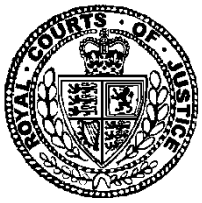

Neutral Citation Number: [2024] EWHC 2657 (Ch)

Case No: **CR-2021-001548; CR-2022-000144**

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**INSOLVENCY AND COMPANIES COURT**

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

Date: **25 September 2024**

**Before** :

**Deputy Judge Simon Gleeson**

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**Between:**

**Laurence Pagden and 3 Others**

**Applicants**

**- and –**

**1. Mark Robert Fry**
**2. Neil John Mather**
**(as former Joint Liquidators of Core VCT plc, Core VCT IV plc, and Core VCT V plc)**

**Respondents**

**And Between:**

**1. Core VCT plc (in liquidation)**
**2. Core VCT IV plc (in liquidation)**
**3. Core VCT V plc(in liquidation)**

**Claimants**

**- and –**
**Soho Square Capital LLP and 12 Others**

**Defendants**

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**Catherine Addy KC and Daniel Lewis** (instructed by **Harcus Parker Limited**) for the **Applicants/Claimants**
**Adam Deacock** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents/Fourth to Eighth Defendants**
**Matthew Weaver KC (**instructed by **Pinsent Masons LLP) for the First to Third, Eleventh and Twelfth Defendants**
**Jonathan Allcock** (instructed by **Stephenson Harwood LLP**) for the **Ninth and Tenth Defendants**

**Stephen Robins KC** (instructed by **Greenberg Traurig LLP**) for the **Thirteenth Defendant**

Hearing dates: **25th September 2024**

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# APPROVED JUDGMENT

**Deputy Judge Simon Gleeson** **Wednesday, 25 September 2024**
(**15:31** pm)

Judgment by **DEPUTY JUDGE SIMON GLEESON**

1. This is an application to lift two temporary stays imposed in relation to this action in earlier proceedings. The application is opposed for reasons which become clear when the facts are set out.

**The Facts**

2. The main action relates to the affairs of a number of venture capital trusts, established between 2005 and 2006, managed by the First Defendant and listed on the London Stock Exchange. The primary promoter of these trusts appears to have been Mr Fakhry, the Second Defendant, with whom the Third Defendant, Mr Edwards, was associated (these first three defendants are referred to herein as the "Soho Defendants"). These VCTs raised substantial monies from retail investors for the purposes of investing in SMEs. After the transfer of various assets in 2011, on 16 April 2015 the Companies were placed in Members Voluntary Liquidation ("MVL") and liquidators were appointed (Messrs Fry and Mather of Begbies Traynor (Central) LLP (the "Former Liquidators")). The Companies were dissolved on 18 November 2016..
3. In June 2018, a member issued claims to restore the Companies to the register for the purposes of investigating previous conduct in respect of the Companies' assets and, on 20 July 2018, the Court (Fancourt J) restored the Companies to the register and appointed Messrs Pagden and Underwood of Menzies LLP as new liquidators (the Liquidators).
4. Subsequently, Mr Fakhry and others applied for the restoration of the Companies and the appointment of the Liquidators to be set aside. That application was ultimately considered by the Court of Appeal: *Fakhry and ors v Pagden and ors* [2020] EWCA Civ 1207. The Court of Appeal did not set aside the orders but held that the views of the members in relation to restoration and the appointment of new liquidators should have been ascertained and the Court

informed of the same prior to restoration. Accordingly, the Court of Appeal directed that meetings of members should be held to vote on (i) whether the Companies should remain restored to the register for the purpose of investigating the conduct of the Manager and the Former Liquidators and (ii) whether the Court appointed liquidators should remain in office, with the matter then to be reviewed by an ICC Judge subsequently in light of the votes cast – including to consider whether interested parties votes should be taken into account.

5. On 3 December 2021 and further to the directions given by the Court of Appeal, ICC Judge Burton gave directions for meetings of members to be convened to consider the resolutions and approved the form of circular. The terms of such circular made clear that

> "The Joint Liquidators investigations have reached the stage where they have issued claims against a number of parties, which they intend to proceed with if they remain in office. A vote in favour of the resolutions would, therefore, be in effect a vote in favour of proceeding with the claims which have been brought by the Joint Liquidators."

