Neutral Citation Number: [2016] EWHC 542 (Ch)

Case No: 7489 OF 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 22/02/2016

Before:

MR. REGISTRAR BRIGGS

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Between :

JOHN MCCARTHY	**Applicant**
- and -	
(1) DAVID WILLIAM TANN	**Respondents**
(2) KEITH ALERIC STEVENS	
(acting as joint liquidators of Emerald Meats (London) Limited)	
(3) IVOR DESMOND MARSHALL	

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STUART ADAIR (instructed by **BRABNERS**) for the **Applicant**
JOHN BRIGGS (instructed by **BOYES TURNER**) for the **First and Second Respondent**
JOSEPH ENGLAND (instructed by **FLADGATE**) for the **Third Respondent**

Hearing dates: 16 February 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. REGISTRAR BRIGGS

Mr. Registrar Briggs:

1. The court is asked to decide whether it should extend time for the filing of an appeal against a decision made by liquidators of a company to admit a proof of debt. The appeal notice was served three business days out of time. If the court were to permit an extension of time it is asked to order inspection of company records pursuant to section 155 of the Insolvency Act 1986. The application to extend time is vigorously resisted by the third Respondent and opposed by the first and second Respondents but to a lesser degree.

2. The issues mentioned above have spawned skeleton arguments that combined run to 70 pages, the citation of 23 authorities, 8 witness statements with exhibits, and an expert report with exhibits. The parties estimated the hearing to take 2½ hours. The time estimate was optimistic. Due to a lack of time not all the arguments regarding the second issue were aired. I have taken into account of the lack of time to air the arguments later in this judgment.

3. This is the third application to come before the court concerning the liquidation of Emerald Meats (London) Limited (the "Company"). The applicant, Mr. John McCarthy, is a contributory and creditor of the Company. This application arises out of a letter sent by the first and second Respondents (the "Joint Liquidators") on 1 July 2015 informing Mr. McCarthy that they had admitted a proof of debt submitted by Mr. Marshall (the third Respondent) in the amount of £53,900.68.

Background

4. The Company was incorporated on 31 May 1983 under the Companies Act 1948 and is limited by shares. Its share capital is £50,000 divided into 50,000 ordinary shares of £1-00 each. The Company's business was concerned in imports and distribution of meats. Mr Marshall holds 25,000 shares. Mr. McCarthy and his wife equally hold the other 25,000 shares.

5. The Company held 100 per cent of the shares in a company known as Emerald Properties (London) Limited ("Properties"). The subsidiary owned a property portfolio which included a block of flats at 30 Lancaster Gate, London that is considered valuable. The day to day running of the Company was undertaken by Mr. Marshall. Mr and Mrs

McCarthy lived, and continued to live, in Dublin. Mr. McCarthy explains in his evidence that he and Mr Marshall had a good relationship for many years. However this changed when Mr Marshall replaced the companies' accountant. He says that there was a lack of information flowing from the Company. The lack of information led to a suspicion (of which I make no judgment) that "Mr Marshall was acting fraudulently, that the errors and omissions identified in the accounts were deliberate, and that they were intended to extract value and assets from the Company". Mr. McCarthy refused to sign the filed accounts for year ending 30 September 2009 and the management of the Company slowly ground to a halt. Mr. McCarthy explains:

> "Having also proposed that we liquidate the companies in a Members Voluntary Liquidation in mid-2012 on grounds that we would not have to file any accounts if they were liquidated, on 25 September 2012, Mr Marshall petitioned the High Court for a just and equitable winding up on grounds management was deadlocked in these regards. I defended the winding up petition and I issued section 994 unfair prejudice proceedings contending there were more reasonable remedies available to the court rather than liquidating the companies. On 19 July 2013 the High Court made an order for the winding up of the Company and stayed the unfair prejudice proceedings."

6. I have made orders for interim distributions as the Joint Liquidators have reported that there will be a surplus in the liquidation in excess of £5m.

