Neutral Citation Number: [2021] EWHC 215 (Ch)

Case No: CR-2020-LDS-000577

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AD COMPANIES LIST (ChD)

1 Oxford Row, Leeds, LS1 3G

Date: 05/02/2021

IN THE MATTER OF PETER JONES (CHINA) LIMITED (CRN: 00783518)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

HOWARD SMITH AND DAVID COSTLEY-WOOD (JOINT ADMINISTRATORS OF PETER JONES (CHINA) LIMITED)	**Applicants**
- and –	
THE REGISTRAR OF COMPANIES	**Respondent**

- -
- -

Ms Cristin Toman (instructed by Gordons LLP) for the Applicants
The Respondent did not appear and was not represented but filed written submissions on the quantum of costs.

Hearing date: 27 November 2020
Written submissions on the quantum of costs were lodged on 8 January 2021 by the Treasury Solicitor on behalf of the Respondent

- -

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.

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and by release to BAILII. The date and time for hand-down is deemed to be 02:00 p.m. on 5 February 2021

HH Judge Davis-White QC :

1. On 27 November 2020 I made an order containing certain declarations and requiring the registrar of companies (the "Registrar") to remove from the record of the above-named company, Peter Jones (China) Limited (the "Company"), certain pages from the statement of affairs lodged by the applicants (the "Applicants" or "Administrators"). The pages in question contained the schedules referred to in Rule 3.30(6)(b) of the Insolvency (England and Wales) Rules 2016 ("IR 2016") (schedules of employees and consumers claiming amounts paid in advance for the supply of goods and service) (the "Schedules").

2. Under r3.32 IR 2016, administrators are required to deliver to the Registrar of Companies as soon as reasonably practicable a copy of the statement of affairs. However, under paragraph 2 of that rule, the administrator must not deliver to the Registrar, with the statement of affairs, any schedule required by rule 3.30(6)(b).

3. In this case, as I shall explain, such schedules were incorrectly lodged. As requested, the Registrar originally did not register the statement of affairs (and Schedules) but returned them. However, later he did register the statement of affairs in its entirety and containing the Schedules. (As I understand it, he also registered the statement of affairs in a version that did not include the Schedules.) The Administrators asked the Registrar to remove such filing of the complete statement of affairs (including the Schedules) from the register. The Registrar refused to do so without court order. On 24 November 2020, the Administrators made an application to the court. On 27 November 2020, I granted the relief that I have mentioned, as well as abridging time for service. On that occasion I also ordered the Registrar to pay the costs of the Administrators. As the Administrators had not lodged and served a schedule of costs, I laid down a timetable for such schedule to be lodged and served. I later provided an opportunity for submissions by the Registrar to be lodged to deal with the quantum. Such submissions were lodged in writing on 8 January 2021. Subsequently I gave the Applicants an opportunity to respond to the Registrar's submissions on the schedule of costs. They did not take up that opportunity. I had earlier indicated that I would give the reasons for my order on 27 November 2020 on a later occasion. This judgment gives those reasons and also deals with the question of the quantum of the costs ordered to be paid by the Registrar determined by way of summary assessment.

The Facts

4. The position is set out fully and fairly in the witness statement of Mr Howard Smith dated 24 November 2020 and made in support of the application. He is one of the two Administrators appointed in relation to the Company. Rather than paraphrase it is convenient if I simply set out the main parts of the witness statement, which I do below.

5. The Administrators were appointed by the directors on 8 July 2020, pursuant to paragraph 22 of Schedule B1 to the IA 1986. They filed their proposals dated 28 August 2020 with the Registrar. The circumstances in which the statement of affairs came to be filed with the Schedules that should not have been filed is explained as follows:

> "3.*2 As a consequence of the Pandemic and the Guidance the Applicants and their staff are currently working from home. On 3 September 2020 a junior member of the Applicants' team sent a copy of the statement of affairs sworn by* [one of the

directors] *on 1 September 2020 (SOA) to the Respondent by email to be filed in respect of the Company and copied his supervisor (Supervisor) into that email. The Supervisor was on annual leave until 7 September 2020. Upon his return to the office and upon opening the email dated 3 September 2020 the Supervisor discovered that the SOA (which shall hereafter be referred to as the "Non-Compliant SOA") that was attached to the email and sent the Respondent by post contained schedules of the employees and former employees of the Company (Employee Schedule) and those consumers claiming amounts paid in advance for the supply of goods and service (together referred to as the "Schedules") which IR 3.32(2) prohibited the Applicants from delivering to the Respondent. Further in respect of the Employee Schedule the Applicants considered there had been a breach of the Applicants' data protection obligations pursuant to the General Data Protection Regulation (EU) 2016/679 (Breach).*

3.3 On discovering the above the Applicants wrote to the Respondent by email on 7 September 2020 to request that the filing of the Non-Compliant SOA be cancelled in an effort to minimise the consequences of the Breach. A further copy of the Non-Compliant SOA was attached to this email. On 8 September 2020 the Applicants sent a further copy of the Non-Compliant SOA to the Respondent and requested that it not be filed with the records of the Company.

