nil, as he contends." (paragraph 41)

41. Section 251 of the Act provides that in the relevant Parts of the Act (which includes Parts in which the above sections appear) the word "contributory "has the meaning given by section 79". Section 79 provides:

> "79(1) - In this Act the expression 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are deemed to be contributory's, includes any person alleged to be a contributory."

42. The persons liable to contribute are defined in section 74:

> "74 – **Liability as contributories of present and past members**
>
> (1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of a winding up, and for the adjustment of the rights of the contributories among themselves."

43. Subsection (2)(d) provides that no contribution is required from any member exceeding the amount which is unpaid on his/her shares.

44. Section 250 is also relevant to this part of the debate in relation to who is to be treated as a member. It provides:

> "250. For the purposes of any provision in this Group of Parts, a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of law, is to be regarded as a member of the company, and references to a member or members are to be read accordingly."

45. Beyond that the concept of "member" is not identified in the 1986 Act, but it is defined in section 112 of the Companies Act 2006. Subsection (1) deals with original subscribers, and subsection (2) with others:

> "(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a *member of the company*." (italics in the original)

46. Putting all that together, Mr Ramel's argument was that Mr McAteer was a contributory for the purposes of section 112 of the 1986 Act via the following route. He was not a member in the strict Companies Act sense because he was not registered in relation to his 10 shares. However, he was a person to whom those shares were transferred within section 250, and so was entitled to be treated a member under the Group of Parts relevant to this matter (section 250). That means he was a member liable to contribute under section 74 (he is a present "member" in the extended sense provided for by section 250); and he is therefore person liable to contribute under section 79, and that makes him a contributory for the purposes of section 112.

47. Mr Curl submitted otherwise. He accepted that the logic of Mr Ramel's chain of reasoning worked, but said that what sections like section 74 and 124 (winding up) were really getting at was persons who were actually liable to contribute, which did not apply to Mr McAteer. He accepted that that meant that the word "contributory" might end up meaning different things in different parts of the Act, but what was required was a purposive approach to construction and it would be contrary to such an approach to accept that Mr McAteer was liable to contribute.

48. I accept Mr Ramel's line of reasoning, and consider that the judge below was wrong in holding that Mr McAteer was not a contributory for the purposes of section 112 and section 147 in respect of his 10 shares. Technically Mr Ramel's journey through the statutory provisions is a correct one; it is hard to see how one escapes it. Mr McAteer is someone to whom shares have been transferred, albeit not registered, and it is hard to see why that should not fall within the special definition provided by section 250. That deliberately extends the concept of member beyond those who would otherwise be treated as members (that is to say registered shareholders). It

covers those who have acquired shares by operation of law (for example, trustees in bankruptcy and personal representatives), and they are specially catered for. The words "person who is not a member of the company but to whom shares in the company have been transferred" obviously go beyond those cases, contrary to a suggestion made by Mr Curl. It is not apparent why they would not cover unregistered transferees. It seems odd that there might be two different contributories in respect of the same shares, but that seems to be the effect of the section. Obviously a liquidator could not claim twice in respect of non-fully paid shares, but a court can control that situation. And if it matters for the purposes of establishing a right to apply under the Act as "contributor", no doubt a court will be able to establish whose voice should be heard, or heard loudest, in determining whether to grant relief.

49. Nor is there any conflict with the policy of not allowing the transfer of shares once there is a winding up as demonstrated by section 88 of the 1986 Act, as Mr Curl suggested. That section voids the actual transfer without the sanction of the liquidator, so in practice there cannot be two contributories in respect of the same shares in respect of purported transfers after the winding up. If there is an unregistered transfer prior to the winding up (as here – the transfer was during the administration, and there is no bar on transfers during an administration) then any competition or conflict would have to be resolved as it arises, but no policy questions are involved.

50. I therefore find that the judge below erred in considering that Mr McAteer was not a contributory for the purposes of section 112 and 147. He held that Mr McAteer was not a contributory because he "was not a member 'liable to contribute' with a liability of nil" (para 41). That is not a correct analysis. One needs to follow the logic of the definitions through, and there is no justification for adding some other sort of qualification, if that is what the judge below was doing in that sentence. Mr McAteer was and is a contributory for the reasons given above.

51. The consequence of that is that Mr McAteer had technical standing for the purposes of sections 112 and 147 – claims for directions and for a stay of the winding up. On the facts of this case it is the latter which is significant.

Mr McAteer's claims as contributory

52. Because he decided that Mr McAteer is technically not a contributory Judge Jones did not consider the fate of the application on the footing that he was and made no findings explicitly related to that factor. However, he did make findings which can plainly be said to go to the point. In paragraph 53 he dealt with whether or not Mr

McAteer's beneficial interest in the 10 shares (which was assumed to exist for the purposes of the application) gave Mr McAteer a sufficient interest to be able to make other claims under the Act. He held that it was not – his interest was so small that:

> "the inevitable conclusion is that his views must in this case be drowned by the views of the Members. His interest is neither sufficient nor legitimate for that reason."