The proof of debt and the late application

7. Mr Tann has given evidence on behalf of the Joint Liquidators. Mr. Marshall and Mr. Tann are both agreed as to the sequence of events leading to the submission of the impugned proof of debt. Mr. Marshall says:

> "I originally filed a proof of debt dated 18 September 2014 which quantified the credit balance of my director's loan account at £201,482. This figure was included as, at the time, it was the most up to date figure available and was taken from the last filed Company audited accounts, dated 30 September 2008.
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> Following submission of my original proof of debt dated 18 September 2014, I had a meeting with Toby Mason of Wilkins Kennedy in mid-January 2015 regarding my proof of debt. In early February 2015 I was then told that the

> liquidators' investigations and review were complete and I was asked to submit an amended proof of debt quantifying that claim at £53,900.68.
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> This was done and the amended proof of debt was sent to the liquidators on 3 February 2015 quantifying the claim in relation to my director's loan account at £53,900.68…….On 1 July 2015 I received a letter from David Tann dated 30 June 2015 confirming that the liquidators had admitted my claim relating to my director's loan account in the amount of £53,900.68.

8. Mr. Marshall resists the application to appeal out of time on the basis that Mr. McCarthy has, in his eyes, tried to delay the winding up which has resulted in increased costs and time. He explains his position in his first witness statement:

> "The application [to appeal out of time] was made the day before he received his distribution of £20,000 (on 30 July 2015), at a time when he was in exactly the same financial position as he had been for the entire period during which he was aware the liquidators had admitted my claim. Accordingly, Mr McCarthy's justification for the delay based on lack of legal representation and money does not ring true. I have suffered prejudice in the form of extra cost in having been forced to apply to be joined to these proceedings when I ought to have been a Respondent from the outset. In addition, his various applications have caused me, the liquidators and the liquidators' solicitors (and therefore the Company) to incur unnecessary costs in dealing with them. The more time and money spent responding to Mr McCarthy's applications means the more the assets of the Company are being rapidly depleted. Finally, I do not see why I should not be able to benefit from the protection of deadlines and be safe in the knowledge that if Mr McCarthy misses a deadline then that is the end of the matter. As it is, I am constantly on the hook."

9. Those are powerful reasons why the time limits set out in the Insolvency Rules 1986 should not be extended by the court. However the statutory mechanism provides the court with a discretion to extend.

10. To make good his submission that time should not be extended, Mr. England on behalf of Mr. Marshall says that in terms of delay, it is 5 years since trading ceased, and over 2

years since liquidation and the appointment of the Joint Liquidators. As regards the costs to date the Company has incurred £250,000 in Joint Liquidators' fees and over £145,000 in their solicitor's fees. Mr. McCarthy's actions only increases the delay and costs reducing the final dividend to members.

11. Mr. Marshall says that he accepts the Joint Liquidators' decision to significantly reduce his proof of debt claim. Mr. McCarthy should also accept their decision. The evidence of the Joint Liquidators is that they have thoroughly investigated the proof and that any disclosure order would be in vain as all documents have been considered properly. Mr. McCarthy on the other hand says that he cannot file full evidence in support of his application to appeal the decision until he has inspected the Company's books and records. Mr. Marshall responds:

> "He has always had access to everything and his investigations have not uncovered anything. I believe his request to access is nothing more than a fishing exercise designed to further delay the liquidation….Mr McCarthy has not raised any new and substantive points in his evidence; it is simply a repeat of matters that were raised in his evidence regarding the winding up petition. All of these points have been previously dealt with by the liquidators or this court. The appeal is clearly not proportionate. The Company is solvent and it is anticipated that there will be a surplus in the liquidation of in excess of £5.5 million. The amount being challenged is just over £50,000, a very small fraction of the total assets of the Company and the parties are being forced to expend thousands of pounds entertaining another of Mr McCarthy's unfounded applications".

