Neutral Citation Number: [2025] EWHC 2115 (Ch)

Case No: CR-2018-009110

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**IN PRIVATE**

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

Date: 07/08/2025

**Before** :

**MR SIMON GLEESON**
**(Siting as a Deputy High Court Judge)**

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**Between :**

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| **(1) BTI 2014 LLC**<br>**(2) BAT INDUSTRIES PLC** | **Applicants** |
| **- and –** | |
| **(1) FINBARR O'CONNELL**<br>**(2) COLIN HARDMAN**<br>**(as Joint Administrators of Windward Prospects Limited)**<br>**(3) WINDWARD PROSPECTS LIMITED (IN ADMINISTRATION)** | **Respondents** |

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**James Sheehan KC, William Willson and Grace Ferrier** (instructed by **Hogan Lovells International LLP**) for the **Applicants**
**Barry Isaacs KC and LLoyd Tamlyn** (instructed by **Paul Hastings (Europe) LLP**) for the **First and Second Respondents**

Hearing dates: 17-18 July 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 7th August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR SIMON GLEESON

**Mr Simon Gleeson :**

1. This is a pair of cross-applications in respect of an Administration. The First and Second Applicants, BTI 2014 LLC ("BTI") and B.A.T Industries P.L.C. ("BAT"), are creditors of the Third Respondent, Windward Prospects Limited ("the Company"). They have lost confidence in the current Administrators of the Company, Finbarr O'Connell and Colin Hardman (the First and Second Respondents and cross-applicants) and seek to have them replaced by other administrators, on the grounds (inter alia) of a conflict of interest. The current Administrators wish to address any conflict by the appointment of a second set of administrators (the "Conflict Administrators") to conduct that aspect of the Administration in respect to which any conflict may appear to arise, and apply for an order appointing such Conflict Administrators. They also seek an order for the extension of the Administration until 30 October 2026 (the "Extension Application").

2. The Applicants say that they, being the overwhelming majority of the creditors of the Company, have reasonable and legitimate grounds for a complete loss of confidence in their ability to manage the Company's assets in the best interests of the creditors with independence, objectivity and professionalism. They advance three grounds for this loss of confidence.

3. The first of these is that the Administrators have a conflict of interest which could prevent them from pursuing the major asset of the company; that being an action against its directors. The Administrators accept that there is at least an appearance of such a conflict, and apply for the appointment of Conflict Administrators to manage those parts of the administration which they might be prevented by conflicts from managing themselves. However, the Applicants say that the conflict is so fundamental to the Administration that there is no imaginable protocol that could manage it successfully whilst giving the current Administrators any meaningful role in the conduct of the Administration itself.

4. The second ground is that the Applicants say that the Administrators' recent conduct has shown a lack of independence, objectivity and professionalism such that they have no confidence that they will be able to exhibit any of those attributes in the future. On this ground they also rely on what they say is a failure to disclose the conflict mentioned above.

5. The third ground is that, since the Applicants are the overwhelming majority of the creditors, and no other creditor has expressed any view on the matter, their views should prevail on this matter.

6. The Administrators raise a number of points in response. As regards the conflicts point, they say that the appointment of a Conflict Administrator should be sufficient to manage any such conflict, and that this would be a cheaper and more efficient approach to the issue than their replacement. As regards the conduct point, they say that the conduct complained of by the Administrators was engaged in in response to attempts by the Applicants to put pressure on them. As regards the third point, they say two things. First, they deny that the Applicants are creditors at all. Second, they say that the disputes between the Applicants and the Administrators are so serious that the interests of the Applicants conflict with the interests of the general body of creditors, and that it would therefore be inappropriate to appoint the replacement administrators nominated by the Applicants.

7. The Administrators also apply for the period of their appointment to be extended by another 15 months. They say that this is necessary to complete the action against the Directors. The Applicants say two things in response to this. One is that these Administrators should not be reappointed in any event. The other is that it is well past time for the Administration to be converted into a Creditors' Voluntary Liquidation ("CVL"), and that any extension of the period of appointment of Administrators should be only long enough to permit this.

8. This judgment is structured as follows. First, I describe the somewhat unusual position of the Company and the obligations which it owes. I then discuss the position which the Administrators seem to have developed that neither of the Applicants are in fact creditors, since this point seems to me to determine much of what follows. This leads to a determination of what proportion of the creditors of the company the Applicants are, which in turn takes me to the point as to the extent to which the court ought to accede to their request because they are the majority creditors. I then consider the issue of conflicts. The key issue here seems to me to be whether the conflict which exists is – as the Administrators argue - capable of being managed through the appointment of Conflict Administrators, or is – as the Applicants argue – so fundamental that the appointment of conflict Administrators would leave the existing Administrators with no meaningful residual role.

9. I then turn to the question of whether the Administrators' conduct has fallen so far below the level expected of office-holders that the creditors' loss of confidence in them is reasonable. This involves some review of their recent conduct of the Administration, but also requires consideration of their approach to the conflict of interest identified above.

10. The Administrators' final argument is that, even if I am otherwise satisfied that they should be replaced, I should not accede to the Applicants' request to replace them because the Applicants' interests conflict with those of the ordinary body of creditors, and that the appointment of the Applicant's nominees would give an appearance of partiality. This involves an examination of the issues which have arisen between the Applicants and the Administrators, and an analysis of whether these disagreements, individually or collectively, do in fact have this consequence.

## The Position of the Company

11. The position of the company and the creditors is unusual, and requires a word of explanation. The Company (formerly Arjo Wiggins Appleton Ltd) was established to act as a holding company for paper making facilities of BAT, which it acquired in 1978 from the US firm NCR. Importantly, upon this acquisition, BAT indemnified NCR against certain environmental liabilities. BAT subsequently discovered that these facilities had (prior to their acquisition by BAT) been seriously polluting the Fox River in the United States for many years, and substantial litigation ensued.

12. The Company and its subsidiaries were demerged from the BAT group in 1990. On the demerger, the benefit of various insurance policies covering environmental liabilities was transferred to the Company, and the Company in turn provided indemnities to its subsidiary Appleton Papers Inc ("API") and to BAT. API also indemnified BAT under the demerger arrangements. When the Company sold API in 2001, as part of that transaction, the Company provided indirect indemnities to API going forward in respect

of API's liabilities for the Fox River and the Kalamazoo River. The net effect (and the important point for the purposes of this Application) was that if any claims in respect of environmental liabilities were asserted against API or BAT, the Company was liable to meet these claims through the chain of indemnities.

13. Very substantial claims were brought by the US authorities from 2008 onwards against NCR, which sought to claim on the indemnities given by BAT in the acquisition agreement, and these liabilities flowed through the chain of counterindemnities to API and to the Company. However, in December 2008 and May 2009 the Company paid away the bulk of its assets by way of dividends (the "Dividends") to its then holding company (Sequana SA ("Sequana")). These payments were made on the authority of the then Directors, who had been appointed by Sequana (the "Sequana Directors"). The payment of these dividends was challenged in the UK courts, but was upheld by the Supreme Court in *BTI 2014 LLC v Sequana SA and Others* [2022] UKSC 25. However, the payment of the second dividend was found by Rose J in *Sequana* to be in breach of s 423 IA 1986. Sequana did not pay the judgment debt; it went into sauvegarde (French administration), followed by liquidation. The Company was therefore entirely unable to meet its obligations under the indemnities which it had given (which could have been as much as $600m).

14. The payment of the dividends gave rise to multiple claims between the potentially liable parties, resulting in both litigation and arbitration. These proceedings were settled by the entry of all parties into the "Funding Agreement" in September 2014.

15. The effect of the Funding Agreement was that (a) the various proceedings were discontinued, (b) the first Applicant, BTI, was established as a Delaware LLC, (c) the Company's claims against the Sequana Directors and any other third party advisors were assigned to BTI, and BAT undertook to fund these actions, (d) BAT paid amounts to the LLC (totalling $230m) for shares in the LLC (and promised to contribute more in certain circumstances), (e) this amount was paid on by BTI to NCR, (f) THowever, the payment of the second dividend was found by Rose J in Sequana to be in breach of s 423 IA 1986. That decision was against Sequana. Sequana did not pay the judgment debt; it went into sauvegarde (French administration), followed by liquidation.he Company promised to pay to BTI 50% of the cost of funding of the amounts paid to NCR (net of any recoveries from the assigned causes of action), payable annually (the "Section 6 Payments"). It is notable that the agreement did not extinguish BAT's claim against the Company – indeed the Company explicitly indemnified BAT in the Funding Agreement for the costs that it incurred under it (net of recoveries). However, it was provided that the Company's liability to BAT in this regard was "limited to an amount which shall not cause Windward's net assets to be reduced below $25 million (the "Windward Floor")". The Funding Agreement is governed by New York law, but nothing turns on this, and the parties (and I) construe it simply in accordance with its terms.

16. In May 2009 the Company was demerged from Sequana, and transferred to TMW Investments (Luxembourg) SARL. This meant that the Sequana Directors resigned, and new directors were appointed (together with a third director appointed subsequently, the "New Directors").

17. The Company did not make the payments specified in Section 6, and in 2018 BTI issued a demand for all outstanding amounts. The New Directors appointed Mr O'Connell of

Smith and Williamson ("S&W") to advise them on their options, and on 26 October 2018 they resolved to place the Company into Administration. This was done using the 'out-of-court' procedure pursuant to para 22(2), Schedule B1 to the Insolvency Act 1986 ("IA86"). Mr O'Connell and Mr Hardman were appointed as Administrators by the New Directors.

18. The statutory objective of the Administration was para 3(1)(b), Schedule B1 i.e. achieving a better result for the Company's creditors as a whole than would be likely if it were wound up. Under para 3(2), the Administrators were (and remain) under a duty to act in the interests of the Company's creditors as a whole.

19. The term of the Administration was originally due to end on 2 October 2019, but was extended by consent to 25 October 2020 and subsequently by order on three occasions. Following the Extension Application, it was most recently extended until 31 July 2025.

20. According to the original statement of affairs, the assets of the company amounted to around £12m. However, since these assets comprised mainly equity investments in smaller companies, their realisable value was unknown. The bulk of this value seems to have been represented by a 5.4% investment in a company called DeepGreen. These shares were subsequently sold for £10.57m.

21. Meanwhile BTI had been pursuing the actions assigned to it under the Funding Agreement, and in June 2024 it settled an action against PwC. Under the terms of the Funding Agreement, £7.6m of the amount received was payable to the Company.

22. The Company is currently suing the New Directors over transfers out of the Company of shares in DeepGreen to them personally prior to the commencement of the Administration. The nominal value of this claim is put by Mr O'Connell in his witness statement at £150m. The conflict to which Mr O'Connell is said to be subject arises out of his involvement in these transfers. These proceedings were commenced on 5 April 2024.

**Who are the Creditors?**

23. An important preliminary point in this litigation arises from the Administrators' suggestion that the Applicants are not (or may not be) "creditors". The argument, in a nutshell, is that the term "creditor" does not apply to a person who does not have a valid legal claim on the relevant entity, and the Administrators dispute that the Applicants have any such claim.