53. I deal below with more recent authority which casts light on the question of standing and interest in applications under the Act, and it seems to me that this finding of the judge, which is eminently justifiable on the facts, goes to what ought to be the fate of the claims which require Mr McAteer to be a contributory – principally the claim for a stay. On the evidence before the judge it was plainly the case that none of the other members, with the vast majority of the shareholding, wished to have a stay. They had expressed their wishes to allow the liquidation and distribution to go ahead and did not wish to prolong the liquidation further. On a fully fought application as to whether there ought to be a stay those wishes would plainly have great force, and it is inconceivable that Mr McAteer's tiny shareholding would be able to carry the day in the face of opposition from the other shareholders. It is to be assumed that if the court had made the sort of order that Mr McAteer is seeking under section 195, then the other shareholders would have voted against a stay and the court would have given that very great weight in a subsequent application. That procedure has been somewhat short-circuited by the liquidators' questionnaire. In my view, although the judge below was wrong to say that Mr McAteer was not a contributory, nonetheless his finding that Mr McAteer's interest would be "drowned" is justifiable and determines the fate of that part of his application which depends upon his being a contributory – as I have said, that is principally the application for a stay. This point was not raised in a respondent's notice, but it would be wrong to ignore it because it seems to me to be so obvious.

54. Furthermore, a stay of the liquidation itself would seem to have no justifiable purpose. There is no suggestion that the business of the company would or could be revived. The main asset has been sold and its proceeds substantially distributed. The only thing left to do, on the findings of the judge below, is a possible final distribution when the liquidators have had their remuneration and are satisfied that they are not going to need to make further reserves. A stay would not further any further claims which (Mr McAteer might say) could be made by the company. Mr McAteer's answer to this point may be that a stay would trigger his rights under the Option Agreement – see below. However, that argument does not work for Mr McAteer. If he is applying for a stay as a contributory in respect of his 10 shares in order to trigger his rights under an entirely separate Option Agreement he would not be applying in right of his being a contributory. The Option Agreement has nothing to do with his 10 shares. That would be fatal to any argument that he can seek a stay as contributory for these purposes. The need to relate relief to the status in connection with which it is sought appears from the authorities, and in particular from recent authority which I deal with below.

55. I acknowledge that Mr McAteer's status as contributory also, at least in theory, gives him a potentially greater standing in relation to the other claims made (under section 108 – removal of liquidator - and section 195 – the qualifying decision procedure). Although they do not require him to be a contributory nonetheless, at least in theory, his status as contributory brings him closer to the liquidation. However, it is at this point that the findings of the judge again come into play. On those applications the court would inevitably take into account the wishes of the vast majority, which were patently against any of this relief, and it is unlikely in the extreme that the court would go against those wishes despite Mr McAteer's technical position as a contributory.

56. Furthermore, the almost de minimis size of Mr McAteer's interest in the shares has to be borne in mind in relation to any relief which depends on his being a contributory in respect of his 10 shares. At the end of the day Mr McAteer's plan seems to be to get claims made by the company in order to swell its assets. However, as Mr Curl pointed out, Mr McAteer's interest was 0.02% of the shareholding in the company. That meant that for every additional £1m which might be available for distribution, Mr McAteer would be entitled to just £200. No rational person would seek to spend time and money for such meagre potential rewards, particularly when the other shareholders did not support any further action being taken. The situation was analogous to the sort of abuse identified in *Jameel v Dow Jones* [2005] QB 946 (CA) where it was held to be an abuse where pursuing a claim was "not worth the candle" (para 69).

57. I agree with Mr Ramel that the mere fact of a small shareholding, without more, will not necessarily bar an application under the Act. The fate of any particular application depends on what the application is and what the end result is going to be. However, on the facts of this case I agree with Mr Curl that the size of the shareholding and the likely returns, against the background of unanimous opposition from the other shareholders, means that the invocation of sections 108 and 112, (assuming for these purposes that their intended effect would be to enable claims to be brought against others) would not be justified. If £5m were recovered (which might be thought to be a fancifully large amount) and there were no deductions from it (even more fanciful), Mr McAteer would receive just £1000. That is not real-world commercial litigation and is capable of being a *Jameel* type abuse. I do not consider that Mr McAteer, as contributory by virtue of his 10 shares, has an ultimate legitimate interest in the relief claimed bearing in mind his otherwise intended direction of travel.

58. It is therefore the case that the judge below's finding, which prevented Mr McAteer from relying on his 10 shares to justify the relief sought, stands, albeit for different reasons.

