Neutral Citation Number: [2020] EWHC 3078 (Ch)

Case Nos.: CR-2019-006231
CR-2019-006229
CR-2019-006233
Teams Remote Hearing

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF GLINT PAY LIMITED (IN ADMINISTRATION)
IN THE MATTER OF GLINT PAY SERVICES LIMITED (IN ADMINISTRATION)
IN THE MATTER OF GLINT PAY UK LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Date: 18/11/2020

Before :

I.C.C. JUDGE JONES

- -

Between :

(1) GLINT PAY LIMITED
(2) GLINT SERVICES LIMITED
(3) GLINT PAY UK LIMITED

Applicants

-and-

(1) JASON DANIEL BAKER
(2) GEOFFREY PAUL ROWLEY
(in their capacity as the former joint administrators of Glint Pay Limited, Glint Pay Services Limited and Glint Pay UK Limited)

Respondents

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Mr Jeremy Richmond Q.C. (instructed by **Greenwoods GRM LLP**) for the **Applicants**
Ms Lexa Hilliard Q.C. (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**

Hearing dates: 5 November 2020

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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.

...........CHJ – 18/11/20.................

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) The Applications

1. The proposition underlying the three Applications before me is that the Respondents were not discharged from liabilities owed to the Applicants in respect of their actions as administrators of those three companies by the Orders for discharge ("the Orders") made on 6 December 2019 under ***paragraph 98 of Schedule B1 of the Insolvency Act 1986*** (to be referred to as "***Paragraph 98***", "***Schedule B1***" and "***the Act***" respectively) pursuant to the Respondents' applications. Alternatively, that they should not have been and should not now be discharged insofar, at least, as the discharge would prevent the Applicants' claims.

2. The Applications produce the following issues:

   (i) whether the Applicants' claims that the Respondents were not validly appointed because their appointments were prohibited by ***paragraph 16 of Schedule B1*** fall outside the ambit of ***Schedule B1*** and, therefore, ***Paragraph 98*** because such appointments would be void;

   (ii) if so, whether there are alternative claims based upon the case that the appointments were valid and, therefore, ***Paragraph 98*** applies;

   (iii) if the primary and/or alternative claims are subject to ***Paragraph 98***, whether these are claims which should proceed under ***paragraph 75 of Schedule B1*** pursuant to the one exception to discharge provided expressly by ***Paragraph 98***;

   (iv) if the primary and/or alternative claims are subject to ***Paragraph 98***, whether ***paragraph 74 of Schedule B1*** is relevant to a decision of discharge;

   (v) if, or to the extent that discharge under ***Paragraph 98*** applies to the Applicants' claims, whether the Orders should be construed as excluding those claims from discharge by reason of their notification to the Respondents and/or the issuing of a claim form before the specified date of discharge; and

   (vi) if not, whether the date specified in the Orders for discharge to take effect should be extended to exclude the Applicants' claims until they are determined, whether that extension is by variation or discharge permitted by the Orders or by a decision to rescind, vary or review the Orders under ***Rule 12.59 of the Insolvency (England and Wakes) Rules 2016*** (respectively to be referred to as "***Rule 12.59***" and "***the Rules***") or otherwise.

   All this arises in the context of claims valued by the Applicants at about £21.4 million.

B) Paragraph 98 – An Introduction

3. ***Paragraph 98*** provides that when a person ceases to be an administrator he will be discharged from all liabilities *"in respect of any action of his as administrator"*

accrued before the discharge. This will occur whenever an administrator vacates office (by reason of resignation, death or otherwise) or is removed from office or because the appointment ceases to have effect.

4. There is only one express exception to that discharge within ***Paragraph 98***. It applies to an application under ***paragraph 75 of Schedule B1*** for the examination of the administrator to investigate and potentially establish liability for specified acts of misfeasance and for misfeasance generally. The application can still be made despite discharge but only with permission of the court.

5. Otherwise, the remainder of ***Paragraph 98*** is concerned with when the discharge will take effect. It deals with that in the context of three circumstances:

   a) The first being that following the death of an administrator, discharge will occur the day the notice of death is filed with the court. The automatic effect of this provision is attributable to the fact that the appointment as office holder is a personal one. The administration will therefore cease unless there is another administrator or, as is to be expected, the administration is continued by a replacement office holder pursuant to ***paragraphs 90 to 95 of Schedule B1***.

   b) The second concerns vacation of office of an appointment under ***paragraph 14 or 22 of Schedule B1*** (i.e. by the holder of a qualifying floating charge, the company or the directors). For those appointments, the date of discharge will be decided by those who have an interest in the outcome of the administration. Namely: (i) if the administrator stated in the proposals the belief that there is sufficient property to result in a distribution to the unsecured creditors, the creditors' committee or the creditors should there not be a committee; alternatively (ii) if the proposals state the belief that there is insufficient property to achieve that result (other than by virtue of ***section 176A(2)(a) of the Act***, applying the prescribed part), the secured and potentially preferential creditors. That is because they are the only relevant creditors with an interest in the outcome of the administration,

   c) The third is when there is discharge by court order, which can be made *"in any case"*. In other words, whether the other two circumstances would otherwise apply or not. Discharge will take effect at a time specified by the court.