24. The starting point – which I think is uncontroversial – is that if a person simply appears out of nowhere and asserts a claim on the entity concerned, the relevant office-holder is perfectly entitled to refuse to treat him as a creditor unless he can produce some evidence to show that he really does have such a claim. However, Mr Isaacs KC, for the Administrators, goes on to say that an Administrator can (or should) disregard claims put forward by creditors whose claims are "putative" or "disputed". He therefore argues that, since the Administrator disputes the claims of both BAT and BTI, it is entitled to treat them as not being creditors.

25. Part of the difficulty here is that an office-holder is in fact required to make two determinations in respect of any particular claim. One is when the proof is adjudicated.

However, as Mr Isaacs accepted, it cannot be the case that a person is not a creditor until his proof is adjudicated, since there are a number of elements of the process – most significantly the formation of the Creditor's Committee – which necessarily occur before any proof is or can be adjudicated. At these stages, the office-holder is required to decide who he will treat as a creditor. It is clearly at least possible that a person who the office-holder initially considers to be a creditor will turn out not to be, and this is neither surprising nor concerning. The office-holder has no choice but to make a determination of this kind at a very early stage in the process, and at that stage he should accept as a creditor any person who has submitted a proof of debt which is prima facie valid. There neither is nor should be either consequence or sanction should a person initially accepted as a creditor turn out on adjudication not to be.

26. This takes us to the question as to whether the Administrators could validly treat the Applicants (who have submitted proofs of debt) as not being creditors of the Company.

27. The starting point for this determination is the Insolvency Rules 2016. Rule 14.1(3) provides that:

> "(3) "Debt", in relation to … winding up and administration, means (subject to the next paragraph) any of the following—
>
> (a) any debt or liability to which the company is subject at the relevant date;
>
> (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date".

28. David Richards J in *In re T & N Ltd* [2006] 1 WLR 1728, para 115, explained that that para (a) is concerned with liabilities to which the company "is subject" at the date of the insolvency event, whereas para (b) is directed to those liabilities to which it "may become subject" subsequent to that date, and that there is no overlap between these two categories.

29. Rule 14.2(1) of the Insolvency Rules states:

> "All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

30. Rule 14.1(5) provides:

> "(5) For the purposes of references in any provision of the Act or these Rules about winding up or Administration to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly."

As Neuberger JSC observed in *In the matter of the Nortel Companies* [2013] UKSC 52, this definition is "strikingly wide" (at [66]).

31. Having established these principles, we turn to the question of whether the Administrators could legitimately have determined that either BAT or BTI were not in fact creditors. I note in this regard that Mr Isaacs frequently referred to these entities as "possible creditors" or "disputed creditors". For this purpose, these categories do not exist – the question is simply as to whether the office-holder, acting within the four corners of his authority, should regard the persons concerned as creditors or not.

*The BAT Debt*

32. The BAT Proof of Debt ("PoD"), dated 7 March 2023 is for a sum of c.£411.5m. The basis for the claim is the indemnity granted by the Company in favour of BAT under s 12.3 of the Funding Agreement, under which the Company is obliged to indemnify BAT in respect of monies it has paid or is liable to pay towards environmental costs. Liability under the indemnity is subject to a condition precedent which is set out at s 12.3 of the Funding Agreement. This provides that:

> "As of the Effective Date of the Agreement, [the Company]'s liability to BAT…shall be limited to an amount which shall not cause [the Company]'s net assets to be reduced below $25 million (the "Windward Floor")": s 12.3(a).

Net assets for this purpose are to be calculated "in accordance with UK GAAP."

33. The Applicants make two points in this regard. The first is that there may be contractually-based arguments for disapplying the Windward Floor. I do not consider these here. The other, however, is the point that the Windward Floor is a contingent, not an absolute, bar to a claim.

34. There is no doubt that the Company's current net assets, calculated according to UK GAAP, are below the Windward floor. However, the Company has – and the Administrators are pursuing – an action against the New Directors for the recovery of misappropriated property which is accepted has a maximum value of £150m. A recovery of this size, even after costs, would clearly take the assets of the Company above $25m, and therefore entitle BAT to some recovery. In order to conclude that BAT was not a creditor, the Administrators would therefore have to be reasonably certain that either that there was no prospect of any recovery at all from the New Directors claim, or that any such recovery would be less than 10% or so of the amount claimed. The first of these is clearly unsupportable – if the Administrators believed this to be the case, they could not justify their current pursuit of the action. The second is equally hard to understand – at this stage in litigation of this kind, the formation of a firm view that there is a hard cap on the amount likely to be recovered is beyond most mortals.

35. I therefore think that it is entirely irrational for the Administrators to have argued that it is certain that the BAT claim will be valueless. It is open to them, acting quasi-judicially and within their discretion, to ascribe a low value to this contingency.

However, I can see no rational grounds for concluding that BAT was not a creditor at all, and I regard their suggestion to that effect as being motivated by other factors.

36. I note that it is possible that the Administrators may say in this regard that this was the advice which they received from their solicitors, and that they relied on it. This would not, to my mind, constitute a defence of any form. I would expect any competent Administrator to understand that the valuation of a contingency is a matter of judgment, and that a contingency must be valued according to the Administrators' assessment of the likelihood of that contingency.

37. The Administrators also say that if BAT were to be permitted to prove on the basis suggested, it would create the possibility that BAT would receive payment from the Company when its net asset value was below $25m. This is both true and irrelevant. It is entirely clear from authority – see, for example, *Ricoh Europe Holdings BV and others v Spratt and another* [2013] EWCA Civ 92 – that the effect of the valuation of a contingent claim may be that the creditor receives a different amount from that which he might otherwise be contractually entitled to receive. The possibility of this outcome does not entitle the Administrators to disregard a contingent claim.

38. I think that it is true that if, when it came to the adjudication of this proof, if the Administrators adjudicated it as £NIL, BAT would at that moment cease to be properly regarded as a creditor until that determination was successfully challenged. I note in this regard that although the Administrators have not adjudicated this PoD, this is not for want of trying on their part – they have pressed BAT and BTI to present their claims for adjudication. I think it is clear on the facts that the reason that they have not done so is that they know what the outcome of such an adjudication would be, and they wish to preserve their position as creditors. The Administrators criticise this as showing that BTI and BAT are not acting in good faith. My feeling is rather the opposite – if an Administrator acting a quasi-judicial capacity informs a creditor that he intends to deal with his proof in way which is entirely unsupported by the law, I think it is reasonable for the creditor to respond tactically – which is what seems to have happened here.

*The BTI Debt*

39. The challenge to the BTI PoD is a two-stage one. The first stage is an argument that contractual payments which are calculated pursuant to a formula which involves a reference to LIBOR should be recharacterized as interest. The second stage is that such payments, even though not falling within Rule 14.23, should as a matter of common law not be recoverable in an insolvency.

40. The provisions of the Funding Agreement which give rise to the Company's liability to BTI arose as follows. It was agreed that, in respect of the amounts to be paid to NCR, BAT would provide funds to BTI, BTI would pay those funds to NCR, and the Company (which was ultimately liable for those payments through the network of indemnities) would pay BTI the cost of funds of the amounts paid.

41. It is important to note that the Company did not borrow any money from anyone, and the payments which it was due to make did not constitute interest on any amount borrowed by anyone. Neither were they a pass-through of interest incurred on borrowings by BTI (or any other party). The use of LIBOR in the payment formula was intended to include a generic indicator of cost of money, but the amount to be paid was

simply a payment calculated by reference to a formula. The Administrators say that this is "in substance" interest (and it is true that it is described as such in the Funding Agreement). However, I think that there is a very clear distinction between a payment which is in substance interest and a payment which is calculated by reference to the cost of the time value of money incurred by a third party. If this were not the case, transactions such as interest rate swaps (which reference a hypothetical third party borrowing cost) would be rendered partially unenforceable under this rule, with unfortunate and potentially far-reaching consequences.

42. The Applicants make the (perfectly correct) point that, even if these payments were interest, they would not be debarred from being proved by the Insolvency Rules 2016, Rule 14.23(1) of which provides that:

> "Where a debt proved in insolvency proceedings bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the relevant date."

This does not apply to the Section 6 payment obligation, because what is being claimed is not interest on a debt proved on insolvency.

43. This position is supported by the authorities. The Administrators rely on *Re Humber Ironworks and Shipbuilding Co* (1869) 4 Ch App 643 (CA) to establish the proposition that it is a general principle of common law that interest should cease to accrue to a creditor on a provable debt after the onset of an insolvency. However, there is nothing in the decision which causes me to think that it is anything more than a prefiguring of the rule set out in Rule 14.23 above. In order to convince me that *Re Humber Ironworks* had any wider scope than this, I would have to be convinced that there was a common law interpretation of the term "interest" which was wider than that set out in Rule 14.23.

44. I am satisfied that there is not. It seems clear from the authorities that an arrangement is only properly described as interest per se where (a) an amount of money is due from A to B, and (b) the payments which are to be characterised as interest are due from A to B and are calculated by reference to that sum.

45. This point was made by Megarry J in *Re Euro Hotel (Belgravia) Ltd* [1975] 3 All ER 1075. In that case a financier had advanced a sum of money to a developer for the erection of a hotel in the form of a single payment. However the agreement contained provisions to the effect that if there was a delay after the scheduled completion date and the opening of the hotel, the financier would receive payments (described in the agreement as "interest"), in effect to incentivise the developer to adhere to the prescribed timetable. Megarry J had this to say about this arrangement:

> "Such payments do not seem to me to be 'interest', and certainly not 'interest of money', within the statute. There are indeed sums of money from which the 'interest' will be ascertained, but I cannot see that those sums of money are anything more than units of calculation. What the company has to do is to make certain payments, the amount of which has to be calculated from the sums of money in question: but the payments do not seem to me to be 'interest' on those sums in any true sense of the word. The sums of money have been paid to the company once and for

> all, and are not due to the petitioning creditor in any way. They are not debts or obligations of the company, and they are not sums which belong to the petitioning creditor in even the most colloquial sense." (at 1085 a-c.)"

46. Mr O'Connell raises a number of issues in his Witness Statement as regards the detailed calculation of the amounts due to BTI under Section 6. I do not propose to go into these here. However, I gather that the conclusion of these points is that, if he is wrong in relation to the interest issue (as I have found that he is), Mr O'Connell's estimation of the actual value of the claim is £27.9m plus some further indeterminate sum representing a future contingent claim, subject to an assertion of an equitable set-off, addressed below.

*Set-off of the £7.6m PwC Share*

47. Since it was argued before me, I will also address the issue relating to set-off – in particular, as to whether the assertion of an equitable set-off by BTI in respect of some sums which are due from it to the Company affects the value of its creditor claim for this purpose.

48. The obligations due from BTI to the Company arise under the Funding Agreement. This provides that some portion of the proceeds received by BTI from the settlement of the negligence action against PwC should be paid to BTI. This amount is agreed to be around £7.6m. BTI has not yet made this payment, and is withholding it on the basis that it should be entitled to set this amount off against it under its proof. The Administrators dispute BTI's entitlement to set-off, and demand to be paid the money.

49. Ordinarily, the insolvency rules mandate a compulsory set-off of all obligations where there is mutuality. However, this does not apply in Administration (unless the administrator intends to make a distribution and has delivered a notice under rule 14.29 – see rule 14.24). The issue is therefore as to whether the ordinary rules of set-off apply in this situation.