12. As a result of the evident break-down of trust between Mr. McCarthy and Mr. Marshall, it is not surprising that they are unable to agree on how the liquidation should be conducted. On one hand Mr. Marshall wants the Company wound up and a distribution as soon as possible. On the other hand there is at least a danger that Mr. McCarthy views the liquidation as a forum in which he can conduct dispute resolution. The Joint Liquidators, as Mr. John Briggs says, are caught in the middle of the dispute. In such circumstances the court is, in my judgment, entitled to give more weight to the evidence provided by the Joint Liquidators as they have no personal knowledge of the events prior to liquidation

and have no personal interest in the outcome other than a desire to conduct an efficient and professional liquidation. Mr. Tann thinks that Mr. McCarthy is acting unreasonably, and comments:

> "I am seriously concerned that if time is extended in respect of Mr McCarthy's application there will be a good deal of expense all round and great delay in resolution of matters which have cost both Mr Marshall and Mr McCarthy a lot of money. Mr McCarthy's unreasonable position has caused him to be liable for a £140,000 costs bill in the winding up proceedings. To this has had to be added my costs relating to his unsuccessful challenge to my partial rejection of his proof and his substantial failure in respect of his s 155 application on those proceedings"

13. Mr Tann adds:

> "I must emphasise that I am fully aware of my obligations by virtue of my appointment as a Liquidator of the Company and also as an officer of the Court, which I take very seriously. I am satisfied that as full and thorough an investigation of both Mr McCarthy and Mr Marshall's claims as is reasonably practicable in the Liquidation has been carried out and the right decisions reached."

14. Mr. Tann concludes that Mr McCarthy has been provided with many opportunities to inspect the Company's books and records and a further opportunity will not take matters further. Further he is concerned that Mr. McCarthy has levelled criticism at the Joint Liquidators regarding their fees. He says Mr. McCarthy wants to have his cake and eat it. On the other hand Mr. McCarthy says that Mr. Tann fails to draw a proper distinction between past applications and the present application. He says that the Joint Liquidators permitted him to inspect the Company's books and records in May 2014. He did not take copies of documents and he was not aware that he would be challenging a future decision made by the Joint Liquidators.

15. Mr. McCarthy's rebuttal of Mr. Tann and Mr. Marshall's evidence is endorsed by an expert auditor's report he obtained from Grant Thornton. On the dispute between him and Mr. Marshall he says that he has provided compelling evidence of a fraud committed by Mr. Marshall in the period prior to October 2007. He points to the accounts for the year

ending 30 September 2008 signed by Mr Marshall's partner Ms Turner, disclosing a £66,435 dividend paid in that financial year. He says he knew nothing about it and received no dividend himself. The expert report discloses debit entry anomalies, queries a journal debit adjustment, raises issues regarding a US dollar and Euro account and asks whether Mr. Marshall in fact owes money to the subsidiary. In addition the Company's Aston Martin DB5 was apparently transferred to Mr Marshall (and then onto his mother) for no consideration: Mr. McCarthy believes it is worth a lot of money. The report continues in detail which is not worth repeating here. It is sufficient to say that the report of Grant Thornton raises issues which require in my judgment some investigation as contributories are bound by one common cause: a fair and proper distribution of the Company's assets.

Legal analysis

16. As touched upon above the court has a discretion to extend time. The jurisdiction is provided by the Insolvency Rules 1986 (the "Rules"), Rule 4.83 which provides:

> "A contributory or any other creditor may, if dissatisfied with the liquidator's decision admitting or rejecting the whole or any part of a proof, make such an application within 21 days of becoming aware of the liquidator's decision."

17. The Court has recently considered the modern approach to an application for an extension of time to challenge the rejection [or admission] of a proof of debt in *Re Lehman Bros International (Europe) (in administration)* [2014] BPIR 1259 where the Judge considered *Re Legal Equitable Securities Plc (in liquidation)* [2010] BPIR 1151 in which Lewison J cited the Judgement of HH Judge Norris QC in *Warley Continental Services Ltd v Johal* [2004] BPIR 353 where he held:

> "….weight must be given to the need for certainty in a collective insolvency proceeding and also to the fact that the Act imposes a very short time limit in order to achieve that objective."