Standing from the other transactions

59. In addition to his holding of 10 shares, Mr McAteer relied on the MOU and Option Agreement as giving him standing to make his applications. On the appeal Mr Ramel did not claim that they gave him the status of contributory, so it cannot be the case that he could rely on them as standing behind the application for a stay (which requires that status). However, he did rely on them as giving him standing under the other sections which do not require that status. It is therefore necessary to set out their provisions. I do so in a little more detail than the judge below because questions of construction arise and, as will appear, I differ from the judge below on one question of construction.

The MOU

60. The MOU was signed by the three parties (Mr Kebbell, Mr Kitchen and Mr McAteer) on various dates between 1 April 2020 and 22 April 2020. It expresses itself to be "legally binding" and to be:

> "entered into by the parties in relation to the bringing to an end of the administration of [the company], the potential acquisition by Mr McAteer of some or all of the minority shareholders who wish to exit the company and the future governance of, and intentions of, the company posed administration."

61. It goes on to express the intention of the parties to be "fair and equitable in their dealings with each other, and any other shareholder in the company", to promote the interests of the company and that they intended that their shareholding in the company would be a long-term investment to generate income flow for the benefit of the parties, their families and successors. It recites the shareholdings of Mr Kebbell and Mr Kitchen and recites that those two shareholders have retained the services of Mr McAteer to bring the administration to an end and return the company to a going concern. Two routes to that end are referred to, a "litigation route" and a "mediation/settlement" route. The latter route is described as follows:

> "The mediation/settlement route will involve the negotiation for the purchase of shares followed by a commitment to bring the administration to an end."

62. Against the background of this case, that can only refer to the purchase of shares from the shareholders in the company other than Mr Kebbell and Mr Kitchen. The agreement then goes on to deal with this purchase under the heading "Purchase of

Shares". The ensuing six paragraphs under this section do not have numbers, but I have numbered them in this judgment in order to aid exposition.

> "1. In the event that the administration is brought to an end, and a price is acceptable to Daniel McAteer and the outgoing shareholders, it is the wish of Martyn Kebbel and Richard Kitchen that Daniel McAteer acquires such shares as soon as practicable.
>
> 2. In the event that Daniel McAteer purchases the shares of any shareholder, Richard Kitchen and Martyn Kebbell as directors of [the company] guarantee not to refuse or block the registration of those shares in his name/the name of this [sic] nominee.
>
> 3. In the event that Daniel McAteer successfully negotiates and acquires shares, his preference is for a long-term investment, though an early exit would not be ruled out in the event that all shareholders, including him, are agreeable to a disposal of the company assets.
>
> 4. To reflect the long-term nature of the investment, all parties have agreed to the grant to the other party an option [sic] to acquire on a first-refusal basis, all or any part of their shares should they decide to dispose of those shares or exit company. (This option is not intended to apply to any disposal by a party to family members or vehicles controlled by them…)
>
> 5. All parties undertake to pass on the commitment entered into under point 6 of this agreement to any family member or other person or entity [sic] which might acquire the shares through gift, purchase or inheritance. [This reference to point 6 is in the actual agreement, though it does not contain a point numbered 6.]
>
> 6. To cover a situation where Daniel McAteer expends considerable resources regarding negotiations for the acquisition of shares which proved to be unsuccessful, and in the event that Martyn Kebbell or Richard Kitchen decide to exit the company, Daniel McAteer has requested that he be

> granted an option, first refusal on any shares in the following terms:
>
> (a) If Martyn Kebbell decides to exit, he will give first refusal to Richard Kitchen, and if Richard Kitchen has no interest, then that option would fall to Daniel McAteer;
>
> (b) if Richard Kitchen decides to exit, he will give first refusal to Martyn Kebbell, and if Martyn Kebbell has no interest, then that option would fall to Daniel Mcateer.
>
> (c) if Daniel McAteer declines to buy than the party wishing to exit through sale of shares has the option to sell to an outside party; and
>
> If Daniel McAteer decides to exit, he will give first refusal to Martyn Kebbell, and then Richard Kitchen if both decline Daniel McAteer will be permitted to sell to an outside party."

63. There is then a section headed "Valuation of Shares" which sets out a process of getting an informal valuation from the managing agent, but immediately prior to any share transaction between the shareholders, a "red book" valuation would be commissioned "to guide the price of the transaction. In the event that a higher prices is offered by a proven genuine third party that valuation will supersede the Redbook valuation as a guide price." The agreement goes on:

> "In the event that an option to purchase shares comes into force the procedure shall be as follows;
>
> a) The exiting party will notify the remaining party of his intention to sell and will specify the price acceptable to him;
>
> b) From the date on which the price is agreed, the exiting party will give the remaining party up to two months to enter into a non-conditional contract agreement for the purchasing of the shares; and
>
> c) Finalisation/payment will complete within four weeks of the signing of the agreement or earlier if mutually convenient, unless the parties mutually agreed different payment terms (for example, a phased payment)."