50. The Company's claim against BTI is a liquidated claim, but BTI's claim against the Company is as yet unliquidated, so no statutory set-off could apply. The question is therefore as to whether there is an equitable set-off and, if so, how it operates.

51. Dealing with the second point first, it is often said that whereas common law set-off is procedural (that is, it can only operate as a defence to a legal action), equitable set-off is substantive. The way to think about this is that a Court of Equity could at any time, at the suit of the party claiming the set-off, grant an injunction preventing the other party from making a claim for the debt beyond the net amount (see e.g. *Eller v Grovecrest Investments Ltd* [1995] QB 272(CA)). However, it is important to note that '(unless the administrator intends to make a distribution and has delivered a notice under rule 14.29 – see rule 14.24)'he assertion of an equitable set-off does not have the effect of reducing or extinguishing the claim made (see the decision of the House of Lords in *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185 and *Derham, The Law of Set-Off*, 4th ed at pp 99-100). The position today, even if the set-off exists, is therefore that BTI owes the Company £7.6m and the Company owes BTI an amount to be determined. However, BTI can resist any claim by the Company for the payment of the £7.6m pending resolution of its claim.

52. Equitable set-off has a formal requirement of close connection between the claims which are sought to be set off – where no such connection can be found, no equitable set-off is available. However, it also requires some equitable ground for the protection of the set-off asserted. The mere proof of a close connection does not entitle a person to a set-off (*Bim Kemi AB v Blackburn Chemicals Ltd* (2001) 2 Lloyds Rep 93 at [39]). In practice, this comes down to a requirement that it should be manifestly unjust to enforce the claim without regard to the cross-claim: *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] CLC 895 at [43](ii), (iv) and (vi); and see *Derham*, 4.73.

53. As regards the "close connection" requirement, it was suggested to me that, even though both claims arose out of the Funding Agreement, they were not in fact sufficiently "closely connected" to found an equitable set-off. The basis for this argument was that the Funding Agreement specifies that Section 6 Payments are payable to a separate bank account from other receipts, for onward transmission by BTI to BAT: ss 6.1(c), 7. The proceeds of settlement of the PwC Proceedings were payable into the "General Payments Account" and could only be used for wholly separate purposes. The relevant purpose for which the settlement proceeds could be used is stated in s 10.3, whereby BTI was obliged to pay "portions of" the recoveries fund to the Company's designated account after receipt.

54. All of this is true. However, I do not regard two payments to be made under the same contract between the same parties arising out of the same substantive agreement between them as being not closely connected simply because they are to be made into different bank accounts, or that the agreement states that, once received, they are to be used for different purposes.

55. It is also argued that there is an equitable ground on which a court might refuse to recognise a set-off. What is argued is that the Administrators were induced to co-operate with BTI in the PwC litigation by the promise of immediate payment of the proceeds. It is then argued that, because this has not been done, it would be unjust – and therefore contrary to this principle – for the court to recognise such a set-off. The necessary implication of this argument is that the Company would not have co-operated with this litigation had it not been for this representation.

56. I admire the ingenuity of this argument, but not its logic. It is entirely true that the Company was told that it would be entitled to be paid a proportion of whatever amount was received from PwC, because that is the outcome that the Funding Agreement provided for. It is also nonsensical to say that the Company only co-operated with this litigation on the basis of a promise that it would be paid the cash received immediately - partly because there is no evidence that any such promise was ever made, and partly because it is entirely clear that the Company would have co-operated in any event, whether such a representation was made or not, because it was heavily in its own interest to do so.

57. I was also offered a somewhat speculative argument to the effect that, since the Funding Agreement was an executory contract, and since post-liquidation receipts derived from the activity of the officeholder and use of the company's resources cannot be set off against liabilities of the Company, there was therefore an objection to set-off on this ground: *Goode & Gullifer on Legal Problems of Credit & Security*, 7th ed, 7-110. However, this argument rested on the fallacy that the entitlement of the Company to the PwC Share arose by reason of the Administrators' decision to continue to assist post-

Administration. This is simply not true – the PwC recovery was procured through the efforts of BAT and BTI, and there would have been no basis for the Administrators not to assist in this process given that the estate administered stood to benefit substantially financially from the successful conduct of the litigation. If Administrators apply the resources of the Company to facilitate the recovery of money from wrongs done to the company prior to the Administrators appointment, this principle has no application in such a case.

58. I therefore find as follows on this point:

i) BAT is a contingent creditor, whose value will fall to be established by the Administrators in due course. It may well be that, despite the very large face value of their claim, the amount adjudicated may be low – it was suggested in negotiation that the actual value might be as low as £20m, and I think this entirely within the range of possibilities. However, for as long as the Administrators continue to pursue the claims against the New Directors, it cannot be zero.

ii) BTI is a creditor for at least £27.9m. When it comes to adjudication of its PoD, it may – if it asserts its set-off – have that figure reduced to £20.3m. However, it is likely that its actual claim will be much higher than this.

iii) BAT also owns the claims of the pension creditors. These are valued at a minimum of £5.1m.

iv) The total of the claims of BAT and BTI, taken together, is therefore at least £33m, and probably more.

v) It is accepted that "other creditors" total £2.4m.

vi) The applicants between them constitute at least 93% of the creditors of the Company.

59. This is a slightly smaller figure than that set out in the Administrators' most recent progress report dated 25 November 2024, which suggests that the Applicants' claims represent 97.5% of total creditor claims.

**The Significance of the Applicants' Status as Majority Creditors**

60. Having established that the Applicants constitute the overwhelming majority of the creditors, I should say something about the significance of this fact. A great deal of the discussion before me turned on the question of how much and to what extent the court should act in accordance with the wishes of the majority of creditors in a case of this kind.

61. In *Pagden v Fry* [2019] BPIR 972, Jeremy Cousins Q.C. pointed out that:

> "On an application for removal, whether under s 108 or 171, the wishes of the majority are a factor to which the court will have regard, but those wishes are not determinative. A similar approach was adopted by Snowden J in bankruptcy proceedings

in *Maud [v Aabar Block Sarl & O'rs* [2016] EWHC 2175 (Ch)] He said at para 97:

> 'In that regard, it is significant that none of the authorities relied upon by Aabar and Edgeworth were cases where the petition was being opposed by other creditors. In such a case, for the reasons that I have already given, and as explained in cases such as the *Crigglestone* case [1906] 2 Ch 327, *In re P & J Macrae* [1961] 1 WLR 229 and *In re Leigh Estates (UK) Ltd* [1994] BCC 292, the collective nature of bankruptcy proceedings requires the court to evaluate the wishes of the creditors and to attribute weight to the views of individual creditors in deciding whether to grant the relief sought in the interests of the class. As Upjohn LJ made clear in *In re P & J Macrae* [1961] 1 WLR 229, this will require consideration of all the circumstances. Accordingly, in the same way as he pointed out that the court might have suspicions about the motives of creditors who oppose a winding up order (e.g. because of their connections to the company) and might require them to explain their reasons for doing so, in an appropriate case the court may also question the motives of the petitioners and supporting creditors and investigate whether they have any ulterior purpose(s) in seeking a winding up order or bankruptcy order. Or as Mr Richard Sykes QC put it in *In re Leigh Estates (UK) Ltd* [1994] BCC 292, 294 "it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices *on each side of the contest* "".

62. I am tempted to say that this point is simply an irrelevance. If an applicant creditor can satisfy the court that an administrator is not performing his role to the required standard, or is in breach of his duties, the court should remove him, no matter what proportion of the creditor body that applicant may constitute. Even a large majority of creditors should not be able to keep a clearly defective administrator in post - this is simply the converse of the proposition that no majority of creditors, no matter how large, should be given the right to remove an administrator without showing good cause.

63. I also note that the majority of those authorities which have addressed the question of the degree of attention which the court should pay to the majority of creditors have dealt with the position where there is a split between the creditors, such that the majority think one thing and the minority another. I am not at all sure how these authorities can be said to apply to a position such as that before me, where a majority of creditors think one thing, and the remainder appear to have no view.

64. My conclusion on this point is that the court should have regard to, but is not bound by, the wishes of the majority of creditors in their capacity as creditors: *Clydesdale Financial Services Ltd v Smailes* [2010] BPIR 62 at [14], [30]; *Cash Generator Ltd v Fortune* [2018] 4 All ER 325 at [29](b).

## How Significant is the Conflict which the Current Administrators Face?

65. An Administrator is a fiduciary. As explained in *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th Ed.) at [12-035]:

> "…the Administrator's powers, although deriving from statute rather than a contract, trust or security instrument, are properly regarded as fiduciary in nature as they are exercised by the Administrator on behalf of another in his capacity as a statutory office-holder acting as such is a fiduciary. "

66. This of course means that, like any other fiduciary, administrators "must guard against conflicts, including self-interest or self-review conflicts, and must be mindful when instructing third parties of any conflicts which might arise" (see per Hugh Sims KC in *Nardelli v Richardson* [2024] EWHC 2740 (Ch) at [46]).

67. It is established that the mere existence of a conflict (or the appearance of a conflict) is not enough to automatically require the replacement of an Administrator. The court should bear in mind that the replacement of an Administrator will necessarily involve some increased costs and delay, and ask itself whether it is possible to manage the relevant conflict through other means – usually the appointment of conflict Administrators – such that the increase in delay and cost may be minimised. As Warren J said in *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2321 (Ch) ("*SISU*"):

> "(a) Removal may be ordered if an independent review cannot be carried out because of conflict. However, the existence of a conflict will not necessarily lead to removal. The additional time and costs and the loss of knowledge which may result from removal should be taken into account. The court should consider whether there are other available options to resolve any such problem without the need for removal (see Clydesdale Financial Services Ltd v Smailes [2009] EWHC 1745 (Ch), (at [30]), David Richards J, as he then was). For example, by appointing an additional office holder (see the approach of HHJ Stephen Davies QC in *Re TPS Investments (UK) Ltd (in Administration)* [2018] EWHC 360 (Ch), [2018] All ER (D) 15 (Mar)).
>
> (b) The court should consider but may not be persuaded by the views and wishes of the majority of creditors in their capacity as creditors (*Sisu Capital Fund Ltd v Tucker* [2006] 1 All ER 167, [2006] BCC 463; *Re Zegna III Holdings Inc (in Administration)* [2009] EWHC 2994 (Ch), (at [24]); and *Re Maud* [2016] EWHC 2175 (Ch)(at [97]–[98])).
>
> (c) It should not be easy to remove an office holder simply because conduct has fallen short of the ideal. Removal should not encourage unjustified applications or cause office holders to have to look over their shoulders (see *AMP Enterprises Ltd v Hoffman [*2002] EWHC 1899 (Ch), [2003]).

> (d) It is relevant to bear in mind that removal will have an impact upon professional standing and reputation (see *Re Edennote Ltd, Tottenham Hotspur plc v Ryman* [1996] 2 BCLC 389 at 398, [1996] BCC 718 at 725)."

68. The conflict of interest arises primarily in the context of the claims against the New Directors (the "Director Claims"), which were issued by the Administrators on behalf of the Company on 5 April 2024. The claims concern a series of transactions that the New Directors caused the Company to enter into, and which are alleged to have been contrary to the interests of the Company and its creditors.