18. In *Re Metrocab Ltd* [2010] 2 BCLC 603 Philip Marshall QC, sitting as a Deputy Judge of the High Court, held that CPR 3.9 provides the necessary guidance for application to extend time:

> "The matters to be considered under CPR 3.9 are 'all the circumstances of the case' including (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions and court orders; (f) whether the failure to comply was caused by the party or his legal representative; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party. In the case of a procedural appeal the court would also have to consider item (g), 'whether the trial date or the likely trial date can still be met if relief is granted'. I take each factor in turn."

19. In *Lehman Bros (supra)* David Richards J explained why CPR 3.9 is relevant:

> "The power of the court to extend the time for an application to challenge the rejection of a proof is conferred in this case by r 12.9(2), in force at the commencement of the administration of LBIE. It provided:
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> > 'The provisions of CPR rule 3.1(2)(a) (the court's general powers of management) apply so as to enable the court to extend or shorten the time for compliance with anything required or authorised to be done by the [Insolvency] Rules.'
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> This rule was replaced in 2010 by r 12A.55(2) in identical terms. The power to extend or shorten the time for compliance with provisions of the Insolvency Rules extends to all the provisions of the Insolvency Rules, not just those concerned with the commencement or conduct of litigation. Applications for an extension of time made under this rule may therefore give rise to an issue as to whether and, if so, to what extent the other provisions of the CPR relevant to the exercise of a power to extend time, and in particular the provisions of CPR 3.9, and the authoritative guidance provided by decisions of the Court of Appeal,

> apply to an application for the extension of time made under this provision in the Insolvency Rules. Since then, CPR 3.9 has been revised to give effect to the recommendations of Sir Rupert Jackson in his Review of Civil Litigation Costs. As explained in the judgment of the Court of Appeal given by Lord Dyson MR in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795, the purpose of the reformulation of CPR 3.9 was to give effect to a tougher approach to delays in litigation and non-compliance with orders and rules. Although CPR 3.9 requires the court to consider, on an application for relief from any sanction, 'all the circumstances of the case, so as to enable it to deal justly with the application', only two factors are then specified: first, the need for litigation to be conducted efficiently and at proportionate cost and, secondly, the need to enforce compliance with rules, practice directions and orders. The Court of Appeal held that these considerations should now be regarded as of paramount importance and be given great weight. Where the non-compliance is not trivial and there is no good reason for it, the expectation generally will be that relief from sanctions will be refused. Inadvertent delay by the applicant or its solicitors will not be a good reason for these purposes."

20. It is accepted by Mr. McCarthy that he is in breach of the time limit for appealing under the Rules. His breach is 3 working days. In *Lehmans* the breach was 12 months. Since the judgment in *Lehmans Bros* the Court of Appeal has reconsidered the guidance it gave in *Mitchell v News Group Newspapers Limited* and provided, if not a new emphasis a different approach to the sanction test. In *Denton & Ors v TH White Limited* [2014] EWCA Civ 906 the Court of Appeal considered three appeals: "*Denton*", "*Decadent*" and "*Utilise"*. In the first of these cases the claimant served further witness statements 5 months after the time ordered for exchange and one month prior to trial. The judge permitted late service due to a change of circumstance between July and December of the relevant year. In *Decadent* the Claimant failed to comply with an unless order for payment of court fees. The cheque for payment was sent on the final day for payment by DX. It was expected by the claimant to arrive the day after the deadline. The cheque was lost either by the DX or by the court. The failure to pay was not noticed until a pre-trial review. The claim was struck out for breach of order. In *Utilise* there were 2 breaches. The first was a costs budget which was filed some 45 minutes late. The second was that the Claimant informed the court 13 days late of the outcome of negotiations. The District

Judge held that the second breach prevented the first breach being trivial (which it would otherwise have been). An appeal to a Circuit Judge was unsuccessful.

21. The Master of the Rolls in *Denton & Ors* first set out the CPR provision, rule 3.9:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders.