6. At such meetings, the members of Core VCT IV and Core VCT V voted overwhelmingly in favour of both resolutions. However, in relation to Core VCT, the Soho Defendants voted against Messrs Pagden and Underwood remaining in office as liquidators.

7. This raised the question of whether their votes should be counted, and the liquidators issued an application for directions (pursuant to section 112 of the Insolvency Act 1986 and further to the directions of the Court of Appeal) to decide that point. That application was heard before ICC Judge Burton (*Pagden and Ors v Soho Square Capital LLP and others* [2022] EWHC 944 (Ch).

8. As all of the members' meetings passed resolutions for the Companies to remain restored, there was no question of the restoration orders being set aside. However, it fell to ICC Judge Burton to determine whether the votes of the members of Core VCT who were Defendants to the Claim should be taken into account, for the purposes of determining whether Messrs Pagden and Underwood should remain in office.

9. At [28] ICC Judge Burton recorded the Soho Defendants' position in the following material terms:

> "Mr Weaver says, the appointment of replacement liquidators would not prevent the Claims from being pursued and would cause no prejudice to the Companies' members. In his fifth witness statement, Mr Fakhry has invited the Joint Liquidators to select a firm from the eight largest in the country, from which replacement office holders would be appointed and he has undertaken to fund the replacement liquidators to the tune of £100,000 "for the express purpose of allowing them to carry out a review of the Part 7 Claim, to interview the relevant parties, to review the litigation funding agreements and to decide whether or not to continue with the claims. This funding would be on an entirely non- recourse basis."".

10. It was in those circumstances that ICC Judge Burton considered whether to take account of the votes of the Soho Defendants and determined:

> "Whilst it may appear morally unattractive for the Soho Respondents to exercise their majority vote to remove those who have commenced the Claims against them, that does not, in my view, amount to oppression of the type I consider to be necessary for the Court to intervene. The Soho Respondents are content for the choice of replacement liquidators to be left to a third party and those liquidators will then determine whether to continue the Claims either using the funds offered by Mr Fakhry to do so – thus ensuring that those who have brought about the change, meet the costs of any duplicated effort - or by seeking funding elsewhere".

11. ICC Judge Burton therefore decided that the votes cast by the Soho Defendants should not be disallowed. This decision was made upon the express Undertaking recited in the Order as follows:

> "UPON the First Respondent undertaking to the Court to pay any new liquidator(s) (the 'Replacement Liquidators') appointed over Core VCT Plc ('Core') the sum of £200,000 on a non-recourse basis, upon the Replacement Liquidators' request, to carry out a review of the Part 7 Claim (as defined below), to interview the relevant parties (if they consider it appropriate and necessary to do so), to review the litigation funding agreements and to decide whether or not to continue with the Part 7 Claim"

12. It was pursuant to these proceedings that the stays were implemented.

**The Stays**

13. This application relates to two sets of proceedings, both of which are currently stayed:
    a. An insolvency application issued by Mr Pagden and Mr Underwood (as the then joint liquidators of all the Companies) for relief pursuant to section 212 of the Insolvency Act 1986 ("IA 1986") against Mark Fry and Neil Mather (both of Begbies Traynor and together the "Former Liquidators" of the Companies), leave for such proceedings (the "Insolvency Application") having been given by ICC Judge Burton pursuant to section 212(4) following a contested application ; and
    b. A Part 7 claim issued on 24 August 2021 for inter alia breach of fiduciary duty, breach of contract, negligence, dishonest assistance and knowing receipt against the Defendants. By order dated 1 December 2021, Master Pester directed that the Claim be case managed, heard and tried alongside the Insolvency Application.
14. The Soho Defendants have no standing as regards the s.212 proceedings, and their opposition to the lifting of this stay arises only as a result of the fact that the two actions are to be tried together.
15. I was taken to the transcript of the proceedings before ICC Judge Burton, in which it seems clear that these stays were proposed by counsel for the liquidators – and supported by counsel for the Soho Defendants – as being a practical measure to avoid further steps needing to be undertaken in respect of the Claim whilst the yet to be appointed Replacement Liquidators carried out their review.
16. Subsequently and as was plainly sensible, the Applicants and Respondents agreed (and on 13 May 2022 ICC Judge Prentis approved) a Consent Order reciting the Stay Order made in the Claim and providing for a corresponding stay of the Insolvency Application with liberty to restore.