3.4 On 11 September 2020 the Respondent confirmed to the Applicants' office that the Form AM02 had been returned to the Applicants' Leeds office by unregistered post.

3.5 On or around 8 October 2020 the Applicants subsequently discovered that the Non-Compliant SOA had been filed against the Filing History on 23 and 28 September 2020, notwithstanding the Respondent's correspondence dated 11 September 2020

3.6 The Applicants subsequently wrote to the Respondent on 8 October 2020 to request that the Non-Compliant SOA be removed from the Filing History.

3.7 On 16 October 2020 the Respondent confirmed that the SOA submitted on 5 September 2020 was rejected on 10 September 2020 in response to the Applicants' request. The Respondent further advised the Applicants that if they had inadvertently filed two further copies of the SOA then they would require a rectification court order to remove the Non-Compliant SOA from the Filing History.

3.8 On 20 October 2020 the Applicants advised the Respondent that no further copies of the Non-Compliant SOA had been filed since the Respondent's email dated 11 September 2020 was received. The Applicant also confirmed that a correct version of the SOA had been subsequently filed (which shall hereafter be referred to as the "Compliant SOA").

3.9 On 28 October 2020 the Respondent confirmed that the following submissions of the SOA had been made: 3 September, 5 September, 7 September and 2 copies of the SOA on 22 September 2020. The Respondent confirmed that the submissions made on the following dates had been rejected: 5 September, 7 September and 1 copy of the SOA on the 22 September 2020 due to poor quality. The Respondent

again confirmed to the Applicant that if they had inadvertently filed 2 further copies of the Non-Compliant SOA they would require a rectification court order to remove them.

3.10 On 4 November 2020 the Applicants confirmed to the Respondent that no third copy of the Non-Compliant SOA had been sent to the Respondent and the latter statement of affairs that was filed was the Compliant SOA. The Applicants also requested that this matter be referred to the Respondent's legal team to review. The Applicants have received no further correspondence from the Respondent in connection with this matter.

6. Two points emerge from the above. First, the Registrar by his conduct accepted that he was able to reject registration of a statement of affairs as requested, at least when the relevant state of affairs set out in that request were as in this case. Secondly, that there is a factual dispute or at least uncertainty as to whether the Non-Compliant statement of affairs as registered by the Registrar was, by mistake, a version that the Registrar had already agreed not to register or whether, as he asserted in correspondence, a further copy or copies of the Non-Compliant version had been filed.

7. In the application notice in this case declaratory relief was sought coupled with orders (among others) (1) pursuant to IR 3.45 that the schedule required by IR 3.30(6)(b) of employees and consumers claiming amounts paid in advance for the supply of goods and service must not be delivered to the Registrar and (2) that the Respondent should exercise his power under Section 1076 of the Companies Act 2006 ("CA 2006") immediately to remove the Non-Compliant SOA that appeared on the Company's filing history on 23 and 28 September 2020 from the Register, and accept the statement of affairs filed against the Filing History on 30 September 2020 (Compliant SOA) in replacement for the Non-Compliant SOA.

8. In her skeleton argument, Ms Toman, who appeared for the applicants, submitted, as her primary case, that:

(1) The relevant Schedules should not have been filed;

(2) The court had no power to rectify the registrar pursuant to section 1096 CA 2006;

(3) The Non-Compliant SOA was not properly delivered to the Registrar because it did not comply with the Insolvency Rules as to the contents of the document;

(4) As a consequence, the Non-Compliant SOA was to be treated under CA 2006 1076(2) as not having been delivered, subject to the Registrar's power in CA 1073 to accept documents not meeting the requirements for proper delivery.

(5) It follows that the Registrar was not under any duty to register the Non-Compliant SOA because CA 2006 Section 1080 imposed a duty to register only documents properly delivered to the Registrar; but he had power under CA 2006 Section 1073 to accept and register the Non-Compliant SOA.

(6) It follows that the Registrar has power:
   a. To replace the Non-Compliant SOA under CA 2006 Section 1076 because it did not comply with the requirements for proper delivery;

b. To remove the Non-Compliant SOA from the register under CA 2006 Section 1094 on the grounds that there was a power but no duty to register it in the first place.