6. It is apparent from this scheme that a court order may specify the effective date if no notice of death is filed or no decision is made for an appointment under ***paragraph 14 or 22 of Schedule B1***. It is also to be implied that any date of discharge provided under the first two circumstances can be superseded by order of the court. Subject to the need for finality, the court's unfettered discretion presents an element of flexibility whenever a court is to specify the date for discharge, recognising that liabilities may not be foreseeable or for good reason may not be raised or considered when the application for discharge is heard. It is an element which exists in the context of the administrator no longer being in office and, therefore, no longer having control over the assets of the company for the purposes of the administration including the payment of costs and expenses. An administrator who vacates office is protected to a degree by the statutory charges prescribed by ***paragraph 99 of Schedule B1***. These secure remuneration and expenses in priority to floating charges but not in priority to any statutory charge under ***paragraph 99(4) of Schedule B1*** for sums payable in

respect of a debt or liability arising out of a contract entered into before the administrator's appointment ceased including liabilities arising under adopted contracts of employment as specifically provided for in ***paragraph 99(5) of Schedule B1***.

C) The Facts

7. The Applications being determined on written evidence and this hearing being for the specific purpose of addressing discharge, the general approach must be that disputed facts will not be determined subject to the usual exceptions. Equally, this judgment will only address matters specifically relevant to the Applications.

8. The Applications are made, the Applicants submit as their primary case and the Respondents as the sole case (a matter to be addressed below), on the basis that the appointments of the Respondents were invalid because the floating charge on which the appointments relied was unenforceable. Ms Hilliard Q.C. on behalf of the Respondents has challenged the "bizarre" nature of this claim but the reality is that it cannot be decided at this hearing that the claim has no merit or insufficient merit to satisfy a strike out or summary judgment test. This decision must be made on the basis that the case as pleaded is an arguable case.

9. It might nevertheless appear strange to an observer that such claim exists when the administrations produced successful exits, namely the Applicants' rescue as going concerns. The Respondents through Ms Hilliard Q.C. emphasise that point. There may be much to be said on this topic should the claims continue but for these purposes it is sufficient to refer to the following passages from the witness statement of Mr Cozens, who describes himself as *"the Chief Executive Officer and founder of the Applicants"*, in support of the Applications as the Applicants' explanation:

> *"9. … By the time of its Administration, Glint had over 35,000 account holders, had just launched in the United States, and had raised over £15m from investors including Sprott, TOCOM, Bray Capital and NEC Capital Solutions Limited. At the time that the matters below occurred, Glint was seeking further investment at a sum which would have valued it conservatively at that point at between £30m-£45m.*
>
> *10. Despite this, each of the Companies were placed into administration on 18 September 2019 ("the* ***Administration****"). The Respondents were appointed as administrators of the Companies by NIVEN Alpha Pte Ltd ("****Niven****"), a purported creditor of the Companies. It is the Applicants' case that the circumstances under which those Companies were placed into administration establish a clear prima facie case of wrongdoing on the part of the Administrators, along with various third parties."*

10. A claim form was issued on 23 December 2019. The Claimants include Mr Jason Cozens and Ms Haruko Fukuda as well as the Applicants. They are joined in their capacity as shareholders of the Applicants. Mr Richmond Q.C., instructed on behalf of the Applicants, describes it as a "protective" claim form. Protective or not, its brief details of claim allege claims under ***paragraphs 74 and/or 75 of Schedule B1***, misfeasance, breaches of fiduciary or other duties, breaches of statutory duty and/or other tortious duties including an unlawful means conspiracy. The bases for those claims being the circumstances of the Respondents' appointments, including their

validity, and their conduct in relation to the administrations and to their exits on 19 November 2019.

11. Recently provided, draft Particulars of Claim claim damages and/or equitable compensation for breach of duty and trespass in the sum of £21.4 million, general/special damages as listed, damages for conversion and/or an account of profits or all additional necessary accounts and inquiries. This claim is by the Applicants only. Mr Richmond Q.C. explained that it is now accepted that those rights of action do not belong to shareholders. Therefore, Mr Jason Cozens and Ms Haruko Fukuda are no longer to be considered claimants.