69. The most significant of the Director Claims are those arising from transactions involving shares in DeepGreen (the "DeepGreen Claims"). The Company used to hold a valuable shareholding in a company called DeepGreen Resources Inc ("DeepGreen"). The Company invested in DeepGreen in around 2014. The DeepGreen investment was a valuable one. The.Administrators assert in the claim against the New Directors that the shares had, at one point, a value of c.£115 million. The New Directors transferred certain of those shares to themselves in 2017 and 2018 (the "DeepGreen Share Transfers").

70. The Administrators challenge the DeepGreen Share Transfers as (i) transactions at an undervalue within the meaning of section 238 of the IA 1986; (ii) preferences within the meaning of section 239 of the IA 1986; and/or (iii) prohibited under Article 3F(b) and/or (c) of the Company's Articles of Association, and consequently ultra vires and/or for an improper purpose and in breach of sections 171 and/or 172 of the Companies Act 2006 (together the "TUV Claims"). The total value of the Director Claims is approximately £150 million. The TUV Claims are valued at slightly more than £115 million: i.e., around three-quarters of the total.

71. The conflict came to the attention of BAT when the Administrators' lawyers received and passed on to BAT the Points of Defence received in response to their pleaded claim. These included claims that the Directors are not liable to the Company because they relied on advice provided to them by Mr O'Connell at the relevant time. The relevant sections of the Points of Defence are as follows:

> 77.1 "Prior to deciding to make the transfer in 2017, the Directors sought and obtained advice from their accountant David Payne and, further, from Mr O'Connell that the transfer of the DeepGreen shares was permitted". When advising, Mr O'Connell "was aware of all material information regarding Windward's operations, investments and financial condition" (page 496).
>
> 77.2 In July 2017, Mr O'Connell discussed transferring shares in DeepGreen with Messrs Gower and Barron "via telephone and in person on several occasions", including at a meeting on or around 19 July 2017. He advised the Directors that "the transfer of shares in lieu of salary was permissible" and "the directors were not expected to work for nothing" (page 496).

> 77.3 In 2018, the Directors made further transfers of DeepGreen shares "in the belief that Mr O'Connell's prior advice applied in the same way to the further transfers".

72. The Applicants raise two primary concerns about this position. The first is that the conflict may assist the Directors' defence, e.g. by showing their good faith and/or lack of appreciation of the Company's insolvency; and (b) that in conducting the Directors Claims, Mr O'Connell could be opening himself and his then firm, S&W, to substantial claims by the Company, on the basis that his advice was wrong and negligent.

73. It is now (I think) accepted by both parties that there is at least an apparent conflict here. The question which they raise is therefore as to whether it is a conflict of a kind which can be managed through the appointment of Conflict Administrators.

74. The appointment of a conflict administrator may be an appropriate alternative to the removal of an administrator where it would be in the best interests of the administration estate. This has been seen in particular in the context of multiple insolvencies of related companies (see the discussion in *SISU Capital Fund Ltd* at [91] onwards).

75. However, where there is a potential (and all the more so an actual) conflict, it is axiomatic that a conflict administrator is only a workable solution if it is an effective way of managing the conflict: *SISU Capital* at [108]. If the majority of the creditors oppose such a course, that is of course a relevant factor: *TPS Investments* at [98].

76. In *Ve Vegas Investors IV LLC*, the court (Mr Registrar Jones) concluded that the Administrators – which (coincidentally) included Mr O'Connell and Mr Hardman, the Administrators in this case – should be removed on the grounds of their conflict of interest. The applicants sought removal on the basis that new Administrators were required to investigate potential claims against the company's directors and/or S&W (the Administrators' firm) relating to a pre-pack sale of the company's business and assets. The Administrators decided to resign part way through the hearing of the application, but Mr Registrar Jones nevertheless decided to determine the removal application because the resignation did not take effect immediately. He held that there were matters that made it clear there was a serious issue for investigation (at [22]) and that the Administrators should be removed (at [31]).

77. The judge also identified two further important points, namely, the need for Administrators to appreciate and remedy conflicts promptly and to conduct themselves in a professional and objective manner. As to these:

78. The judge held that Mr O'Connell, Mr Hardman and their co-appointees

> "ought to have concluded, effectively from the date of their appointment or soon thereafter, that they as members of S&W were conflicted and could not carry out those investigations. S&W were inextricably bound up in the process by reason of their contractual retainer and, therefore, so were the Respondents. This is not technical legal analysis. It is obvious" (at [25]).

He then concluded that the conflict and its consequences ought to have been "readily apparent to them at all material times" and that they should have raised the issue much earlier and sought directions from the court. The judge

> "unhesitatingly reach[ed] the conclusion from that evidence that the Respondents have lost perspective of their role. Throughout, their evidence demonstrated that they are primarily and essentially concerned with the defence of any claim against S&W and not with the competing, conflicting interests of the Company. The answers and responses of Mr Shinners and Mr Hardman demonstrated that they had and have no adequate appreciation of their conflict" (at [32])."

79. The judge also referred to the question of whether there might have been an alternative solution such as the appointment of a conflict administrator for a specific investigation ([26], [29]), but those questions were never explored or addressed by the judge because the respondents instead chose to resign (see [34]).

80. The Administrators maintain that they should stay in office – and indeed continue to manage the Director Claims – with Conflict Administrators being appointed to handle certain functions of the Administration. It seems clear that, at a minimum, the Administrators envisage the Conflict Administrators handling the settlement and negotiation of any settlement of the Director Claims; and any investigations considering the liability of Mr O'Connell and/or S&W and/or the Administrators in respect of the O'Connell Advice (and deciding whether proceedings should be issued, and if so, pursuing such proceedings). However, I note that if I were to decide that Conflict Administrators could in principle be appointed, the question of the scope of their responsibility would be a matter for a subsequent hearing.

81. The Applicants say that there are two sets of reasons why the appointment of a Conflict Administrator would provide no solution.

82. First, that there is a need for an investigation into whether Mr O'Connell and his firm are liable to the Company for breach of duty in respect of the advice he gave to it under its previous management; whether the Administrators or their firm are liable for failing to investigate such claims (and doing so within any applicable limitation period); whether the Administrators' solicitors are liable for failing to investigate, advise etc. on these matters; and whether there are claims against the Administrators or their solicitors in respect of the conduct of the Director Claims. Put simply, they say that the Administrators' independence is utterly compromised, and the widespread possibility of claims against them leaves no alternative to their removal (*Re SISU Capital Fund Ltd* at [89]-[90]).

83. Second, the conflict which arises is not capable of management. They argue that the scope of the Conflict Administrators' appointment would have to be so wide as to deprive the continuing Administrators of any power to make determinations as to the conduct of the litigation, including whether and when to settle, and on what terms. Since this litigation is the primary asset of the Company, they say that such an appointment would leave the continuing Administrators with no meaningful role in the administration.

*Could the conflict be "managed"?*

84. The question before me at this stage is simply as to whether a conflict of this kind could in theory be managed through the appointment of Conflict Administrators. The Administrators say that it can – they have identified proposed appointees, and put forward a draft memorandum of understanding ("MoU") indicating the functions which they would expect the Conflict Administrators to perform. The Applicants say that not only is the proposal put forward by the Administrators inadequate, but that in the context of the Administration the conflict is so substantial that if Conflict Administrators were appointed there would be no role left for the current Administrators to play.

85. The starting point here is the decision in *SISU*. In that case, a large group of companies had become insolvent, and the same office-holders had been appointed to a large number of the subsidiaries of the group, in a situation where there were substantial intra-group obligations. The office-holders' appointment was challenged by creditors of one group entity on the basis that they were conflicted through their status as Administrators of other group debtor entities.

86. In that case, Warren J delivered some remarks about the management of conflicts. His starting point was the dicta of Hoffmann J in *Re Maxwell Communications Corp Plc* [1992] B.C.C.372. He said:

> "The disadvantage of appointing an additional Administrator is, as Morritt J observed in the Polly Peck Case [*Re Polly Peck International Plc* [1991] B.C.C. 503], the further expense and delay which is caused by having to have co-operation between two different firms of accountants and in this case by having to introduce a new firm which has no previous knowledge of the circumstances of this company to join Price Waterhouse, who have a head start in the matter.
>
> There are other ways of dealing with a potential conflict of interest. One of them is to leave the matter to be dealt with if and when it arises. It seems to me that any provision which I make to deal with it today could equally be made at some future date either here or in the US. If such a conflict should surface there should be no difficulty for the administrators, if they find themselves faced with any difficulty in the matter, in securing the appointment of the necessary independent persons by the court in New York or by the court here to relieve them of any embarrassment which they might feel." (at p.375B0-D)"

87. Warren J analysed this passage as follows:

> "In other words, the judge is again saying that conflicts of this nature can be managed rather than there being a rigid requirement to avoid them. Whether, and if so how, a conflict can be managed is a matter for decision when a potential conflict materialised. Where there is already an existing conflict, the management must be put in place immediately, if it can be, or if

> it cannot be, then the administrator will have to relinquish one, if not both (or more), of his conflicting positions. But even then, the circumstances may be such that the officeholder could not responsibly resign, for instance if some commercial compromise were about to take place against the background of an immovable and urgent timetable which simply would not allow for a new officeholder to become sufficiently familiar with the full facts of the case in time to make an informed decision on the deal."

88. I think the upshot of this is straightforward – an Administrator should not be removed on grounds of conflict alone if there is a mechanism available that would allow him to continue in office without being affected by that conflict. This is, of course, the basis on which Conflict Administrators are usually appointed. The question for me is as to whether such a mechanism might be found.

89. The Applicants before me pointed out – entirely correctly – that the draft MoU put forward by the Administrators was clearly inadequate for this purpose. The Administrators responded – equally correctly - that this hearing was explicitly not intended to determine the terms of appointment of the Conflict Administrators, but merely to address the question of whether the appointment of such Conflict Administrators could in theory address the conflict issues. They therefore argued that the issue before me was not whether the terms of this particular draft MoU would be adequate but whether there was any possible form of division of responsibilities between the current Administrators and the hypothetical Conflict Administrators which could effectively manage this conflict.

90. I think that the way to approach this is to ask what are the minimum functions that a Conflict Administrator in this particular context would have to take on in order to relieve the existing Administrators of their difficulty. Their primary function would, of course, be to conduct the Director Claims. This would include the conduct of the litigation, the investigation of any possible claims which the Company might have against Mr O'Connell or his firm, and the conduct of any such claim. It would be wholly improper for the existing Administrators to have any involvement in, or information in relation to, any such claims until after they are determined or settled. This would include deciding on who the appropriate solicitors to act in the claim would be, and on the question of whether the claim might be better managed for the benefit of the Company by its assignment to the Applicants on appropriate financial terms. I also think that the conduct of any possible s.213 claim (as discussed below) against the Sequana Directors would have to be managed by the Conflict Administrators, since it would be counterproductive to have the two different claims on foot but managed by different Administrators who were inhibited in their ability to discuss the claims with each other. I note that, since the s.213 claim only arises when the Administration is converted into a CVL, if the Conflict Administrators determine that this claim has value and should be brought, that determination will also – in effect – determine that the Administration should be brought to an end. Finally, I think that, given the irrational positions which the current Administrators have announced that they proposed to take over the adjudication of the BAT and the BTI proofs of debt, (that is, the determination of the majority of the claims on the Company), the role of adjudicating these proofs should also be conducted by the Conflict Administrator.