17. Thereafter Messrs Baxendale and Sherry of PriceWaterhouseCoopers LLP (the "Replacement Liquidators") were appointed by the Court and duly carried out their investigations and review of the claims made in the proceedings. The Replacement Liquidators confirmed the outcome of the review to the parties on 1 December 2023 and issued the applications to lift the stays on 12 January 2024. Those applications were opposed, and resulted in the proceedings before me.
18. The stays were both expressly subject to liberty to restore and the Court obviously has power to lift them pursuant to CPR rule 3.1(2)(m) - the Court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…". The question for me is therefore whether it would be just and in accordance with the overriding objective for them to be lifted.

**THE GROUNDS OF OPPOSITION TO THE STAYS BEING LIFTED**

19. The Soho Defendants submit that the stays should only be lifted once meetings of the Companies' shareholders have been held to determine whether they wish the Claims to be pursued. This argument is based on two premises; first, that MVLs ought to be conducted for the benefit of the Companies' members, and the members of the Companies ought to be consulted before proceedings for their apparent benefit are pursued, and second, that this must have been the view of ICC Judge Burton, who must have been of the view that the members of the Companies ought to determine whether investigations into the Former Liquidators and others ought to be carried out for their benefit. They say that the actions which the liquidators propose to take now are substantially different from those which were before the shareholders in the meetings which took place in 2021, and that as a result new shareholders meetings should be called. This is because in an MVL the shareholders remain the key stakeholders in the Companies, and it is therefore no more than just that they should be consulted.

20. The Claimants point out in response that the members' meetings directed by the Court of Appeal have taken place, and that what the Defendants are seeking is a second set of meetings that are not authorised by any existing court decision or statute.

**Decision**

21. What the Defendants are in effect arguing for is the creation of a right to be vested in the shareholders to control the acts of the Liquidators – specifically, that if the Shareholders do not vote in favour of the continuation of the litigation brought by the liquidators, that litigation should remain stayed.

22. The starting point for consideration of this application is the observation of David Richards LJ in the Court of Appeal (at para [66]), who summarised the current state of the law as follows:

> "[T]he members do not enjoy powers to control the actions of liquidators. Whilst the articles of association usually confer on the directors the power and responsibility to conduct the business of the company as they, in accordance with their duties, see fit, it is open to the members to exert control and instruct the directors in their conduct of the business by special resolution, altering the relevant articles either generally or pro tanto. The members enjoy no such powers over the liquidator even in a members' voluntary liquidation. The most they can do, short of taking steps to remove the liquidator, is to apply to the Court for directions under s.112 of the Act. It is then for the Court to decide whether any directions be given to the liquidator. "

23. Thus even in an MVL the "members do not enjoy powers to control the actions of liquidators". Pursuant to section 165 and Schedule 4 of the Insolvency Act 1986, the power to bring legal proceedings in the name and on behalf of the company vests in the liquidator (save in respect of a proposed resolution to remove a liquidator appointed by the members) and the members do not have their own power under the Insolvency Act 1986 to require the liquidator to summon a meeting.

24. There are good policy reasons for the fact that, when a solvent company goes into a MVL, control of the company's assets is handed over to a liquidator rather than being left in the hands

of the shareholders. Those grounds are reasonably obvious. The architecture of company governance is designed to cover the operation of a company which is in continuous business. As soon as that stops, there develops a very severe risk of what is unattractively described as "looting" by the incumbent controllers, so the process is handed over to an independent liquidator to conduct. Current policy, as reflected in recent changes to statute, is to strengthen that independence - recent developments in this area, notably the reworking of Section 165 of the Insolvency Act 1986 by s.120 of the Small Business, Enterprise and Employment Act 2015 to permit a liquidator in a MVL to exercise powers without the sanction of a members resolution being a clear manifestation of this policy. I think it is quite clear that ordinary policy is that the liquidator should be allowed to conduct the winding-up of the affairs of a company entirely without external interference.

25. Now, the issue that arose in this case was that the company was struck off, and was then restored to the register without the members having been consulted. It is entirely clear, as the Court of Appeal made clear, that the members should have been consulted on that decision.