12. The draft claims the Respondents' appointments were in breach of ***paragraph 16 of Schedule B1*** and are based upon a variety of particulars relating to the reasons why under the terms of the floating charge it was not enforceable. These include a claim of improper and collateral purpose and a challenge to an assignment. They are advanced to reach the conclusion that the appointment was invalid. It is alleged that the purported administrators acted in breach of statutory duty by failing to ensure a valid appointment and/or to apply to the court to terminate the administrations. Their particularised actions as purported administrations involved trespass and conversion. It is also claimed that they breached fiduciary and/or common law duties owed to the Applicants as purported administrators. It is asserted that such breaches also resulted from the purported administrators acting in breach of an agreement with the consortium of shareholders who financed the rescue of the companies as going concerns. Breaches of such duties are also alleged to have been brought about by the manner of exit, by failing to secure funding and in dealings concerning their fees.

13. The Respondents' previous Applications for discharge (which also addressed remuneration) heard on 6 December 2019 arose from their decision that the companies would be rescued imminently as solvent going concerns through funding by a shareholder consortium. The administrations' objectives having been achieved, the exit route would be under ***paragraph 80 of Schedule B1*** by the filing of notices with the court and Registrar of Companies.

14. The evidence in support of the Respondents' Applications included the statement that there was no knowledge of any challenge to the applications and it was anticipated they would be unopposed. This conclusion and opinion had been reached in the context that all creditors' claims would be paid in full following exit and no objections had been received in respect of the proposals for the administrations. The Respondents' evidence was that they had no knowledge of any claims against them arising out of their actions as administrators except for one, by Niven Alpha Pte Ltd and it was no longer a creditor.

15. That evidence also informed the court (my underlining):

> *"As outlined above, the Administrators have determined that a Solvent Rescue is achievable in respect of each of the Companies and will be filing their Exit Notices imminently (and indeed by the date on which these Applications are heard, the Administrators anticipate that they will no longer be in office). Therefore, the Administrators seek an order from the Court to be discharged from liability in respect of their acts or omissions in the administrations of each of the Companies and otherwise in relation to their conduct as*

> *administrators of each of the Companies pursuant to paragraph 98 of Schedule B1 to the 1986 Act with effect from 28 days after the termination of each appointment save in respect of any claim notified to the Administrators by that date."*

16. That saving ("the Saving") was consistent with the information previously sent to creditors within the Respondents' progress reports. It was proposed in the evidence explaining that whilst views of creditors had been sought by the proposals made available just under a month before the hearing date, the date required for responses would not expire until after the future, intended administrations' exit dates. Therefore, there was potential for objection to the discharge to be received after the hearing.

17. The First and Final Progress Report for the period 18 September 2019 to 19 November 2019 at Section 2 states as follows (my underlining):

> *"As explained above, because the Decision Date has not yet been reached, the Administrators will be seeking an order from the Court to be discharged from liability in respect of their acts or omissions in the administrations of each of the Companies and otherwise in relation to the conduct as Administrators of each of the Companies pursuant to paragraph 98 of Schedule B1 to the Act with effect from 28 days after the termination of their appointment save in respect of any claim notified to the Administrators by that date."*

18. The hearing was originally listed for 23 January 2020. It was re-listed as a result of correspondence from the Respondents' solicitors relying upon the merits of drawing a line under the administrations as soon as practicable following the solvent rescue, a matter *"of fairness, [to] all parties"* and also referring to counsel's commitments.

19. The 6 December 2019 Orders did not include the Saving. Each reads (my underlining):

> *"2. pursuant to paragraph 98(2)(c) of Schedule B1 to the Insolvency Act 1986, the Administrators and each of them be discharged from liability in respect of any action or omission as Administrators in the administration of the Company with effect from 00:01 on 25 December 2019".*

20. There is an issue whether or to what extent the Applicants gave notice of their claims before 6 December 2019. The Applicants rely upon evidence from Mr Cozens of a meeting on 19 September 2019 and upon solicitor's correspondence both before and after the hearing. For reasons which will appear below, I do not consider that this decision should turn upon this area of dispute.

21. There is also an issue whether the Applicants had notice of the hearing and were able or ought to have attended. The evidence of Mr Cozens can be summarised as being that the Applicants were not served with sealed copies of the Applications and were unaware of the hearing date until the morning of 4 December 2019. Therefore, they were *"left in an impossible position as a result of the tactics resorted to by the Respondents during the Administration"*. I also do not consider that this decision should turn upon this area of dispute. The reasons will become apparent.

D) Submissions

22. The submissions were (in the best possible sense) wide-ranging. Therefore, I will set out a summary of each side's case and refer to specific submissions (expressly or not) within my decision insofar as I need to do so.

23. Mr Richmond Q.C.'s submissions were made on the basis that the discharge orders on their true construction do not prevent the Applicants' claims. That is because the time provided before discharge would be effective, namely between the date of the Orders and Christmas Day, was intended to allow claims to be notified or commenced. As a result, it is to be implied that any such claims are excluded from the discharge. He observes and prays in aid that this is also consistent with the representations made within the information provided to creditors in the progress reports and within the request for the Saving in the evidence in support of the applications. It is also consistent, he submits, with the court's normal practice.