64. A paragraph numbered 20 (the first paragraph in the agreement to bear a number) provides that:

> "In the event that an option to purchase shares comes into force and the parties fail to agree on a valuation, the parties agree to appoint a suitably qualified, independent mediator to determine the valuation. That valuation will be binding on each party for the purposes of deciding whether or not the purchasing party wishes to exercise the option. In the event that the purchasing party does not wish to exercise the option at a price which has been determined either by agreement or by the independent mediator, then the option will lapse after two months. The selling shareholder will then be free of the option obligation and can seek an outside purchaser."

65. The only other relevant provision of the agreement (for relevant purposes) is one under the heading "Temporary Loan to Fund the Shares Purchase" which starts:

> "In the event that Daniel McAteer successfully negotiates the purchase of shares from outgoing shareholders, the acquisition will be funded as follows;"

66. And there then follow some rather obscure references to sources of funding which do not wholly make sense but which I do not need to penetrate further.

67. ICCJ Jones held that paragraph 1 did not contain a binding agreement for the sale of shares to Mr McAteer. I am not sure the contrary was ever argued, but in any event that conclusion is clearly right, though the operation of the provision is a little obscure. What the judge said was:

> "60. This is a pre-emption agreement but the question is: when does the option to acquire on a first refusal basis apply? It is expressly provided that the agreement referred to is intended to reflect "the long term nature of [Mr McAteer's] investment". Namely, an investment which will only arise if he "successfully negotiates and acquires shares". Therefore, the answer is that it applies once he has acquired some shares. It obviously will not apply if he agrees a purchase of all their shares when the administration ceases but will apply to any shares continued to be held by Mr Kebbell and/or Mr Kitchen once he has become a shareholder. It will equally apply to Mr McAteer's shares, which of course it can only do if the option arises after he becomes a shareholder.

> 61. Therefore, that provision does not assist Mr McAteer because it is dependent upon a purchase of shares under the terms of the Memorandum pursuant to the earlier provision having taken place in the first place. It is to be concluded that the Memorandum of Understanding does not create a sufficient interest. There is no arguable case to the contrary. I have reached that conclusion having read and considered the Memorandum of Understanding as a whole and without their being any evidence of circumstances before me which could possibly lead to any other conclusion."

68. It is not wholly clear what the learned judge is saying here, but it would seem from paragraph 61 of his judgment that he is saying that the right of pre-emption has not come into effect because it is a pre-condition that Mr McAteer acquire some shares first, which he has not done. That, it is said, does not give rise to a sufficient interest for the purposes of the statutory provisions.

69. Mr Ramel pointed out the difficulty in understanding what the judge was saying, but said that in any event the judge was wrong insofar as he was saying that the pre-emption rights had not arisen. They had arisen because Mr McAteer had acquired shares – his 10 shares from Mr Kebbell. The MOU in this respect contained clear contractual rights.

70. Mr Ramel also relied on a submission that paragraph 4 contained a free-standing option – a free-standing contractual right – and paragraph 6 contained a separate and different right. The paragraph 6 contractual right was not dependent on the prior purchase of shares. This bundle gave his client contractual rights which were sufficient to give rise to a sufficient interest to entitle him to apply under the provisions of the statute which required such an interest.

71. Mr Curl (at least in his skeleton argument) submitted that the MOU was no more than an agreement to agree, without indulging in complete analysis. I disagree – while it is hard to follow it seems to contain, in its various provisions, enough to give rise to some sort of enforceable pre-emption rights. In his oral argument Mr Curl did not develop this point but submitted that paragraph 4 operated only when shares had been acquired by Mr McAteer from the minority shareholders, which had not happened and which was not going to happen. The paragraph 6 option, which he seemed to agree was a separate right, operated only if a shareholder decided to exit, which they had not done and which, again, was unlikely to happen. Overall the agreement did not give any relevant economic interest.

72. Before deciding whether this agreement does or does not give rise to a sufficient interest for Mr McAteer's purposes it is necessary to work out what that interest is. First, it gives rights of pre-emption, not options. Although the agreement uses the word "option", the rights are in substance pre-emption rights. There is nothing in the nature of a right to purchase which can be triggered by a unilateral act of Mr McAteer or by some ascertainable external event. The only thing which triggers a right of purchase is a decision by Mr Kebbell or Mr Kitchen to sell. That is quite apparent from paragraphs 4 and 6.

73. Mr Curl submitted that the whole agreement operated only if and when Mr McAteer had managed to acquire some shares from the minority shareholders. I do not consider that that is right. While it is true that the introductory words anticipate the "potential acquisition" of minority shareholdings, there is nothing which clearly introduces such a condition. Paragraph 1 and 2 equally anticipate such a purchase, but they are not made a pre-condition. Paragraph 3 refers to the acquisition of any shares, but is an expression of wishes as to what should happen. Paragraph 4, insofar as it contains a separate right of pre-emption, applies to such shares as all parties have, whether acquired from a minority shareholder or not, and paragraph 6 anticipates a situation in which Mr McAteer has <u>not</u> been able to acquire minority shares.