22. He then explained that the court should address an application for relief from sanctions in three stages: "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"".

23. It has been argued before me on behalf of Mr. Marshall that the court in this case should consider whether the breach is material. The test of materiality was proposed by the Law Society and Bar Council intervening in *Denton & Ors*. Having scorned semantics the Master of the Rolls said:

> "It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most

obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance."

24. The Court of Appeal was concerned to give guidance in clear and simple language and not cloud its guidance by providing alternative tests as has been suggested. The court has to ask whether the breach is serious or significant at stage one. Lord Dyson said "at the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought." If the breach is not serious or significant "relief from sanctions will usually be granted". Finally, Lord Dyson said of the application by the Courts of the relief provision that judges were "approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*…A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight." In my view materiality should only be used to help inform the court as to whether the breach is serious or significant. It is not an alternative test.

25. The particular cases being considered by the Court of Appeal in *Denton & Ors* provide working examples of what are serious or significant breaches. The breach in *Denton* -the late service of witness statements one month before trial- were significant because the trial date had to be vacated. The conduct of the litigation was disrupted and it was not accepted that the reason for the breach was reasonable or good. The appeal was allowed in *Decadent* even though all failures to pay court fees were said to be serious. The late payment did not prevent the litigation being conducted efficiently and at proportionate cost. The Court of Appeal also allowed the appeal in *Utilise*. The breach of filing the costs budget 45 minutes late was neither serious nor significant: "the breach did not imperil any future hearing date or otherwise disrupt the conduct of this or other litigation." As regards the failure to inform the court of the outcome of negotiations 13 days late, such a breach was not serious or significant. It did not disrupt the litigation: "[It was] neither serious nor significant, [and could not have] turned what was neither a serious nor a significant [earlier] breach into something worse."

26. In *Mischon de Reya v Caliendo and Barnaby Holdings* [2015] EWCA Civ 1029 Antonio Caliendo and Barnaby Holdings LLC claimed loss as a result of Mischon de Reya's negligence. The issue for the Court of Appeal was whether Hildyard J was wrong to grant relief from sanction pursuant to CPR 3.9. The claimants had failed to serve notice on Mischon de Reya of the existence of a conditional fee agreement and an after the event insurance policy. The Judge set out the three stage approach focusing on the breach, the consequences of the breach and not complaints emanating from the nature of the funding arrangement. Having taken into account the automatic sanctions for breach and the weak link between the breach, delay and prejudice, the first instance tribunal was in favour of granting relief as the breach was not serious or significant. The Court of Appeal agreed.

Stage one- is the breach serious or significant?

27. It is submitted by Mr. England that the failure to comply with the Rule 4.83(2) of the Insolvency Rules 1986 is a serious and significant breach. He argues that the seriousness of the breach arises as a result of a need for certainty in connection with the collective process of insolvency. This is a similar submission to that advanced to HHJ Norris QC in *Warley Continental Services Limited* (supra) where the company was in compulsory liquidation and the application was made pursuant to section 376 of the Insolvency Act 1986. Mr. John Briggs for the Joint Liquidators argues that the need for certainty in a collective process is paramount and a delay in dealing with the appeal will be prejudicial to the outcome of the liquidation. He says that the prejudice arises from further delay that will ordinarily arise in respect of an appeal, an increase in liquidation costs and legal fees, and in any event to permit the application would be to expose the liquidation of the Company to inefficiency. In terms of the failure, Mr. Briggs accepts that the number of days in excess of the 21 day period for filing an appeal was not excessive but says there is no excuse for the delay.

28. Mr. England, acting for Mr. Marshall, submits that the time limits for an appeal against decisions on proof are strict. If this were the case there would be no jurisdiction to consider whether or not the breach under consideration was serious and/or significant. There is no authority to support this contention. I find it unconvincing. Further section 376 of the Insolvency Act 1986 (considered in *Warley Continental Services Limited*) and Rule 4.3 of the Insolvency Rules 1986 do not have a restricting provision cutting down

the jurisdiction to extend time in relation to Rule 4.83. I am unpersuaded by this argument.