24. In the alternative, he submits that the date when discharge takes effect should be extended upon the hearing of the Applications. This could also be achieved by the Orders being rescinded, amended or reviewed pursuant to ***Rule 12.59***. Whichever route is applied, he submits the result will be the correct one when: (i) the nature of the claims were identified to the Respondents before their applications for discharge were made; (ii) creditors had previously been informed by the progress reports and the court was informed by witness statement that the discharges would be subject to the exclusion of claims notified before the discharges took effect; (iii) it is the practice of the court in any event to exclude claims notified during the period pending the date of discharge; (iv) the Applicants had no opportunity or reasonable opportunity to attend the hearing when the orders were made, a hearing which had been expedited; (v) the Applicants notified and issued their claim before the discharge took effect; and (vi) it cannot be right in those circumstances for the discharge to continue.

25. Ms Hilliard Q.C. submits in response (in summary) that ***Paragraph 98*** provides there will be discharge and specifies the date of discharge by reference to three circumstances. In each case, the discharge is of all liabilities whether notice has been given or a claim has been issued. In this case, the Orders make no reference (express or implied) to the exclusion of any claims when the discharges become effective whether by reference to notice, issuing or otherwise. Nor is it or should it be the court's practice to make such a provision. If discharge is to be opposed or it is to be argued that the effective date should be delayed, under the statutory scheme that must occur at the hearing. Although that is obviously subject to ***Rule 12.59 of the Rules***, the power to review, rescind or vary any order made under ***Parts 1 to 7 of the Act*** is subject to established principles. Those principles do not apply.

26. In any event the claims will not be subject to discharge insofar as they result from the allegation that the Respondents' purported appointments are in breach of ***paragraph 16 of Schedule B1***. If that is established, the appointments were void and ***the Act*** does not apply.

27. If, which is disputed, the claims rely upon the Respondents' actions as validly appointed administrators, Ms Hilliard Q.C. submits they will not be affected by discharge because ***paragraph 75 of Schedule B1*** will still apply in accordance with ***Paragraph 98(4)(b)***. There is no basis for amendment or variation of the orders of

discharge. In addition, any such alteration would offend the purposes of discharge explained by Mr Justice Sales in ***Re Hellas Telecommunications (Luxembourg) II SCA*** [2011] EWHC 3176 (Ch), [2013] 1 B.C.L,C. 426. Those purposes are to avoid administrators being at risk when they will no longer have assets of the company under their control from which to meet any liability properly incurred including the costs of successfully opposing a claim against them which would normally be an expense of the administration concerned.

E) The Law Applied

E1) *Paragraph 98*

28. The starting point for the Applications is that because the Respondents have ceased to be administrators, there will be discharge from liability in respect of any action as administrator at a time specified by the court in accordance with ***Paragraph 98*** subject to the exception to be applied to an application under ***paragraph 75 of Schedule B1*** (see paragraphs 3-5 above). That starting point assumes, however, that ***Paragraph 98*** applies. The Applicants' primary case, and Ms Hilliard Q.C. submits only case, is that the Respondents' appointments were invalid because they were in breach of ***paragraph 16 of Schedule B1***. This is the first issue.

E2) *Paragraph 98* and An Invalid Appointment – Issue (i)

29. A key submission for the Respondents is that the consequence of an invalid appointment by reason of ***paragraph 16 of Schedule B1*** will be that the purported appointments were void and, therefore, ***Schedule B1*** never applied. Ms Hilliard Q.C. acknowledges that in one sense this is unhelpful to the Respondents because discharge cannot be relied upon as a defence. However, as she explained in her submissions, if that is the law, a matter the Applicants contest, it must be applied. If applied, she submits the Applications must be dismissed.

30. In a recent decision, I had to review the authorities concerning the consequences of breach of statutory requirements for the appointment of administrators by the company or its directors under ***paragraph 22 of Schedule B1*** (see ***Re Tokenhouse VB Limited*** [2020] EWHC 003171 (Ch) at [40-41]). It is apparent from those authorities that a breach of ***paragraph 16 of Schedule B1*** is fundamental and any purported appointment is void.

31. That is apparent from the decisions of Mr Justice Norris in ***Re Euromaster Ltd*** [2012] EWHC 2356 (Ch), [2012] B.C.C. 754 and of Mr Justice Marcus Smith in ***Re Skeggs Beef Ltd*** [2019] EWHC 2607 (Ch), [2020] B.C.C. 43. The result of a fundamental breach being void is explained in cases such as ***Re G-Tech Construction Ltd*** [2007] B.P.I.R. 1275, ***Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer*** [2010] EWHC 836 (Ch), [2011] B.C.C. 338 and ***Minmar (929) Ltd v Khalastchi*** [2011] EWHC 1159 (Ch); [2011] B.C.C. 485. If there is no appointment, there can be no insolvency proceedings.