74. So the position is that Mr McAteer has some form of right of pre-emption but, like all such rights, it arises only if and when an existing shareholder decides to sell. In the case of clause 6 he is second in line to the shares of Mr Kebbell and Mr Kitchen, so to that extent his interest is more remote.

75. The judge below seems to have considered that the right of pre-emption did not arise unless and until Mr McAteer was himself a shareholder in the company. He added the words "under the terms of the Memorandum", but it is not apparent what that means. If he means "acquired from the minority shareholders", then I disagree for the reasons just given in relation to Mr Curl's submissions to that effect. However, it is also necessary to consider whether it is necessary to for Mr McAteer have become a shareholder, from whatever source, before he can have a right of pre-emption. I consider it is not. While the agreement anticipates a situation in which the three parties will become shareholders in the company in order to carry it forward, paragraph 6 would seem plainly to cover a situation in which Mr McAteer has not yet got any shares. It expressly applies to a situation where he has not managed to acquire shares from a minority shareholder, but in that event he is unlikely to have acquired shares from the other two shareholders either – the agreement anticipates that they will be hanging on to their shares. Insofar as the judge below considered that Mr McAteer had to have shares from whatever source, then I respectfully

disagree. As will appear, however, that does not make any difference to Mr McAteer's ability (or inability, as I find it to be) to rely on the MOU for his purposes.

76. Mr McAteer is therefore in the position of someone with the benefit of a right of pre-emption but where the present owners of the shares have not decided to sell, and who would seem, in the circumstances, to be highly unlikely to wish to sell to a third party. It is not apparent that, bearing in mind that the company is now in liquidation, the property has been sold, a distribution has taken place and, as things stand, any transfer of shares would be void, Mr Kebbell or Mr Kitchen (who now seem to be hostile to Mr McAteer) would ever wish to, or be able to, sell to a third party, which is what would be necessary to give rise to Mr McAteer's rights to have shares.

The Option Agreement

77. This agreement is dated 14th October 2021 and is made between Mr Kebbell and Mr McAteer. It provides :

"3. Martyn Kebbell shall grant Daniel McAteer an option to purchase his shares in [the company] (in liquidation) on the following terms.

- The purchase price for the shares shall be in accordance with the following formula;
    - Valuation of property £6,500,000
    - Less deferred taxation £799,365 (TBC)
    - Less costs of administration at the date of this agreement (TBC)
    - Less creditors at the date of this agreement (TBC)
    - Defines a Net Value at the date of this agreemenet (TBC)
    - Purchase price – 51.98% of Net Value.

- The payment terms are set out in the schedule of payments attached

…

4. The Option period shall last for a period of up to twelve months from the date on which the present liquidation arrangements are brought ot an end by either court order or agreement with Mr Maloney and Mr Toone [the liquidators]."

78. Clause 5 contains a provision providing for Mr Kebbell to receive an uplift in the event of the property being sold within 6 months from the exercise of the option for a price in excess of £6.5m, the amount being agreed between the parties in a fair and equitable manner having regard, inter alia, to the legal costs expended by both parties "directly in relation to the ending of liquidation between 1st April 2021 and the date the liquidation is terminated". What this clause, and the valuation method, clearly demonstrate is that it was anticipated that the option would be exercised at a time when the property (not defined, but plainly the single property owned by the company) had not yet been sold.

79. Nevertheless, the judge below rejected a submission that the option could be exercised only before the property was sold. Mr Curl did not renew that submission on this appeal. The judge did observe, correctly in my view, that whether or not Mr McAteer would wish to exercise the option in those circumstances depended on the value of any rights remaining in the company, even though the price would be based on the property which had been sold.

80. Both parties agreed before the judge, and before me, that clause 4 of the agreement meant that the option was exercisable only within a period of 12 months commencing on the date of the end of the "liquidation arrangements". They differed, however, on the meaning of that term. Below, Mr McAteer argued that the termination of the liquidation arrangements would include any change in the arrangements for the liquidation, including the removal of the liquidators. Mr Curl had argued that the ending of the "liquidation arrangements" must mean only the termination of the liquidation. ICCJ Jones decided that question in favour of Mr Curl's submissions. He did not accept Mr McAteer's broader construction, but held that that did not affect his conclusion on "interest" anyway. The important point for him was that there was, at that time, no change in the liquidation arrangements so the option was not exercisable. Nor was there any evidence that it would become exercisable in the foreseeable future (judgment para 70).