91. Mr O'Connell, in his witness statement, gave a helpful summary of what – in his view – were the elements of the Administration which were still to be completed. These were:

(a) Adjudicating the BAT proof of debt;

(b) Adjudicating the BTI proof of debt;

(c) Determining whether Director Claims should be assigned to the Applicants, and on what terms;

(d) If not, determining whether new solicitors should be instructed in respect of the Director Claims;

(e) Determining whether there is a section 213 claim which can be pursued, and if there is, whether the Company should enter liquidation so that the claim can be pursued and whether the claim should then be assigned to the Applicants;

(f) Determining whether BTI has a valid right of set-off in respect of the PwC Share;

(g) Pursuing the Company's claim against the Applicants for the legal costs incurred in assisting with assigned claims;

(h) Determining whether the Company has a claim against the Applicants and/or Hogan Lovells for breach of confidence and/or negligence, and if so, how they should be addressed;

(i) Determining whether the Company has any liability to HMRC arising from the assignment of claims to BTI under Section 8 of the Funding Agreement or any liability to HMRC in respect of its right to the PwC Share (whether the PwC Share is paid to the Company or applied by way of set-off); and

(j) Determining whether and when the Company should enter liquidation.

92. Of these ten elements, the first five clearly fall into the bailiwick of the Conflict Administrator. I think that the position as regards the sixth (the set-off point) is too clear to require any further input. The eighth and ninth (the HMRC and Hogan Lovells claims) I regard as entirely confected, being attempts by the Administrators to create negotiating leverage against the applicants, and having no substance as they currently stand (see paras 176 to 183 below). Thus the only roles left for the current Administrators to perform are to recover the Company's legal costs of assisting with the PwC claim (which are not disputed), and managing the transition to a CVL.

93. In summary, I am of the opinion that once Conflict Administrators had been appointed, and the scope of their mandate had been appropriately determined, there would be almost nothing left for the existing Administrators to do. I therefore do not think that this is a conflict of a kind for which the appointment of Conflict Administrators would provide a satisfactory solution.

94. This does not, however, necessarily take me to a conclusion that the current Administrators should necessarily be replaced. I think it is probably true that if a court concludes that an Administrator's continuation in office is not conducive to the efficient and effective conduct of that Administration, it is his duty to resign. However, the

Applicant's application before me is that there is a positive case that the court should order these Administrators to be replaced, and that is the issue which I am asked to decide. I therefore turn to it.

## The Removal of Administrators - Principles

95. The legal principles in respect of applications to remove Administrators are well-established. Para 88, Schedule B1 IA 1986 provides that "the court may by order remove an Administrator from office". Unlike the provisions of IA86 addressing the removal of a liquidator , para 88 does not use the expression "on cause shown" as a qualification to the power to remove an Administrator. However, it is generally accepted that the two powers are broadly analogous, such that "it would be for the applicant to show "cause" as to why the administrator should be removed from office and this would be measured by reference to the real, substantial, honest interests of the administration and the purpose for which the administrator is appointed" (*Lightman & Moss on The Law of Administrators and Receivers of Companies*, 6th edition, at 27-003). The parties before me proceeded on the basis that for this purpose there was no difference between the principles relating to the removal of an Administrator and the removal of a liquidator, and that the authorities relating to the removal of a liquidator apply *mutatis mutandis* to the removal of an Administrator.

96. Accordingly, the court must have good grounds for removing an Administrator; and what is good or sufficient must be ascertained by reference to the purposes of the office and the facts of the case (*Re St George's Property Services (London) Ltd* [2012] Bus LR 594 (CA) at [15]). The evidence must first establish good or sufficient ground or cause for the removal of an Administrator: only then does the discretion to remove arise: *Finnerty v Clark* [2012] Bus LR 594 (CA) at [15]-[16]; [31]; [33].

97. Mr Isaacs places strong reliance in this regard on the Judgment of Neuberger J (as he then was) in *AMP Music Box Enterprises v Hoffman* [2002] EWHC 1899 (Ch) at pp. 1001-1002 ("*AMP*"). He said

> "On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. So to hold would encourage applications under s.108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who was appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over

> his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay."

98. This is clearly a correct statement both of the law and of the policy behind it. It is regrettably common that creditors may form adverse – sometimes extremely adverse – opinions as to the way in which an Administrator has performed his role. However, it is important that where a creditor has a dispute with an Administrator, that fact alone should not be treated as justifying an application by that creditor to remove that Administrator. Put simply, the mere fact that an Administrator has fallen out with the creditors is not per se a ground for his removal. The view which the court must form is not as to whether the applicants' grievances are justifiable, but as to whether the conduct of the Administrator has fallen sufficiently far below the standard expected of him as an officer of the court that the court should exercise its supervisory jurisdiction to replace him. In conducting that analysis, the court should consider all of the points raised by the creditors, but the mere fact that they have raised those points is not of itself a ground for removal.

99. Removal therefore involves a three-stage process:

a) examination of allegations made and findings on those allegations;

b) whether those findings constitute good or sufficient grounds for removal;

c) exercise of the discretion whether to remove, having regard to all the circumstances: *Nardelli v Richardson* [2024] EWHC 2740 (Ch) at [60].

100. Whether a ground is good or sufficient is measured by reference to the real, substantial honest interests of the Administration, and to the purpose for which the Administrator is appointed: *SISU* at [84], [87]-[88].

101. The court is likely to be concerned only with the future and not with the past: *SISU* at [86]. The historic conduct of the officeholder is material, but ultimately the assessment is whether removal of the officeholder is in the interests of the insolvency process as a whole: *Re Birdi* [2019] BPIR 498 at [55]. The purpose of the removal is not to punish the Administrator for mistakes made in the past, it should be based solely on the likelihood of his failing to perform his functions in the future.

102. A conflict of interest may constitute a ground for removal but the court should consider whether the conflict can be managed without removal if such removal would be clearly detrimental to the conduct of the Administration, including cost and disruption to the insolvency process: *Re Fox Street Village Ltd* [2021] BCC 89 at [61]-[62]; *Tailby v Hutchison Telecom FZCO* [2018] EWHC 360 (Ch) at [35], [37], [94]-[97]; *SISU* at [91]-[132], in particular at [108], [112]; [130]-[131].

103. The court does not lightly remove an officeholder and will pay due regard to the impact of removal on an officeholder's professional standing and reputation: *Edennote* at 398f; *AMP* at 1,001G-1,002B; *SISU* at [85].

104. An applicant's concern as to the existence of a conflict need not be resolved in their favour at the time of the application so long as the evidence raises a serious issue for investigation (*Re St George's* at [16]). Accordingly, and by way of example, if there is a possibility that there will be misfeasance proceedings against an Administrator/liquidator, they should ordinarily be removed (*SISU* at [89]).

105. The cases show that the critical feature is the ability (or inability) of the Administrator to retain either actual or apparent independence. It was with this specific consideration in mind that David Richards J held in *Re Clydesdale Financial Services* that there were sufficient grounds for removal, and concluded on the facts (at [30]) that "What is, however, clear is that Mr Smailes and his firm were so closely involved in the negotiations that he cannot be expected now to conduct an independent review".

106. It is important to emphasise that a majority of creditors do not have a right to remove an Administrator (save under the qualifying decision procedure provided for in paragraph 97 of Schedule B1 to the Insolvency Act). An Administrator is an officer of the court, and should only be removed if the court is satisfied that there are good reasons why he should not continue in office. However, the applicant need not show misconduct or personal unfitness on the part of the Administrator (*Re Clydesdale Financial Services* [2009] EWHC 1745 (Ch) at [14]; *Re St George's* at [16]).

107. The court will be entitled to consider and account for the impact which the removal and replacement will have on the general conduct of the Administration – in particular, in relation to issues such as costs and delay: *AMP Music Box Enterprises Ltd v Hoffmann* [2002] BCC 996 at 1002A-B. It is also important that the court should not act in a way which could encourage unjustified applications by disgruntled creditors.

108. It is also said that the court should also consider the impact on the professional standing and reputation of an Administrator. This seems to me to be a consideration of a different kind from those identified above, ad I address it further below.

109. A common ground of removal is that the creditors no longer have confidence in the officeholder's ability to perform their functions (including e.g. to realise the assets of the company to the best of their advantage). However, the creditors' loss of confidence must be reasonable (*Re Edennote Ltd* [1996] BCC 718, 725G-H). The loss of creditor support is much more significant where the creditors' committee justifiably loses confidence in the officeholder (*City & Suburban Pty Ltd v Smith* (1998) 28 ACSR 328).

110. Further, the views of creditors, if legitimate and reasonably held, are especially entitled to consideration in circumstances where, as here, it is the directors – and not the creditors – who were responsible for the Administrator's appointment (*Re Clydesdale Financial Services* at [30]).

**Has the test for removal been met?**

111. The Applicants case, in summary, is that when the Administrators were informed that BAT intended to seek their removal, their conduct of the Administration became primarily motivated by a desire to remain in office and to be paid. This involved seeking to challenge BAT and BTI's status as creditors, since for as long as BAT and BTI remained members of the Creditors Committee there was no prospect of the Administrators having their fees (which they knew that the Applicants regarded as

excessive) approved by the Creditors Committee. They also say that attempts were also made to manufacture new creditors (most notably HMRC), to threaten BAT and BTI with adverse publicity if they persevered, and to obstruct the conduct of the potential s.213 action against the Sequana Directors.

112. The principal support for these allegations, beyond the actual conduct of the Administrators, is a series of extraordinary e-mails sent by Mr O'Connell on the 28 March and the 9th, 11th and 13th April 2025. I note that Mr O'Connell had been on sick leave in the latter part of 2024, and it is entirely possible that he was not fully recovered when he penned these missives. However, I can entirely understand the disquiet which they caused.

113. I shall consider in turn first the Administrators' conduct and then the content of the e-mails.

*The Administrators' Conduct in Respect of the Conflict*

114. The Applicants say that the abrupt reversal in the Administrators' position was triggered by the discovery of the conflict problem by Mr Lloyd of Hogan Lovells (solicitors for the Applicants). As noted above, Mr O'Connell had disclosed in general terms that he had provided advice to the Company prior to its entry into administration. However, it seems that it was only when Mr Lloyd received the New Directors Points of Defence on 4 September 2024 that he (or anyone else on the Applicants side) discovered that Mr O'Connell was alleged to have advised the New Directors personally on the disposal of the relevant assets. Mr Lloyd promptly contacted KaurMaxwell to say that these seemed to him important and significant points which required to be firmly rebutted. However the rebuttal actually provided was – in his view – equivocal, and indicated that there might be some substance to these points.

115. It seems to have been shortly after these communications that, on 15 November, Mr Hardman sent an e-mail suggesting that BAT's proof of debt would be adjudicated as having no value because of the Windward Floor. The reason that this matters is that Mr Hardman's view seemed to be that the fact that he intended to adjudicate this proof at zero meant that BAT was no longer a "Creditor" for the purpose of the proceedings. It is entirely clear that this seems to have been an attempt to justify excluding BAT from the proceedings – and in particular from the Creditors Committee (whose approval was required before the Administrators could be paid fees). The Applicants suggest that this was part of an attempt to exclude BAT (and subsequently BTI) from the conduct of the Administration in order to protect themselves. The Administrators' case is that it was in response to the suggestion that the BAT proof should be adjudicated as zero that the Applicants embarked on a campaign against them aimed at forcing them out in order to put in place more compliant Administrators who would accede to their (*ex hypothesi* illegitimate) demands.