32. Mr Richmond Q.C. raised a counter argument that an invalid appointment will still enable a claim to be made under ***the Act*** because ***paragraph 75 of Schedule B1*** expressly includes a *"purported"* administrator. I will refer to that provision in more detail below but in essence it is the equivalent of ***section 212 of the Act***, providing a summary remedy against administrators upon the court's examination of their conduct.

33. The inclusion of a *"purported"* administrator covers an application for examination where a person holds themselves out to be validly appointed when that is not necessarily true. The right to an examination will not depend upon determination of that issue, although the decision whether to grant consequential relief may. In contrast, the Applications (to the extent that they concern claims alleging a void appointment) are made to avoid discharge of claims which, if successful, rely upon the fact that the Respondents were not appointed as administrators. If there were no ***Schedule B1*** appointments, there can be nothing to discharge. The Applications will be otiose, at least to the extent of those claims.

E3) *Paragraph 98* and An Alternative Case – Issue (ii)

34. Mr Richmond Q.C. submits that in any event the Claim Form and the draft Particulars of Claim present an alternative case relying upon the assumption that the appointments were valid. If so (to be decided below by analysis of the pleadings under sub-heading "F", that being a matter of fact rather than law to be addressed under this sub-heading), there will be the issue whether ***paragraph 75 of Schedule B1*** applies to that alternative case.

E4) *Paragraph 75 of Schedule B1* – Its Application – Issue (iii)

35. The ***paragraph 75 of Schedule B1*** exception within ***Paragraph 98*** provides that discharge will not prevent the court exercising its power under ***paragraph 75(6) of Schedule B1*** to grant permission for an application to examine the conduct of a person who is or purports to be or has been or has purported to be an administrator. Subject to that filter, the exception covers a wide area of potential liability significantly restricting the otherwise, apparently boundless definition of "discharge" in ***Paragraph 98***. It requires the ***paragraph 75 of Schedule B1*** applicant to allege that the (purported) administrator: has misapplied or retained money or property; owes a duty to account for money or property; has breached a fiduciary or other duty owed to the company; or is responsible for an act or omission of misfeasance. The court has power upon such an examination to order repayment, restoration of money or property, an account, or compensation and interest.

36. The wording of the provision mirrors the summary remedy provision of ***section 212 of the Act***, which applies in liquidations. Indeed, that provision used to apply to administrators until amendment under the ***Enterprise Act 2002, Schedule 16, paragraph 18*** resulted in the insertion of ***paragraph 75 of Schedule B1*** as a separate provision for misfeasance by administrators. It follows, therefore, that the decision in ***Re D'Jan of London Ltd*** [1993] B.C.C. 646 that ***section 212 of the Act*** applies to

breaches of any duty including duty of care equally applies to ***paragraph 75 of Schedule B1***. On the face of it, all the Applicants' claims will be subject to that exception and filter to the extent they assume valid appointments.

37. However, ***paragraph 75(2) of Schedule B1*** also provides that the application for examination must be made by the official receiver, the administrator, a liquidator, creditor or contributory of the company. The company itself is not included. Mr Richmond Q.C. submits, therefore, that ***paragraph 75 of Schedule B1*** does not apply to the Applicants' case, primary or alternative.

38. I agree. The exclusion is not a lacuna. The application for examination is a summary remedy to be exercised during the period the company is subject to an insolvency remedy, namely an administration or a subsequent liquidation. It does not establish a new cause of action but provides (potentially) a relatively inexpensive process by which to pursue the causes of action which must be alleged. That is why the application must be made either by an office holder or by those interested in the outcome of the insolvency, not the company itself.

39. In this case the Applicants seek to proceed with their claims after the administration has ceased and whilst they are carrying on business as solvent companies. The summary remedy of examination is unavailable. They must bring their own claims as solvent companies. The Applicants need to address the application of ***Paragraph 98*** if they wish to proceed with alternative claims relying upon a valid appointment.

E5) *Paragraph 74 of Schedule B1* – Issue (iv)

40. The Applicants' claim form refers not only to ***paragraph 75*** but also to ***paragraph 74 of Schedule B1***. Mr Richmond Q.C. also prayed in aid the submission that discharge pursuant to the Orders would prevent an application under this provision to challenge the Respondents' conduct as administrators. However, this provision is concerned with the ongoing regulation of the administration as such, not with claims of liability. In my judgment nothing turns on ***paragraph 74 of Schedule B1*** for the purposes of the Applications.

E6) *Paragraph 98* and the Orders - Issue (v)

41. The Applicants rely upon a variety of matters to justify the submission that the Orders do not apply or should not apply to their claims. In part the submission relies upon the proposition that the Orders when specifying the future date when discharge will take effect create a period of delay during which claims can be notified and potentially issued. The result being that those claims will be excluded from discharge in accordance with the usual practice of the court.