81. His conclusion on "interest" is expressed in paragraph 72:

> "72. The position is that Mr McAteer does not have sufficient standing and/or a legitimate interest when: (i) He has no current contractual right under the terms of the 14 October 2021 Agreement to exercise the option. (ii) Not only does he face the abovementioned difficulty that enforcement is in issue between himself and Mr Kebbell but the 14 October 2021 Agreement does not confer a right upon Mr McAteer to obtain relief which will bring the "present liquidation arrangements" to an end upon Mr McAteer. (iii) Nor does it place any contractual obligation upon Mr Kebbell to apply for a stay. (iv) Mr McAteer by this Application in its proposed amended form is in

> reality seeking to obtain a stay to activate the option period of a contract between himself and Mr Kebbell. That is not a legitimate interest pursuing the interests of the members as a whole. Mr McAteer has no standing to ask the Court for a stay to interfere with the interests of the members as a whole to give effect to a personal contract between himself and one member even assuming (incorrectly) there is no dispute over enforceability and the contract confers a right to apply for a stay to enable the option period to be activated."

82. Mr Ramel criticised the point made at (i) on the basis that Mr McAteer did indeed have a present contractual right under the agreement. This criticism is misplaced. The judge was not saying that the agreement did not confer contractual rights. He was saying that there was no present right to exercise the option. That was entirely correct. The liquidation arrangements had not been brought to an end, whatever that may mean. The judge went on to say that not only was there no such right, but also Mr McAteer could not bring about the circumstances for the option to become exercisable (ie to end the present liquidation arrangements) because the agreement did not provide for such a mechanism and there was no obligation on Mr Kebbell to bring it about by seeking a stay of the liquidation.

83. The key to the judge's reasoning is in his (iv), where the judge points out that Mr McAteer was seeking a stay of the liquidation in order to bring about a situation in which he could exercise the option. That did not give Mr McAteer a legitimate interest in pursuing that relief. Mr Ramel did not really engage with that conclusion, and submitted that the existence of the option per se gave Mr McAteer a sufficient and legitimate interest in the relief sought.

What sort of interest is required for standing?

84. It is now necessary to turn to the authorities as to what sort of interest is necessary to justify one or more of the applications made under the Act. Before the judge the starting point of the debate about standing seems to have been the decision of the Privy Council in *Deloitte Touche AG v Johnson* [1999] 1 WLR 1605 which was said to establish the need for a legitimate and sufficient interest in order to establish standing in those provisions of the Act which do not in terms require a particular status. Since the judgment at first instance in this case was delivered the Supreme Court has delivered a decision on the topic in *Brake v The Chedington Court Estate Ltd* [2023] 1 WLR 3035. That can now be taken as setting the parameters for a consideration of the topic. It concerned applications under section 168 and 303 of the Insolvency Act 1986, which allow for applications challenging decisions of a trustee in bankruptcy and liquidator respectively by any person "dissatisfied" or "aggrieved"

by those decisions. The principles propounded by Lord Richards JSC will apply to sections 108 and 195, which are the relevant sections invoked in the present case.

85. In that case Lord Richards JSC, with whom the other members of the court agreed, made clear the limits of the interests that will justify applications in liquidations and bankruptcies. He summarised the position as follows:

> "8. Neither section is intended to provide a means of redress to a party with no connection to the bankruptcy or liquidation. I agree with the observation of Peter Gibson LJ in *Mahomed v Morris* [2000] EWCA Civ 46, [2000] 2 BCLC 536 at para 26: "It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of section168(5)".
>
> 9. Limitations apply also to bankrupts, creditors and others who are connected with the bankruptcy or liquidation. In accordance with the principles that serve to confine standing under these sections, the authorities have established the following propositions. First, subject to very limited exceptions discussed below, a bankrupt must show that there is or is likely to be a surplus of assets once all liabilities to creditors, and the costs and expenses of the bankruptcy, have been paid. The same is true of a contributory of a company holding fully paid shares, although there has been no decided authority on this point. Second, a creditor will not have standing, except as regards a matter which affects the creditor in its capacity as such. As a matter of principle, this limitation applies also to bankrupts, even when they can demonstrate a surplus. Third, there are other, very limited, circumstances which will provide standing to an applicant, whether or not the applicant is the bankrupt, a creditor or a contributory. So far as the authorities go, those circumstances are confined to cases where the challenge concerns a matter which could only arise in a bankruptcy or liquidation and in which the applicant has a direct and legitimate interest."

86. Thus even if a position of technical standing as a creditor can be established, it is still necessary for the relief sought to be claimed in that capacity. That is emphasised in paragraph 13:

> "The processes of bankruptcy and insolvent liquidation are primarily for the benefit of creditors. They necessarily have an

> interest in the proper administration by the trustee or liquidator of that process. Equally, though, their standing to challenge the trustee or liquidator is limited to matters which affect their interests as creditors under the statutory trust, and not in some other capacity."