116. The Administrators argue that full disclosure of the facts giving rise to the conflict was properly given at an appropriate time. This argument relies on the "Statement of Prior Professional Relationship" contained in the December 2018 Joint Administrators' report. This statement discloses that Mr O'Connell had given advice to the company prior to the Administration, but did not specify the nature of that advice, and did not mention advice to the New Directors. Mr O'Connell's explanation of this is that at the time that this disclosure was given "the Administrators were wholly unaware of the

possibility of a claim against the Directors at the time of our disclosures or that any advice I might have given to the Company might be an issue." That may well be true. However, it merely explains why the appropriate disclosure was not given at that time.

117. On the 16th January 2025, Mr Lloyd sent an e-mail to the effect that there was a "real issue as to whether [the Administrators may have] assumed a duty of care to the Directors … and whether this issue could provide an effective defence for the directors" and that the Administrators' conflict could "expose [the Administrators' firm] to a claim by the Company (of which its officers are administrators".. In response, Mr O'Connell again denied that the Administrators had "a conflict issue as regards our ongoing litigation against the directors", albeit in the same email he stated that "we are going to make an application to court soon to appoint them as a conflicts administrator".

118. In the event, it was not until six weeks after the Applicants issued the Removal Application – and over eight months after the conflict first came to light – that the Conflict Application was issued.

119. The Applicants say that there can be no real doubt that the latter application was only issued as an attempt to resist the former application. Just as in *Ve Vegas,* the Administrators ought to have concluded, effectively from the date of their appointment but certainly by the time the Director Claims were in reasonable contemplation, that they were conflicted. Their apparent failure even to appreciate this, and their wholesale failure to address it save as a reactive attempt to avoid their removal from office, is one of the reasons why the creditors have overwhelmingly lost confidence in the Administrators.

*The Conduct of the Administrators After the Conflict was Discovered*

120. The Applicants argue that, shortly after the discovery by the Applicants of the conflict issue, the Administrators have embarked on a series of actions which give rise to serious concerns about their motives and objectives.

121. First, the Administrators denied the Applicants' status as creditors (without having adjudicated upon their proofs of debt) despite having previously acknowledged and treated them as majority creditors for years.

122. In January 2025, for the first time, and a matter of days after Mr Lloyd had suggested that the Administrators may need to be removed, Mr O'Connell sent an email to Ms Brown (in-house counsel at BAT) and Mr Lloyd, which purported to raise "a number of sensitive issues which the Administrators have not shared with you before now due to confidentiality […] and for other reasons", including that "You will understand that there are clearly also outcome scenarios where neither BTI nor BAT are creditors of Windward". Although the Administrators had said in November 2024 that they "are likely to adjudicate the BAT claim at £Nil", this was the first time that BTI's status was ever disputed.

123. The Administrators purported to rely on an observation of Mr Lloyd's that in certain circumstances (i.e. where recoveries were sufficiently large) BTI would not be a creditor at all to say that neither BAT nor BTI were creditors at all, and that the Creditors' Committee was disbanded (it was not).

124. At the same time as the Administrators were denying their status as creditors, they appeared content to continue to treat (at least) BTI as a major creditor for the purposes of seeking approval for their own fees. On 9 April 2025, in the same email that suggested that BTI may have no claim whatsoever in the Administration, Mr O'Connell was content to suggest that BTI (if not BAT) should be involved in approving the Administrators' fees.

125. The emails which followed became ever more prolix and incomprehensible. In an email to Ms Brown dated 11 April 2025, Mr O'Connell proceeded (amongst many other things): (a) "regrettably" to give BAT and BTI "formal notice […] under section 236 of the Insolvency Act 1986", i.e. seeking to use formal office-holder powers to compel information; (b) to state that he was "highly suspicious that these detailed claim figures are not forthcoming"; (c) to raise the issue of BTI's legal standing; and (d) to call the question of BAT and BTI claims "the £0 question", but then to accept, in a seemingly double volte face, that BTI did have a correct legal basis for a claim in the Administration. On 14 April 2025 Mr O'Connell demanded revised proofs of debt again "for adjudication by me".

126. The same is true of the suggestion that BTI has no right of set-off in respect of its recoveries from its claim against PwC. It was the Administrators who first publicly acknowledged the right of set-off in respect of mutual debts under the Funding Agreement, and BTI asserted its right of set-off without objection in August 2024. This was not disputed until this hearing.

127. The Administrators have said that they intended to place the Company into CVL in order that an interim distribution could be paid to creditors, and in the most recent Progress Report, the Administrators stated that a CVL was "expected to be within the next few months". The Administrators now seek to extend the Administration until 30 October 2026.

128. The explanation for this change given by the Administrators was that they wished to extend the Administration by (initially) 24 months, "to ensure the proceedings against the directors have concluded before converting into insolvent liquidation, unless the Company is solvent, in which case it will be returned to the custody of its directors". This is not a convincing explanation - the Company's own claims remain vested in it regardless of the nature of the insolvency process and the officeholder claims (to the extent that they have a meaningful status of their own) can be equally well pursued by liquidators as by Administrators. The Applicants are of course concerned that the real motivation is to use the threat of prolonging the Administration to secure the payment of their fees – Mr O'Connell, in his e-mail of 22 April 2025 on conversion of the Administration into a CVL said that the issue of fees was "a deciding point" as regards this conversion.

129. In addition to the above, the Applicants have serious and legitimate concerns about the Administrators calculation of their fees and charging practices. In summary, the Administrators have (a) failed to provide creditors with a proper insight into their charging practices; (b) sought to impose unwarranted fee increases which they have applied retrospectively; and (c) appeared to consider their own self-interest above that of the estate in dealing with fees issues.

*Conduct – the E-mails*

130. Mr O'Connell's emails dated 28 March, 9 April, 11 April and 14 April 2025 are extraordinary. I note that towards the end of 2024 Mr O'Connell had had an extended period of sickness, and it may be legitimate to speculate that he was not fully recovered when he wrote them.

131. In the 28 March email, Mr O'Connell gave as one of "[a] few examples of BAT/BTI's strategising, positioning and highly commercial approach" that Mr Lloyd had attempted to "blackmail" him. After Hogan Lovells responded to that statement identifying it as an accusation of blackmail and in response to a perceived invitation to weigh up "which of us has the best lawyers", in the 9 April 2025 email, Mr O'Connell stated:

> "That Kevin Lloyd raised the spectre in paragraph 68 that Hogan Lovells, a firm of solicitors, might have been accused of 'attempted to blackmail the Administrators into agreeing to admit the BAT Proof for c. £20m-£25 million' is ridiculous and I imagine that his compliance partner and indeed all his partners have gone berserk at him writing that. He will have to have reported to the Hogan Lovells partnership that he believes he and Hogan Lovells (as he was not there as a private citizen) have been accused of blackmail when he is not even a legal party to any of the relevant matters. What possible reason would Kevin Lloyd esq. have for blackmailing anyone?".

132. Whatever the email is intended to mean, it is clearly a poor reflection on Mr O'Connell's judgement. More recently, Mr O'Connell has maintained that Mr Lloyd "was trying to get me to act against my duties"; but he is no longer sure "whether blackmail was the correct word". This approach is deeply concerning.

133. In his 14 April 2025 email, Mr O'Connell stated that he had been working with "[t]he HMRC civil fraud team" to investigate the discovery of the conflict problem by Mr Lloyd of Hogan Lovells (solicitors for the Applicants)he Company's undeclared tax liabilities and suggested that BAT had been involved in tax avoidance schemes, may not properly have declared them to HMRC and might be guilty of "some type of a money laundering scheme as well". I address the position surrounding this claim at 176-183 below. Suffice it to say here that it is difficult to avoid the conclusion that the Administrator's primary objective in pursuing this point was to create negotiating leverage against BAT.

134. The e-mails also contain vituperative attacks on the Applicants, asserting that: (a) BAT is in "the business of selling deadly tobacco products to the public"; (b) BAT/BTI has had "multifaceted involvements" in "this massive environmental disaster since 1978"; (c) BAT wishes to pay "the least cleanup costs"; and (d) BAT is financially unviable, suggesting that Mr O'Connell has "major cause for concern about the financial viability of BAT group and the risks to [the Company], and its creditors, of BAT group holding on to its funds. The fact that President Donald Trump has never smoked, in my view, adds another very serious risk to the group's current viability and future. It might only take a whim for Donald Trump to take against this deadly business."

135. There is a curious point here about the rancour which Mr O'Connell seems to have developed towards BAT's solicitors, Hogan Lovells, and in particular towards Mr Lloyd, who has had conduct of the various part of the litigation surrounding the Fox

River claims for BAT since 2011. Mr O'Connell, when appointed, instructed as his advisors a small firm called KaurMaxwell. This is uncontroversial. The problems seem to have arisen when Mr O'Connell decided that he was going to instruct KaurMaxwell to conduct the Director Claims. It is easy to understand the angry frustration which must have been felt by BAT (and Hogan Lovells) when they discovered that Mr O'Connell intended to pay out of the Company's assets the very substantial costs which would be involved in KaurMaxwell getting up to speed on an issue which Hogan Lovells and BAT were already on top of. This, combined with the low regard which BAT and Hogan Lovells had for the work which KaurMaxwell was providing in other areas, seems to have turned a dispute between principals into a dispute between principals and law firms. One of the mysteries of this case – and a mystery which I am neither able nor required to unravel – is the connection between Mr O'Connell and KaurMaxwell. I note in this regard that the Applicants also raise questions as to whether there are conflict of interests issues in relation to KaurMaxwell, since they do not appear to have properly identified and dealt with the Administrators' conflict issue in respect of the Director Claims at the time that they first became apparent, and that they do not appear to have identified and investigated potential claims that the Company may have against the Administrators and their firm in relation to the conflict of interest issues identified above. However I do not think that I need to address these issues here.

136. Taken together, I think that the Applicants have shown that there are good grounds for them to suspect that the Administrators' conduct of the Administration going forward will be affected by considerations other than those of the best interests of the creditors. I emphasise that this is absolutely not a finding of wrongdoing in the past, nor is it a finding that there is a likelihood of wrongdoing in the future. However, I think that the Administrators' conduct has been sufficiently far outside what might ordinarily be expected as to justify the Applicant's concerns. This takes me to the conclusion that, since the majority of creditors have legitimate concerns about the Administrators' conduct of the administration, there is a good prima facie case that that Administrators should be replaced.

**Do the Applicants have an Adverse Interest to the Creditors Generally?**

137. The basis of the Administrators' arguments before me was that the Applicants were seeking to undermine the Administration for their own benefit, and in particular that there were a number of areas where there were significant disputes between the Applicants and the Administrators, acting on behalf of creditors as a whole. As a matter of legal principle this was an argument which the Administrators were entitled to raise.