42. I do not accept that submission. For reasons which follow, the submission's proposition is contrary to principle and practice. First, because the proposition of exclusion from discharge by notification or issuing a claim is not expressed within ***Paragraph 98***. Nor can it be implied from its wording. Second, the court will have to

expressly provide for such exclusion when specifying the date of discharge. The court has an unfettered discretion when specifying the time discharge will take effect but the Orders do not make that provision. It too cannot be implied from the wording. The facts (if correct) that the Applicants have given notice of claims and/or issued a claim either before or after 6 December when the Orders were made are irrelevant in themselves. What is relevant is the fact that the Applications have been issued.

43. The third reason is that this approach is entirely consistent with normal practice. The court will usually prescribe a time which provides an opportunity for objection to discharge or to the effective date to be raised before the court not a provision excluding any claim issued or notified before the effective time specified:

a) Discharge is a matter which comes before the court frequently in the context of block transfer orders under ***Rule 12.36 of the Rules***. These orders will usually be made on paper in box work without hearing creditors. Although there is no prescribed form of order and the orders will vary, the court will usually provide pursuant to ***Paragraph 98*** a period to enable creditors or any other interested party to object before discharge takes effect. For example, the order will require its advertisement and discharge will take effect 56 days after advertisement unless an application is made to oppose it during that period. The obvious point being that it would be wrong to discharge on an application without notice without there being such an opportunity and the order should normally expressly exclude discharge until the application in opposition is determined.

b) In the case of other applications to the court under ***Paragraph 98***, the hearing will be listed but for many reasons creditors and contributories will not and will often not be expected to attend. The court should have evidence from the applicant administrator explaining what steps have been taken to inform creditors and any other potentially interested party of the application and (assuming this to be the case) that no objection has been raised or relevant liability identified (see ***Re Nortel Networks France S.A.S.*** [2019] EWHS 2447, Snowden J. at [19-20]. If that is the case, whilst practice may differ on a case by case basis, the normal order is for discharge to take effect 28 days after the administrator has filed his final report. This is derived from the description of usual practice identified in ***Re Hellas Telecommunications (Luxembourg) II SCA*** [2011] EWHC 3176 (Ch), [2013] 1 B.C.L.C. 426 [at 98 and see further below], as drawn attention to within the notes for ***Paragraph 98*** in *"Sealy & Milman, Annotated Guide to the Insolvency Legislation (23rd edition)"*. The obvious point again being that those who have an interest should have a reasonable opportunity to object.

c) If legitimate objection is identified within the evidence in support of the application, the usual course is to delay discharge for an appropriate period, potentially only for the relevant liability (see ***Re Oakhouse Property Holdings Ltd*** [2003] BPIR 469 and further at paragraphs 43-44 below).

44. The fourth reason, which ties in with the third, is that the court should aim (when it is right to do so) to specify a discharge date to take effect as soon as practicable to achieve protection for former administrators against the "unfair risk" identified by Mr

Justice Sales, as he then was, in the following passage from his judgment in ***Re Hellas Telecommunications (Luxembourg) II SCA*** (above at [98]):

> *"The reason that it will usually be right to order such a discharge is that the administrator will no longer retain in his hands the assets of the company out of which he is entitled to meet any liability properly incurred by him, so that it is unfair to leave him on risk generally. In so far as there is a good arguable case against him of improper conduct or misfeasance, that can be proceeded with after the discharge is given, in accordance with paragraph 98 of Schedule B1 read with paragraph 75."*

45. In ***Re Angel Group Ltd*** [2015] EWHC 3624 (Ch) Mrs Justice Rose, as she then was, having considered the judgment of Mr Justice Sales accepted the submission that administrators will generally be discharged from liability in respect of their actions as administrators once they cease to act. She decided they do not need to establish particular prejudice to avoid their discharge being delayed. She observed that it is usual practice to delay discharge to enable a liquidator to investigate the administrators' handling of the administration. The longest period of delay found in the authorities was three months.

46. Both Judges, therefore, approached discharge from the principle that it should normally take effect as soon as practicable to achieve protection for former administrators against that "unfair risk". However (tying this into the third reason), both also recognised the need to balance this against legitimate objections to discharge raised before the court. Mr Justice Sales explained:

> *"That balancing of interests is in my view particularly appropriate in the present case. The 28 day period will allow an opportunity for any person who wishes to say that the Administrators ought not to be discharged in this case because of the claims currently being brought in New York for issue of Definitive Notes (in which the Administrators have been joined as parties) to come forward to argue for a variation of the discharge order, if they can show that it is necessary. At the moment, I cannot see that it will be, since the company will continue in existence with a different officeholder (the liquidator) acting as its agent; but if I am wrong about that, it is open to a party to come forward to explain why."*

47. In the context of a balancing exercise and potentially as points undermining the reasoning of Mr Justice Sales based upon the existence of an "unfair risk" , Mr Richmond Q.C. during his submissions made the general observation that administrators who are discharged will still have three potential forms of protection. First, in the case of an invalid appointment, ***paragraph 21 of Schedule B1*** provides that the court may order the person who purported to appoint to indemnify the appointee against liability arising solely by reason of that invalidity. Second, there may be a contractual indemnity agreed before appointment which would cover that and other liabilities. Third, the statutory charge under ***paragraph 99 of Schedule B1*** will continue to apply.