87. The same must apply if the applicant had the technical status of a contributory, whose position, for these purposes, is analogous to a bankrupt in a bankruptcy. Another way of putting the point is that an applicant has to have an interest which takes him/her beyond being just an "outsider" to the insolvency. This concept, which has been deployed in several authorities, can be illustrated by one reference in Lord Richards' judgment:

> "24. The Court of Appeal [in *Mahomed v Morris* [2000] EWCA Civ 46, [2000] 2 BCLC 536] held that the applicants lacked standing under section 168(5) to challenge the decision of the liquidators to compromise the dispute. It was not enough "that the person claiming to be aggrieved by the act or decision of the liquidator in respect of assets of the company is a surety when his subrogation rights do not in any way depend on the company being in liquidation" (para 26 per Peter Gibson LJ). The applicants were "outsiders to the liquidation" (para 28 per Peter Gibson LJ)."

88. Thus someone with technical standing such as a contributory or creditor cannot use that as a peg to hang an application on if in substance he/she is not applying in that capacity.

89. Having said that, there is a third class of person who might have standing without being a creditor or contributory, as acknowledged by Lord Richards:

> "76. The third category comprises a very small number of other applications which have arisen directly out of provisions which are peculiar to the insolvency regime. As discussed above, the relevant cases have concerned the disclaimer of a lease (*In re Hans Place Ltd*) and the quantification of a trustee's expenses for the purposes of securing an annulment of the bankruptcy (*Engel v Peri* and *Woodbridge v Smith*).As Peter Gibson LJ said in *Mahomed v Morris* at para 26, the landlord in *In re Hans Place Ltd* had standing because it was "directly affected by the exercise of a power given specifically

> to liquidators, and who would not otherwise have any right to challenge the exercise of that power". There may be other provisions, now or in the future, which could on a similar basis result in standing for a person aggrieved or dissatisfied with an act, omission or decision of the officeholder. An example may well be section 283A of the IA 1986, under which the Brakes made an unsuccessful claim, as mentioned above. Another possible example discussed in argument was a claim by a bankrupt to tools, equipment and other property under section 283 of the IA 1986."

90. Insofar as necessary, Mr Ramel placed Mr McAteer in this category in respect of his rights under the MOU and the Option Agreement. I consider below whether he is entitled to do so. For the moment it is necessary to note the limits on this third category. Lord Richards clearly ruled out some broad brush approach based on some sort of perceived legitimate interest in the relief sought. See for example paragraph 96 of his judgment, where Lord Richards pointed out that the question of "legitimate interest in the relief sought" was only the start of the inquiry, and not an answer to the inquiry itself. The limit placed on this third class of case appears most clearly from paragraph 99 of the judgment:

> "99. …Beyond that, there is a limited class of cases where creditors, the bankrupt, contributories or others will have standing, but only in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime. *Engel v Peri* and *In re Hans Place Ltd* provide good examples of cases within this category."

91. *In re Hans Place Ltd* [1993] BCLC 389 is a useful example of this sort of situation. It involved a challenge to a disclaimer of a lease mounted by a landlord who had the benefit of a guarantee which would have been destroyed by the disclaimer. Because the source of the problem was a power given to a liquidator and arising only in the liquidation (it is peculiar to the liquidation regime, see Lord Richards in paragraph 99), then an affected third party is sufficiently interested to be able to challenge it within the liquidation. That is a narrow path.

The application of those principles to Mr McAteer's interests under the MOU and Option Agreement

92. I have set out above how the MOU works. It gives Mr McAteer rights of pre-emption in circumstances which have not yet arisen. It is a commercial bargain which would, in theory, give him a right to shares which would, if successfully exercised, put him in the position of a contributory. Until then he has no relationship with the company in respect of those shares.

93. The MOU therefore does not give Mr McAteer the status of creditor or contributory in the liquidation. He therefore cannot use it as the basis of an application under sections 112 or 147. However, Mr Ramel submits that Mr McAteer is a person within the third class of persons in *Brake* who can apply under section 108, by virtue of his rights under the MOU. Although the application notice also invokes section 195, that did not figure much in the argument on the appeal and I shall put it on one side for the moment.

94. ICCJ Jones considered that the MOU did not give standing because of a misplaced construction of the document. He seems to have held that the MOU did not create a sufficient interest because the exercise of the right depended on the earlier acquisition of shares which had not occurred. While, as I have indicated, it is not easy to follow his reasoning in this area, it is to be noted that he did not have the benefit of the decision in *Brake*. That decision makes the position in relation to the MOU clearer. To state a truism, Mr McAteer does not have shares because the MOU does not give him shares, and he has no present right to shares (assuming for these purposes that that would make a difference). His interest is very remote from being a contributory. When he seeks to establish standing via the MOU he is not doing so as a contributory, or in right of being a contributory. He is therefore forced back on the third category of potential applicants in *Brake* (the narrow path referred to above). Unfortunately for him, he is not seeking to challenge something "in respect of matters directly affecting [his] rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime", to use Lord Richards' helpful summary of a third category of potential applicants. The liquidators have done nothing pursuant their special powers which directly affect any right of his under the MOU. In relying on the MOU Mr McAteer is trying to be treated as a shareholder, which he is not. He is seeking to do something which he would like to do if he becomes a contributory, which he may never do – in fact, which he is highly unlikely ever to achieve because there would seem to be no circumstances in which he would be able to acquire Mr Kebbell's and Mr Kitchen's shares in the company. He is not entitled to anticipate a future event in this manner, and especially one that is highly unlikely ever to happen. He is nowhere near the third category of possible claimants permitted by *Brake*.