26. Now, as Mr Weaver made quite clear to me, the only way that the members could have expressed any sort of informed consent on that decision was if they were told in some detail what the company was being restored for. It was therefore made clear to them that the reason that the company was being restored was for it to pursue a number of claims which potentially, if successful, would increase its assets and therefore the return to shareholders.

27. I think the intention of the Court of Appeal and of ICC Judge Burton was that members should be consulted, not on what claims should be pursued, or whether they should be pursued, but on whether the Company should be restored to the register. Once they had agreed that it should be restored, then the subsequent course of events should simply proceed as if it had never been struck off.

28. It is helpful in this regard to consider a simple counterfactual. If the company had never been struck off and the question of restoration had never arisen, if the shareholders of the company came to court today and said, "we would like a vote on what the liquidator is doing", having previously approved the appointment of a liquidator, then the court would have to say "well, you can't have one. What you can do" -- a point Ms Addy K.C. quite correctly made -- "and what you should do is to make an application under Section 112 of the IA 1986 on the basis that you don't like what the liquidator is doing, and it will then be for you to convince the court that what the liquidator is doing is so unreasonable that it should not be allowed to continue, and the court should intervene."

29. The point here is that where the Defendants say that they should have some ability to control the Liquidator, they gloss over the fact that the legislative schema provides them with exactly such a remedy. Section 112 provides an mechanism by which a member can seek to challenge or control the actions of a liquidator in (inter alia) an MVL (the conventional application in this regard being that the Court should apply section 168(5) IA 1986).

30. Viewed from that perspective, this application could be considered as an attempt to bring a s112 application by other means. I note that, on the basis of the evidence provided, such an application would seem bound to fail. The Court will not normally interfere with the decision of a liquidator unless it can be shown to be perverse (*Re Edengate Homes (Butley Hall) Ltd; Lock v Stanley* [2022] EWCA Civ 626 at [43]-[44])

> "It is common ground that the test on the merits is one of perversity or, as it was put more fully in *Re Edennote*, affirming previous authority, the correct test (fraud and bad faith apart) is that: "the Court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it. As the judge said, this is a formidable test."

31. Males LJ also said (*Re Edengate* at [29] and further at [36]), in any application for relief under section 168(5) IA 1986:

> "The first stage is to consider whether the applicant is "a person aggrieved" by an act or decision of the liquidator within the meaning of the section. The second stage is to consider whether the applicant has a legitimate interest in obtaining the relief sought. It will not have such interest if its interests "are adverse to the liquidation and the interests of the creditors". Thus an applicant may qualify as "a person aggrieved" by virtue of being a creditor, but will not have a "legitimate interest" if its interest in obtaining the relief is contrary to the interests of creditors generally."
>
> "This concept can be expressed in a variety of ways. "Where an application may be made as 'a creditor' then it must be made by that creditor in his capacity as such (and not in any other capacity)": BLV Realty Organization Ltd v Batten [2009] EWHC 2994 (Ch); [2010] B.P.I.R. 277 at [24] per Mr Justice Norris; "whether an application in a liquidation or other insolvency process is really for the benefit of the creditors as a whole": Nero Holdings Ltd v Young [2021] EWHC 1453 (Ch); [2021] B.P.I.R. 1324 at [59] per Mr Justice Michael Green; or as the judge put it at [34], the applicant's "interest in the outcome of the application must also be aligned with the interest of the class as a whole and it must not have a collateral interest which transcends the class interest". However it is put, the essential point is clear."

32. Accordingly, any application by the Soho Defendants seeking to overturn the decision of the Replacement Liquidators to continue the Claim would be met by the fact that their interests in obtaining such relief (as Defendants to the Claim) would be contrary to the interests of members generally – and by the fact that the Replacement Liquidators' decision plainly could not be considered to be perverse.

33. The application not to lift the stays (or to lift them only on condition that a further shareholder vote is held) is therefore in effect an attempt to create a new restriction on the freedom of action of the liquidator which would not exist in a normal MVL. I think that such a request goes entirely contrary to the policy of the legislation, and that if I were to make an order that had that effect, I would be doing something that flew in the face of some of the fundamental principles of the way in which MVLs are intended to operate. I do not say that such a step could not be taken in an appropriate case. I simply say that this is not such a case.

34. For those reasons I will simply discharge the stays.