48. That submission raises interesting questions. There is an opaque quality to the concept of discharge from liability when all of the causes of action covered by ***paragraph 75 of Schedule B1*** are excluded (subject to the filter). Also when the statutory charges prescribed by ***paragraph 99 of Schedule B1*** upon vacation of office (in any of the ways to which ***Paragraph 98*** applies), which are created in priority to the statutory

charge for remuneration and expenses, are limited to contractual debts or liabilities including adopted contracts of employment (see paragraph 6 above).

49. However, the point for the purposes of the Applications is that the forms of protection identified by Mr Richmond Q.C. are only potentially available to an administrator who has vacated office. The extent to which they will provide any real protection will depend upon the facts. For example, an application must be made before ***paragraph 21 of Schedule B1*** can apply. There may not be an applicable contractual indemnity. The statutory charges may not apply to the liability, for example when, as here, the claims are tortious. In any event there may be no or insufficient assets remaining for the purposes of the statutory charge. Their existence, therefore, does not affect the underlying reasoning of the Judges (and would not as a matter of precedent).

50. It is plain from the reasoning above, therefore, that (as a matter of principle and practice) the time discharge will take effect can and normally should be delayed to provide the opportunity for all interested parties to raise their objections before the court. There will be no automatic or implied exclusion for claims notified or issued during that period. If that were to be otherwise, it would leave the administrator subject to the "unfair risk" for an unspecified and uncertain period that discharge is meant to avoid. For that reason, a court would not normally make an express provision to that effect within the order specifying the time of discharge. However, the discretion is unfettered and there may be cases when that would be appropriate subject to the order providing when and how the exclusion will end. This is not such a case.

51. In this case the Orders followed the normal course except for the time allowed being relatively short and not linked to the filing of the final report. That from the court's perspective is understandable when the application for discharge proceeded (as the transcripts reveal) on the basis that these were successful administrations achieving the going concern purpose. The court had no reason to envisage any issues arising. In any event it made no difference because the Applicants were able to issue the Applications before the date expired. It is for the Applicants to establish their case that the time for discharge specified in the Orders should be altered for any claims relying upon a valid appointment based upon the fact that the Applications were issued before discharge took effect.

E7) Jurisdiction to Exclude the Claims from Discharge - Issue (vi)

52. The Orders do not expressly provide for rights to apply to vary or discharge them. However, as established above, the purpose of the delay between the date they were made and the specified date for the ***Paragraph 98*** discharge to take effect is to enable applications to be made to court by those interested to seek discharge of the order or its variation by extension of the date of discharge. That right is to be implied within the usual implied permission to apply. This is consistent with the passage from the judgment of Mr Justice Sales in ***Re Hellas Telecommunications (Luxembourg) II SCA*** at paragraph 46 above.

53. Plainly, this confers a wide jurisdiction upon the court when hearing the Applications. Case law will provide limited assistance to the extent that each case will turn on its

own facts. Nevertheless, the approach taken in other cases can provide guidance to be applied when considering different facts. In ***Re Hellas Telecommunications (Luxembourg) II SCA*** (above) Mr Justice Sales considered whether it was inappropriate and/or unnecessary to exclude the relevant claims from discharge. He considered it might be inappropriate because of an absence of merit. Bearing in mind in this case the claims are founded in misfeasance, it would be appropriate to have regard to the approach to be taken under the filter provided by ***paragraph 75(6) of Schedule B1***. However, the precise matters to be taken into consideration will depend (to varying degrees and subject to relevance) upon the facts and upon any decisions made for the purposes of the Orders.

54. It follows that ***Rule 12.59*** does not apply to the Applications. Whether it would have had to be relied upon had the Applications been issued after discharge is a moot point that need not be addressed. It may in any event have been an academic point in practice notwithstanding the caution applied within the general principles of this review jurisdiction identified in ***Re Paragon Offshore Plc (In Liquidation)*** [2020] EWHC 2740 by Deputy I.C.C. Judge Agnello Q.C. at [9-11].

F) The Decision

55. The application of the law has led me to the conclusion that the Applications should only concern claims which flow from the Respondents having been validly appointed. ***Paragraph 98*** does not otherwise apply. To the extent that those claims exist, the court must exercise the jurisdiction identified in summary under paragraphs 52-54 above.