95. Turning to the Option Agreement, the judge below again had to proceed without the benefit of the analysis in *Brake*. I have set out his chain of reasoning and his conclusions above. There is nothing in *Brake* which renders the judge's reasoning wrong, and nothing which opens up a new line of argument for Mr McAteer. The

judge's analysis is that Mr McAteer was starting from a position in which he had no currently enforceable right to shares which would give him standing, and that in order to acquire that right he wanted to make an application to bring about the trigger which would then give him that right. It was a sort of bootstraps argument.

96. I would agree with the judge that that analysis demonstrates that Mr McAteer does not have standing via the Option Agreement. As things stand he has none of the Option Agreement shares. He has no current right to have them. He would arguably have such a right if the current "liquidation arrangements" come to an end, but that has not yet happened and I agree with the judge below that it is highly unlikely to happen unless Mr McAteer can make it happen via this application. So Mr McAteer, as a non-contributory, seeks to have relief which would put him on the path to being a contributory by triggering a contractual right to have the shares. That is nothing to do with a contributory's rights in a liquidation and nothing in Lord Richard's analysis in *Brake* would support a proposition that it does. The capacity in which he seeks to apply is as a would-be contributory, not as a contributory. He is, for these purposes, an "outsider" to the liquidation.

97. For those reasons, therefore, the judge was correct in his conclusion. Mr Ramel sought to say that Mr McAteer's interest was legitimate without really engaging with the remoteness of it or with the need to relate Mr McAteer's current capacity to the interests of contributories within the liquidation. He submitted that Mr McAteer's intentions were proper and in the interests of the company, but that is not the question. The question in relation to applications requiring the status of contributory is whether he is properly applying as contributory, and for the reasons just given he is not. He also submitted that the judge asked himself the wrong question; the right question was whether Mr McAteer had rights which were adversely affected by acts of the liquidators. That is certainly <u>not</u> the right question. Various authorities demonstrate that outsiders who are affected by acts of the liquidators do not have a right to apply under the Act just because they have been thus affected. Thus in *Re Zenga III Holdings Inc* [2010] BPIR 277 a contractor who had been disappointed by the administrators' decision to terminate its contract when other contractors were kept on was not allowed to apply to challenge the decision – see particularly para 24. Again, in *Re Edengate Homes (Butley Hall) Ltd* [2022] 2 BCLC 1 a contributory who sought to challenge a decision to assign the company's cause of action against her was held not to have standing notwithstanding that the decision to assign obviously affected her. Thus it is not sufficient that say that Mr McAteer's contractual rights have been affected. He remains an outsider. His status as a contributory in respect of his 10 shares does not assist him because insofar as he seeks to get the benefit of, and applies by virtue of, the Option Agreement, because he is not applying in right of those shares, and cannot do so.

98. Mr Ramel's last point in relation to the Option Agreement is that Mr McAteer falls within the third class of persons entitled to apply under *Brake*. It is said that he does not have rights which he ought to have because of acts of the liquidators.

99. It is not clear what acts have been performed by the liquidators which affect Mr McAteer, but in any event he does not, in my view, come within this class. This class is a very special one, as is demonstrated by the limited instances which Lord Richards put into this class – a landlord/guarantee holder who has been prejudiced by a disclaimer and a person seeking a discharge of a bankruptcy who needs to fix the trustee's charges. The claims in those cases arose only by reason of the insolvency process itself. That is crucial. There is nothing like that in the present case so far as the exercise of the option under the Option Agreement is concerned. There is nothing that the liquidators have done or propose to do which is peculiar to the liquidation and which operates against Mr McAteer in a manner analogous to the disclaimer; and he is not applying in relation to anything else which is peculiar to the liquidation regime. He is effectively trying to bring about a state of affairs which is favourable to his option rights – removal of liquidators or some other way of changing the "present liquidation arrangements". That is a bootstraps claim which does not give him standing.

The claim under section 195

100. For the sake of completeness I return to the application under section 195 (the qualifying decision procedure). The judge below did not deal separately with this point, and it did not figure much on the appeal before me, but everything said above about standing applies to that claim as well as the more significant claims for the removal of the liquidators and a stay of the liquidation.

Conclusion

101. As appears above, I have differed from the judge below on questions of construction, and there has been recent authority which assists in questions of standing which was not available below. In the light of that I would grant permission to appeal, but as a result of the reasons appearing below I would dismiss the appeal.