29. I also find unconvincing the argument that all breaches of time limits set out in the Rules or in court orders are serious. The Master of the Rolls in *Denton & Ors* found that even though there had been a breach of a time limit the failure could not be characterised as serious: the breach in *Utilise* of filing the costs budget 45 minutes late was not serious. Further it was not significant because it did not disrupt the conduct of the litigation, or other litigation. By contrast the late filing of witness statements close to trial leading to an adjournment did disrupt the conduct of the litigation and could therefore be categorised as both serious and significant. The issue in each case is one of degree.

30. In the alternative, Mr. England submits that the facts of this case give rise to prejudice as there is a need for the liquidation to progress. This argument and the argument that Mr. McCarthy has provided no proper reason for delay are matters to be dealt with at stage two and three of the inquiry.

31. In my judgment the argument advanced by the Joint Liquidators and Mr. Marshall that further investigations into the proof of debt and the appeal will lead to a delay in the winding up and increased costs fail to observe the guidance given in *Denton & Ors*. Such complaints relate to an assessment not of the seriousness and significance of filing an application 3 business days out of time but on Mr. McCarthy having the right to appeal. Mr. McCarthy accepts he was aware of the deadline but was unable to meet it.

32. Mr. McCarthy wrote to the Joint Liquidators on the day of expiry seeking an extension of time. The Joint Liquidators were aware that Mr. McCarthy would appeal. Mr McCarthy claims that the proof of debt is so wrong that instead of the Company owing Mr. Marshall money, Mr. Marshall owes the Company money. Mr Tann appears to accept in his third witness statement an error amounting to £45,600 in respect of the allowance made for Mr Marshall's salary. This would reduce the proof from £53,900 to £8,300. In *Mischon de Reya v Caliendo* the merits (of lack of merits) of the underlying claim did not feature in any argument before the Judge, nor as any ground of appeal. That does not mean that

prospects of success are not relevant. There would be little point in making an order extending time if the appeal was hopeless. The acceptance by Mr. Tann is enough of itself to demonstrate that an appeal has real prospects of success and an order made extending time would not be made in vain.

33. Other factors that lead me to conclude that an order would not be made in vain include Mr McCarthy's claim that the Joint Liquidators have declined to take any action in respect of a transaction whereby Mr Marshall purported to sell an Aston Martin DB5 to his elderly mother for £20,000, despite the fact that the price of £20,000 represents, in his view, an undervalue. The price has never been paid, the ownership of the vehicle has never been transferred into her name at the DVLA and the Company continued to pay the costs of the insurance and maintenance of the vehicle. These are matters which would be relevant to consider in relation to the proof of debt as a set off is likely to apply. Mr. McCarthy also claims that there has been a failure to question the correctness of the balances of Mr Marshall's loan account shown in the Company's 2007 and 2008 accounts, despite admissions by Mr Marshall in a witness statement that he has used company funds to pay personal expenses and that the balances of his loan account need to be reviewed. The Joint Liquidators have been content to rely on the fact that the accounts were signed by both directors. In the teeth of an admission or something that strongly resembles an admission in the witness statements I take the view that there should be some investigation of the loan accounts.

34. In addition Mr. McCarthy says that the Joint Liquidators ignored a memorandum written by Mr Jonathan Reynolds, an accountant formerly employed by Wilkins Kennedy of the Joint Liquidators' firm, stating that he had identified transfers of $231,000 from the Company's dollar account to Mr Marshall's personal account in the United States and withdrawals by Mr Marshall of €50,000 from the Company's euro account. Mr Reynolds noted that although Mr Marshall had written on the documentation relating to the euro transactions that the withdrawals should be posted to his directors' loan account, there did not appear to be any record of such transaction in the SAGE accounting records.