56. Plainly the Claim Form relies upon an invalid appointment within its brief details of claim. However, in my judgment, the Claim Form is sufficiently broadly drafted to include claims arising from the Respondents' conduct as validly appointed administrators. Its brief details of claim include express reference to conduct during the administrations and upon exit. It also refers specifically to claims under ***paragraphs 74 and 75 of Schedule B1***. Whilst any claims relying upon those provisions must fail for the reasons set out above (see paragraphs 37-39 and 40 above), the reference to them opens the route for the construction of paragraph 4b of the Claim Form to include misfeasance by the Respondents whilst acting as validly appointed administrators. However, the Claim Form does no more than provide identification of the relief that may be claimed. It is the Particulars of Claim which are crucial.

57. The draft Particulars of Claim down to paragraph 64 concern the allegation that the floating charge on which the Respondents' appointments rely was not enforceable. The breaches of duty pleaded at paragraphs 65 to 75 flow from the claim of invalidity. The fiduciary duties pleaded at paragraph 76 result from *"wrongful acceptance of their position as Purported Administrators"*. The term "Purported Administrators" does not provide for an alternative claim based on valid appointments. It is used when referring to the Respondents' alleged misconduct resulting from them having wrongfully accepted the invalid appointments.

58. The same conclusion applies to paragraphs 78 and 80 of the draft. In addition, paragraph 81 expressly depends upon invalid appointments. The same conclusion applies to paragraphs 82-113 because they rely upon breaches of duties pleaded within paragraphs 76, 78 and 81 of the draft. Duties resulting from the alleged invalid appointments.

59. It can be argued that paragraphs 77 and 79 of the draft only apply if ***Schedule B1*** applies and, therefore, if the appointments were valid. That is because those paragraphs refer to fiduciary duties resulting from the duty under ***paragraph 3(2) of Schedule B1*** to act in the interests of all creditors and to them being officers of the court (see ***paragraph 5 of Schedule B1***). My understanding of those paragraphs, however, is that they are founded on the premise that a purported administrator (i.e. as defined above in paragraph 57) will assume such duties applying the analogy of a *"trustee de son tort"* because of the invalid appointments. However, even if the intention has in mind an alternative case based on validity, there is no clear path pleaded from those paragraphs to an identifiable alternative claim.

60. This analysis is consistent with the description of the claims within the skeleton argument filed on behalf of the Applicants. That is not a defining matter. Skeleton arguments set out counsel's understanding for the purposes of providing a skeleton and are not equivalent to statements of case. They are not binding and can always be corrected. However, the consistency presents an understanding that the Applicants intend their claim to be presented on the bases that they say (to quote from the skeleton subject to modification): (i) the purported appointments of the Respondents as administrators of Glint were invalid and of no effect; (ii) had the Respondents fulfilled their duties to check and satisfy themselves of the validity of their appointments Glint would never had entered into administration and/or would not have remained in administration for such a long period; and (iii) the Respondents were in a hopelessly conflicted position in light of their invalid appointment and / or favoured their own and their appointor's interests over the interests of Glint, its creditors and members.

61. It is only the third of those summarised claims that offers the possibility of an alternative claim relying upon valid appointments. The first particular of that claim within the skeleton argument identifies (as alleged) a refusal to agree to a shareholder consortium's proposed, post-administration funding without agreement of their remuneration. The second particular, challenges a decision to accept funding from a party other than the shareholder consortium as a breach of an agreement with the consortium.

62. However, the case of conflict of interest upon which these particulars rely is pleaded within paragraph 81 of the draft Particulars of Claim. It is specifically and only concerned with conflict arising from the allegation that the appointments were invalid. The particulars referred to in the skeleton argument are derived from the facts and matters pleaded at paragraphs 82-104 of the draft. Those facts and matters are pleaded as particulars of paragraph 81 and, therefore, do not present an alternative case based upon a valid appointment.

63. Further, as mentioned within paragraph 58 above, paragraphs 82-104 also rely on breaches of duties pleaded within paragraphs 76 and 78 of the draft Particulars of Claim. Those duties are pleaded as arising in the context of an invalid appointment.

64. I have considered whether in the light of the submissions on behalf of the Applicants I should treat the draft Particulars of Claim as though they were redrafted to present an alternative case. However, even if the allegation of conflict of interest and/or its particulars are not intended to be restricted to the Respondents' *"conflicted position in the light of their invalid appointment[s]"*, the claim would need to be spelt out in far greater and clearer detail within the Particulars of Claim before a decision under ***Paragraph 98*** could be considered.

65. It is for the Applicants to decide the nature of their case and the draft before me is the one they rely upon for the purpose of the Applications. This is not a case where a few additional or substituted words are needed. The alternative case of a valid appointment referred to in oral submissions would take the claim in a different direction. The route would need to be identified if, indeed, it is a route the Applicants may wish to take.

66. My decision is that the Applications are otiose. There is no claim for which they are necessary or relevant. The claims are limited to actions and omissions by the Respondents whilst there were no insolvency proceedings because their appointments were invalid as alleged.

Order Accordingly