138. Given the conduct of the Administrators as considered above, this argument may call to mind the well-known adage about pots and kettles. However, it is an argument that must be taken seriously. It is an independent and free-standing (albeit somewhat elderly) principle that a person who has an interest which is adverse to the interests of the body of creditors as a whole should not be permitted to appoint his own Administrator.

139. Where a creditor seeks to replace an Administrator, it is always appropriate for a court to ask whether the request is made pursuant to an ulterior motive. In this regard, it was urged on me that

(i) An officeholder should not be the choice of a person who has a duty or purpose which conflicts with the duties of the officeholder: *Fielding v Seery* [2004] BCC 315 at [33], in particular [33](4); *Raithatha v Holstein GmbH* [2017] EWHC 3069 (Ch) at [26], [45], [53].

(ii) The officeholder should not be the nominee of a person against whom the company has hostile or conflicting claims or whose conduct in relation to the affairs of the company is under investigation: *Fielding* at [33](5). This may apply where a proof of debt is being investigated: *Ex parte Sayer; Re Mansel* (1887) 19 QBD 679 (CA).

(iii) There is a public interest in officeholders not only acting but being seen to be acting in the best interests of creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated: *Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd* [2013] BCC 47 at [14].

140. I note that the Administrators did not suggest, and have never suggested, that the individuals suggested as proposed appointees would act in accordance with the instructions of the Applicants, or that their appointment would result in the Administration being conducted in a way which would not be entirely consistent with their obligations as officers of the court.

141. In *Fielding* a creditor made an application to remove a liquidator apparently in order to stop proceedings being brought against him and his companies. In this context, HHJ Maddocks said

> "A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator… More specifically the liquidator should not be the nominee of a person: (a) against whom the company has hostile or conflicting claims … or (b) whose conduct in relation to the affairs of the company is under investigation."

142. However he also said

> "By contrast it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator."[33].

In the circumstances the court declined to remove the liquidator.

143. One of the cases relied on in *Fielding* was *Ex Parte Sayer; In Re Mansel* (1876) 19 QBD 679 (CA). In that case, the court addressed the position where a creditor sought to hold a creditors' meeting to remove a trustee in bankruptcy in circumstances where the Court of Appeal thought it clear that the purpose of the removal was to prevent the investigation of the validity of that creditor's status as such. The court (unsurprisingly) declined to permit the meeting to be held until the investigation into the status of the creditor was completed.

144. This takes us to *Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd* [2013] BCC 47. This was another case where the former directors and owners of a company (who were the majority by value of creditors) sought to appoint a particular Administrator.

That proposed Administrator had given a witness statement explaining that he intended to work closely with the former directors. His witness statements also showed that he was unaware that there had been suspicious dealings between the company and the former directors shortly before the failure, but that, having been informed of them, his confidence in the former directors was undiminished.

145. Lewison J declined to appoint the Administrator, on the basis that

> "Given [the proposed Administrator's] apparently undiminished confidence in and reliance upon [the former director], the creditors cannot be satisfied that he is truly at arm's length from [the former director] and will investigate his conduct with appropriate vigour."[26]

146. He explained the position as follows:

> "There is a public interest in office-holders charged with the administration of an insolvent estate not only acting but being seen to be acting in the best interest of the creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated. This is a reflection of a more general principle that justice must not only be done but must be seen to be done. The importance of the principle is reflected, amongst other ways, in the fact that applications for recusal are almost always made not on the ground of actual bias but on the ground of appearance of bias." [14]

147. We now turn to *Raithatha v Holstein* [2017] EWHC 3069 (Ch) in which these authorities (and a number of others) were considered by Marcus Smith J. He observed that, in considering issues relating to the removal of an office-holder

> "the fact that the body of creditors or part of the body of creditors seeking the removal of a liquidator may themselves face claims against them brought at the instance of a liquidator is highly material. I do not accept that this factor is determinative in all cases, but it is clearly highly material."

148. It is potentially significant that Marcus Smith J did not suggest that the existence of claims against a proposer of a replacement liquidator was an automatic bar to the appointment of that liquidator. He proceeded to consider whether the holding of a creditor's meeting to substitute an appointment should be permitted. His conclusion was that it should not, but his primary reason for coming to this conclusion was that the proposed alternative office-holders were clearly unsuitable.

149. In *Kean v Lucas* [2017] EWHC 250 (approved in *Raithatha* by Marcus Smith J at [39]), Mr Registrar Briggs made an important set of points as to the position of liquidators generally. He said

> "The implementation of the changes recommended by the Cork Report provide, in my judgment, an altogether different factual basis upon which to judge whether an insolvency practitioner is

> likely to act without integrity and in breach of his or her duties. In order to persuade the Court that such an event is likely or has happened the Court will require adherence to evidential proof to the usual standards." [13].

150. The point here is that the mere fact that an office-holder is proposed for appointment by a party should not, without more, be taken as an indication that that office holder will act in a way which improperly favours the party proposing him for appointment.

151. There are two preliminary enquiries here – one being as to what is meant by "adverse" in this regard, and the other being as to whether these interests are in fact in conflict with those of the "general body of creditors".

152. It seems to me that the effect of these authorities is as follows:

i) In principle, the question of whether an office-holder should be removed is a separate question from the question of who should replace them. However, in practice the applicant must propose an alternative, and the two issues are intertwined. Unsuitability of the proposed replacement is therefore good grounds for refusing the removal: *Raithatha v Holstein* [2017] EWHC 3069 (Ch).

ii) Where a creditor seeks to remove an office-holder in circumstances where the office-holder, on behalf of the company, is properly exploring possible claims against that creditor qua director, there is a real risk that the replacement will give an impression of apparent bias. In such circumstances the court should be very slow to remove an office-holder. *AMP Enterprises Ltd v Hoffman* [2002] EWHC 1899 (Ch), [2003]).

153. However, the mere fact that an office-holder is investigating the conduct of a creditor is not an absolute bar to a request from that creditor for the office-holder's replacement. The issue must be determined on the facts.

*Application to the facts*

154. The Administrators point to seven specific areas of dispute between the Administrators and the Applicants, and say that these disputes, taken collectively, amount to a dispute between the Applicants and "the general body of the creditors" which is so significant that these authorities are engaged. They therefore argue that they should not be replaced by Administrators proposed by the Applicants.

155. There are two preliminary points here. The first is that, by the time a creditor becomes sufficiently dissatisfied with an administrator to apply for his removal, he will inevitably have at least one – and probably more – substantial disagreements with that administrator as to the conduct of the administration. It clearly cannot be the case that the existence of such disputes is per se a bar to that creditor applying for the removal of that administrator. In order to conclude that a creditor has a dispute with a company in administration which is so serious that it disbars him from appointing replacement administrators, it is necessary to find something seriously problematic in the factual matrix, such that there is a real risk of perception of bias or inappropriateness in the

appointment. The mere existence of disputes between administrator and creditor will not, ordinarily, satisfy this requirement.

156. The second preliminary point is that although the Administrators seek to characterise this issue as arising from a conflict between one creditor and "the body of creditors", the creditor concerned constitutes 93% of the value of the claims on the Company, and the other creditors have indicated no interest, and taken no part, in any of these disputes. This proportion is clearly not of itself determinative – even a 93% creditor may have an irretrievable conflict with the body of creditors as a whole. However, the facts on the ground significantly weaken the assertion by the Administrators that this is a real, as opposed to a confected, conflict.

157. In order to consider this argument, it is necessary to discuss the individual areas of dispute.

1. Conflict

158. The conflict point is not really engaged here, since the Administrators do not dispute that there is at least a potential conflict. I think that the Administrators do say that the fact that the Applicants dispute that there is a possibility of resolving the issue through the appointment of conflict administrators puts them at odds with the general body of the creditors, but I do not think that this is a true conflict – there is nothing in the position which the Applicants take on this issue which seems to be to be in conflict with anything other than the Administrators' desire to remain in office.

2. The failure to convert into a CVL.

159. The Administrators have for some time been saying in their periodic reports that they intend to convert the administration into a CVL, but this has not yet happened. The Administrators are now asking for a 15-month extension of the Administration. The basis of this request is that they think that the Director Claims can best be conducted by Administrators.

160. The Administrators argue that the requests by the Applicants for the administration to be converted into a CVL are contrary to the interests of the creditors generally, since there are good reasons why the conversion should be delayed.

161. There are two intertwined points here. One is that the Administrators say that a transition to a CVL would of itself be detrimental to the interests of creditors, for reasons that I will outline below. The other is that the conversion into a CVL has the benefit of opening up for the Company the possibility of bringing an action under s. 213 of the IA86 (fraudulent trading) against the Sequana Directors (since such a claim can be brought by a liquidator but not an administrator). The Administrators say (I think) that the Applicants' requests that this action be pursued is contrary to the best interests of the body of creditors.

162. The Administrators have put forward a number of arguments to the effect that conversion into a CVL would be actively damaging to the interests of the creditors as a whole, and that in pressing for this conversion the Applicants are acting contrary to those interests.

163. The first of these (which I think has appeared for the first time in this hearing) is in relation to creditor's claims for interest. Mr Isaacs points out (correctly) that the law as it currently stands, as stated by the Supreme Court in *Re Lehman Brothers International (Europe) (No 4)* [2018] AC 465 (SC) at [113]-[119], is that where an Administration is converted into a CVL, the creditors are no longer entitled to interest in respect of the period of the Administration. This is advanced as a reason for declining to convert the current Administration into a CVL.

164. In practice this point is almost irrelevant. Creditors would only be entitled to interest once all claims were paid in full. Currently creditors' claims are at least £35m – possibly very much more. Recovered assets are £12m and administrators' costs are expected to consume almost all of that balance. Mr Isaacs argues that there is at least a theoretical possibility that the recoveries from the Director Claims might be so great as to enable all creditors to be repaid in full with interest. However, this prospect seems highly notional.

165. The second is that conversion would prejudice the Director Claims. This again is an argument which had not previously been alluded to before removal had been threatened, and appears to have been concocted for the purpose of this litigation. The argument is that these claims are currently pursued by the Administrators under ss 238 and 239 of the IA86. It is suggested that those sections create a single cause of action vested in the "officeholder", and that, if an Administration were to convert into a CVL, the liquidator would have to begin a new claim. It is further suggested that, if this were to be the case, the result would be to treat the Director Claims as discontinued with a consequential costs order against the Administrators. Furthermore, the costs of the Director Claims have been incurred by the Administrators. The indemnity principle may cast doubt on the ability to recover those costs if the Company moves to CVL.

166. This again does not withstand analysis. In such a situation it would seem relatively straightforward to apply under CPR 19.4 to substitute the claimant. This has been done in a number of other cases – most notably the transfer of claims from Northern Rock Plc to Northern Rock (Asset Management) Plc which is noted in CPR 19.4.8 – and transfers of this kind are routinely made in cases of equitable assignments of claims – see *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083. My admiration for the theoretical nature of this objection does not extend to a belief that it has any real substance.