35. It is understandable that the Joint Liquidators wish to be seen not to be taking sides in the liquidation. They are right to observe impartiality. However in my judgement where one

of the three parties interested in the outcome of a liquidation raises what appear to be very real concerns that may affect the final distribution, those concerns should not be treated lightly. If in doubt the Joint Liquidators may seek directions from the court.

36. In identifying and assessing the seriousness and significance of the "failure to comply with any rule, practice direction or court order" engaging CPR Rule 3.9(1) I have regard to the following (fact sensitive) factors:

    36.1. The breach is for a short period of time;

    36.2. A trial date is not going to be lost;

    36.3. The hearing under consideration is not a final hearing;

    36.4. The conduct of any litigation is not disrupted;

    36.5. The conduct of the liquidation is not disrupted as a result of the breach;

    36.6. There is no causal connection between the application to extend time by three business days and any or any significant increase in liquidation costs. The Joint Liquidators did not have to oppose the application;

    36.7. The Joint Liquidators hold the assets of Company on a statutory trust for the benefit of the creditors and contributories (see *re Cases of Taffs Well Limited* [1992] Ch 179). There are no creditors. They must act in the interests of the contributories as a class;

    36.8. Unlike the *Lehmans* insolvency or most other insolvent liquidations there are a very few interested parties in the outcome and no third parties; and

    36.9. This is a solvent liquidation in which the Joint Liquidators are able to recoup their fees and remuneration subject to a proper account and compliance with the relevant practice direction.

37. In my judgment whether employing the test of materiality as a guide to seriousness, or otherwise determining the seriousness and significance, I conclude that the breach under consideration is not a serious and significant violation impeding or disrupting the proper conduct of the liquidation (or litigation). If the breach is not serious or significant given the circumstances I do not need to consider stage two or three of the guidance provided by the Court of Appeal in *Denton & Ors* and make this judgment longer than it need be.

Inspection of documents

38. The Court has a discretion under section 155 of the Insolvency Act 1986 to permit a contributory to inspect the books and records of a company at any time after the making of a winding up order. The Courts have considered the section and its predecessor on a number of occasions. Following *re North Brazilian Sugar Factories* (1887) 37 Ch. D. 83; *DPR Futures Ltd* [1989] BCLC 634 and *Re a Company, (No 005374 of 1993),* [1993] BCC 734 the Court has to decide (i) whether the exercise of the power under section 155(1) of the Insolvency Act will be for the purpose of the winding up; (ii) whether making the order sought would be just; and (iii) what if any order should be made.

39. The Joint Liquidators are under an obligation to fulfil their statutory functions. One their functions is to consider and decide upon proofs of debt prior to making distributions. Issues that are connected with the Joint Liquidators functions are related to the winding up of a company. Appeals of a proof of debt involve the decision making of the office-holder. Although the office-holder may (and often does) stand in neutral outcome territory the office-holder recognises that their decision may be scrutinised by the court. If the proof of debt in this case is successfully challenged there will be a greater distribution to those interested in the winding up. Those interested in this matter are the members only, who are to be treated as a class. In my judgment section 155(1) of the Insolvency Act 1986 is therefore engaged as the appeal falls within the qualification or the requirement that the order can only be made for the purpose of the winding up: *Re Sunwing Vacation Inc and others* [2011] EWHC 1544.

40. The evidence of Mr McCarthy refers to a number of issues which appear to require investigation. It will be just to permit inspection as it will partially assist to deal with the main reason for the company entering liquidation. Further to make an order is just as the beneficial result for Mr. McCarthy is indirectly beneficial to the contributories as a class.

41. As regards the scope of the order it has been argued that the application is not sufficiently specific. The order I make is that Mr McCarthy including his nominated expert accountant may have access to the Company's books and records for the purpose of challenging the proof of debt. I am conscious that there was insufficient time to hear argument on the scope of inspection and shall therefore give the parties liberty to apply. My initial view is that inspection is to be restricted to the matters set out in the report of Mr. Jacobs although I can see argument for restricting inspection further.

42. I invite the parties to agree an order dealing with the scope and timing of inspection.