167. The third argument in this regard is that such a move would trigger the application of insolvency set-off to the Company's claim against BTI for the recovery of part of the recoveries from the PwC litigation. The argument here is that whereas insolvency set-off is mandatory, as against an administrator set-off is only available where it would apply as between solvent parties, and is discretionary. This is only relevant if the Administrators are correct that they are entitled to recover these monies from BTI without BTI asserting a set-off in respect of its debt claims against the Company. This is of course correct. However, there is only one area where it is of any relevance, and that relates to the making available of funding to pay the Administrators' fees. That is simply not a proper ground of objection. Until the Administrators' fees are settled (either by the Creditors' Committee or by the court), the Administrators cannot extract fees, and, once that determination is made, there should be sufficient funds available within the Company to pay those fees.

3. The argument that investigation of the s.213 claim would be detrimental

168. It is agreed that a s.213 claim in relation to fraudulent trading can only be brought by a liquidator. The Applicants say that there are grounds for the making of such a claim, and that the Administrators' refusal to convert the Administration into a CVL is preventing such a claim from being brought.

169. My conclusion on this point is that the Applicants' position on these issues – that the benefit of securing the possible s.213 action significantly outweighs the disbenefits which the Administrators identify – is in line with rather than in conflict with, the interests of the body of the creditors.

4. The possible Assignment of the Director Claims

170. The Administrators seek to argue that the fact that the Applicants suggested that they take an assignment of the Director Claims means that they had put themselves into a position where their interests were adverse to those of the "creditors as a whole". The argument is that, since the Applicants would have been prepared to acquire the right of action on terms (and by doing so cure the conflict problems which would have faced the Administrators in bringing the claims directly), and that since such an acquisition would have had to be on commercial terms, the Applicant's interests as regards that pricing discussion would be contrary to those of the other creditors.

171. This argument disregards the reason why BAT/BTI were prepared to consider such an assignment. The problem for the Company was that the Administrators were conflicted in their conduct of that claim. By taking an assignment of the claim, BAT/BTI could not only have relieved that problem, but could also have come to a financial arrangement with the Company which could have relieved it of the costs of conducting the claim whilst retaining some right to its proceeds. No terms were ever discussed, and it is impossible to say what such terms might have been. However, the logic of an assignment of the claim is clear and, if properly negotiated, such an assignment might have been beneficial for both parties.

172. Mr Isaacs argues that the irremediable problem here is that a person who is seeking to buy something from another has an irremediable conflict of interest with that other. I do not agree. It is perfectly possible for a commercial bargain to be financially beneficial to both sides, particularly where – as here – the asset involved is a risky asset, and the risk appetite and financial resources of the two parties is different. It is simply not possible to say whether any potential assignment of this cause of action would be detrimental or beneficial to the Company, and it is therefore clearly not the case that the fact that the transaction was being proposed by the Applicants gives rise to a conflict of any form between them and the body of the creditors.

5. The Dispute over the Administrators' fees

173. There is a dispute between the Applicants and the Administrators as to the way in which the Administrators have calculated their fees. The Administrators – unsurprisingly – strongly dispute the criticisms made by the Applicants. I do not think that the existence of this dispute has any bearing on the position as between the Applicants and the body of creditors generally.

6. The HMRC claim

174. This point was never explained, and haunted the proceedings like an intangible spectre, the only evidence of its existence being the Administrators' statement that they believe in it. The key point is that it was suggested that the entry into the Funding Agreement might have given rise to a UK tax liability that was unidentified at the time and has remained unidentified for the subsequent seven years, for the whole of which period the Administrators have been responsible for the Company's tax affairs. Given that entities like BAT are not usually in the habit of entering into transactions involving hundreds of millions of pounds without the benefit of fairly high-quality tax advice, it must also be assumed that the issue – whatever it is – had been missed not only by the current Administrators but also by those tax advisors.

175. The reason that it is relevant here is that the Administrators argue that the Applicants could be acting to prevent the Administrators from investigating this point, and are therefore acting against the interests of the general body of creditors. It is hard not to note that trying to stop the Administrators manufacturing a tax liability which might not otherwise exist might be regarded as entirely in line with the interests of the creditors as a whole. However, even if I assume that BAT would have an interest in closing down this line of enquiry, I cannot see that the appointment of their chosen administrators would have any bearing on the likelihood of that happening. In this regard I note that this is not a case such as *Raithatha*, where it is suggested that the proposed administrators had a close pre-existing relationship with the appointor likely to cast doubt on their independence. I am in no doubt that, now that this spectre has been raised, the new administrators will pursue it thoroughly.

7. The Litigation Threat against Hogan Lovells

176. Finally there is the threat by the Administrators to sue Hogan Lovells. This is another argument which reeks of desperation. The origin of this point is a threat made by Mr O'Connell in his first witness statement that "I have instructed [KaurMaxwell] to write to HL, putting HL and the Applicants on notice of a claim by the Administrators and the Company against them", on the basis the Applicants and Hogan Lovells breached confidence and were negligent by including material in a witness statement and its exhibits "which ought not to have been seen by the Defendants in the Director Litigation".

177. Both of the documents concerned were filed in a redacted form, to avoid anything being made available to the New Directors which might prejudice the Director Claims. Both Hogan Lovells and counsel took part in this process. After issues had been raised by the Administrators' solicitors, both Hogan Lovells and counsel re-reviewed the redactions to ensure that the redaction process had been carried out properly in the first instance. This re-review largely confirmed that the redaction process had been carried out appropriately.

178. The Applicants say that the Administrators' complaints are not well-founded. They give as examples:

    i) The Administrators asserted that correspondence between KaurMaxwell and the Directors' solicitors and a judgment given at, and a transcript of, a hearing in the Director Claims which took place in public and at which the Directors were

represented by both solicitors and counsel, should have been redacted. This is material which was self-evidently already in the possession of the Directors.

ii) The Administrators asserted that a section entitled "The claims against the directors", which was already partially but not wholly redacted, should have been redacted. For the most part, this section simply summarised the nature of the Director Claims, including by quoting from the pleadings. The only part of that section which went beyond simply summarising the proceedings was an opinion expressed by Mr Lloyd that the Director Claims would be undermined were the Directors to succeed in establishing one of their defences. However, this assertion is both not confidential (it is the opinion of a non-party based on the publicly available pleadings) and, in any event, patently obvious (as demonstrated in particular by the fact that the Directors have themselves pleaded this point).

iii) The Administrators asserted that the entire section entitled "Judicial Criticism of the Administrators and KaurMaxwell", which was already partially but not wholly redacted) should have been redacted. For the most part, this sets out the sequence of events leading to the conduct of the Administrators being criticised by ICC Judge Burton as "approaching deplorable", all of which would again have been well known to the Directors. The only unredacted assertion in that section which would not already have been known to the Directors was the note (in the first sentence of paragraph 179) that Mr Lloyd had to make repeated requests of KaurMaxwell to obtain the judgment from the hearing in which that criticism was made. This cannot possibly be prejudicial.

iv) The Administrators asserted that various sections of the Witness Statements which involved discussions as to their fees should be redacted. These are of no relevance to the Director Claims.

179. The only area where Mr Lloyd accepts that there may have been a breach of the rules is as regards the application notice and witness statement in the Extension Application. He accepts that these should have been redacted, not because their disclosure would prejudice the Director Claims (it would not), but because there was an Order in place providing for their confidentiality. This fact was inadvertently overlooked by Hogan Lovells and counsel when carrying out the redaction process because the focus of that process was on potential prejudice to the Director Claims.

180. It seems to me that there is simply no issue here. Even if there were an issue relating to negligence – which on these facts seems extremely doubtful – the idea that it is of any significance, in terms of either size or volume, to BAT and BTI is untenable. It is clear that Mr O'Connell has, in his own mind, conflated BAT and Hogan Lovells into a single malevolent entity, but I very much doubt that either BAT or Hogan Lovells see things that way, and I am highly confident that the idea that the Company might sue Hogan Lovells is not something which gives any possible perception of prejudice on the part of BAT.

181. I am therefore satisfied that none of these issues, taken separately or together, establish that the Applicants have an adverse interest to the creditors as a whole as regards the conduct of this administration. I therefore do not consider that there is any obstacle to administrators who they propose being appointed.

## The Reputation Ground

182. Finally, I should say something about the "reputation" ground. The Administrators in this case argue that their removal would cast a significant shadow over their commercial and professional reputations, and that this is a factor which the court should take into account in considering their removal. Hugh Sims KC considered this point in *Nardelli v Richardson*, and said

> "…the court will not lightly remove its own officer and must pay due regard to the impact on any removal on professional standing and reputation: see *Re Edennote Ltd* [1996] 2 BCC 718 (CA) per Nourse LJ at 725H, referred to in *Sisu Capital* above at [86] and also referred to in *Re VE Interactive Ltd (in Administration)* [2019] BPIR 438 at [35]. I have my doubts as to whether "the impact on any removal on professional standing and reputation" is a factor to take into account, or should be given significant weight, and it does not seem to me to be part of the ratio of the decision of the Court of Appeal in *Re Edennote* (which was to focus on whether or not the office-holder was acting under advice; see at 726C-D). It did not feature in *Re Keypak Homecare Ltd* (1987) 3 BCC 558 where Millett J (as he then was) took the view the office holder had been guilty of complacency. Nor in any of the cases I have read does it appear to have been decisive. Instead, it seems to me that even if removal may resound to the discredit, to some extent, of an office-holder, the court should not shy away from making the order if satisfied there are good grounds for doing so; see Neuberger J in *AMP Music Box Enterprises Ltd v Hoffman* [2002] BCC 996 at 1001H. Office-holders have an important function which they should conduct with independence and professionalism."

183. Mr Isaacs criticises this judgment, and describes it as Mr Sims "going out on a limb". I do not agree. It is entirely correct that the dictum of Nourse LJ formed no part of the ratio in *Edennote*. Mr Sheehan KC submitted that there is no case in which the Court found that it would be appropriate to remove an Administrator, but then decided that because of the impact on reputation it was inappropriate. I think this is correct, if only because it seems to me that a court would be wrong to do any such thing.

184. The removal of an office-holder may well be damaging to the reputation and good standing of that office-holder. However, the fact that an office-holder may suffer such damage is not a reason not to remove him if good cause for that removal can be shown.

## Conclusions

185. Both of the Applicants are properly regarded as creditors of the Company until their proofs are adjudicated. The precise value of their claims will, in both cases, fall to be determined by the Administrator acting quasi-judicially.

186. The fact that the Applicants constitute the majority of the creditors of the Company is a fact to which the court should have regard, but does not mean that their request to

replace the Administrators should be given any special status. As with any request of this kind, the court will only accede to it if they can show that they have good grounds for making it.

187. It is accepted by the parties that the administrators have a conflict of interest. I do not think that the conflict which arises on these particular facts is a conflict of a kind which could be managed by the taking of appropriate measures. The only proper response for the current Administrators is therefore for them to step down.

188. The Applicants seek to show that they have good grounds to have lost faith that the Administrators will in future act solely in the real, substantial and honest interests of the administration. I think they have succeeded in that aim. I am therefore satisfied that a majority of creditors have good grounds for a loss of faith in the existing administrators. In such circumstances the court should order their removal.

189. There are a number of disputes currently ongoing between the Applicants and the Administrators. However, that does not mean that the Applicants are in a position which is fundamentally adverse to that of the body of creditors as a whole. There is therefore no obstacle to the appointment of administrators nominated by them.

190. I am therefore prepared to order that the current administrators be removed, and the new administrators identified by the Applicants be appointed.