(7) The Court has power to order the Registrar to exercise the powers set out under (6) above and should do so, following the principles set out in *Registrar of Companies v Swarbrick [2014] EWHC 1466 (Ch).*

9. In the alternative, Ms Toman submitted that:

(1) the confidential Schedules were "unnecessary material" within the meaning of CA 2006 Section 1074. In this regard:-

a) Unnecessary material means material that is not necessary to comply with an obligation under any enactment and is not specifically authorised to be delivered to the Registrar.

b) The confidential Schedules were not necessary for the Administrators to comply with IR 3.32 and the Administrators were expressly prohibited under IR 3.32 (3) from delivering them to the Registrar.

(2) The confidential Schedules could be readily separated from the rest of the document. CA 2006 Section 1074(5) applies to give the Registrar power to register the document either after removal of the confidential Schedules or as delivered.

(3) It follows that (if the confidential Schedules were unnecessary material) the Registrar has power:

a) To replace the Non-Compliant SOA Under CA 2006 Section 1076(1)(b) because it included unnecessary material;

b) To remove the confidential schedules from the register under CA 2006 Section 1094 on grounds that there was a power but no duty to register them in the first place, and they were unnecessary material (see CA 2006 Section 1094(2))

10. In the further alternative, Ms Toman submitted that:

(1) the Court should make an order under IR 3.45 to the effect that the confidential Schedules must not be delivered to the Registrar of Companies. If the Court so orders, the confidential Schedules would be unnecessary material which the Registrar has power to replace under CA 2006 Section 1096 or remove under CA 2006 Section 1094. A similar approach was taken in *Swarbrick*;

(2) An administrator is entitled to make an application under IR 3.35 if he thinks that the disclosure of information (here the confidential Schedules) would prejudice the conduct of the administration. Whilst this point was not specifically addressed in the Administrators' evidence, the Court can conclude that the Administrators have the necessary belief based on their evidence that they consider that publication of

the employee Schedule puts them in breach of their data protection obligations pursuant to the General Data Protection Regulation (EU) 2016/679.

The statutory provisions

(i) The prohibition on delivery of the relevant Schedules in this case

11. Rule 3.30 IR 2016 (especially paragraphs (5) and (6)) sets out the requirement that a statement of affairs contain relevant schedules of claims (including in the form of the Schedules), as it did in this case:

> **" 3.30 Statement of affairs: content (paragraph 47 of Schedule B1)**
>
> **(1) [Heading and content of statement]** The statement of the company's affairs must be headed "Statement of affairs" and must–
>
> **(a)** identify the company immediately below the heading; and
>
> **(b)** state that it is a statement of the affairs of the company on a specified date, being the date on which it entered administration.
>
> **(2) [Further content]** The statement of affairs must contain (in addition to the matters required by paragraph 47(2) of Schedule B1)–
>
> **(a)** a summary of the assets of the company…..
>
> **(b)** a summary of the liabilities of the company….–
>
> **(c)** a list of the company's creditors with the further particulars required by paragraph (3) indicating–
>
> **(i)** …
>
> **(3) [List of creditors]** The list of creditors required by paragraph 47(2) of Schedule B1 and paragraph (2)(c) of this rule must contain the details required by paragraph (4) except where paragraphs (5) and (6) apply.
>
> **(4) [Creditor particulars required]** The particulars required by paragraph (3) are as follows–
>
> **(a)** the name and postal address of the creditor;
>
> **(b)** the amount of the debt owed to the creditor;
>
> **(c)** details of any security held by the creditor;
>
> **(d)** the date on which the security was given; and
>
> **(e)** the value of any such security.
>
> **(5) [Employee and pre-paid consumer creditors]** Paragraph (6) applies where the particulars required by paragraph (4) relate to creditors who are either–
>
> **(a)** employees or former employees of the company; or
>
> **(b)** consumers claiming amounts paid in advance for the supply of goods or services.
>
> **(6) [Particulars re r.3.30(5)]** Where this paragraph applies–
>
> **(a)** the statement of affairs itself must state separately for each of paragraph (5)(a) and (b) the number of such creditors and the total of the debts owed to them; and
>
> **(b)** the particulars required by paragraph (4) must be set out in separate schedules to the statement of affairs for each of paragraphs (5)(a) and (b).

12. The requirement for delivery to the Registrar, and the requirement that the Schedules in this case should not be delivered, is contained within rule 3.32 IR 2016 which provides so far as relevant:

> "3.32— *Statement of affairs: filing*
>
> ***(1) [Duty of administrator to file copy with registrar of companies]*** *The administrator must as soon as reasonably practicable deliver to the registrar of companies a copy of–*
>
> > ***(a)*** *the statement of affairs; and*
> >
> > ***(b)*** *any statement of concurrence.*
>
> ***(2) [Rule 3.30(6)(b) schedules to be omitted from statement]*** *However, the administrator must not deliver to the registrar of companies with the statement of affairs any schedule required by rule 3.30(6)(b).*
>
> ***(3) [Limited disclosure to registrar of companies]*** *The requirement to deliver the statement of affairs is subject to any order of the court made under rule 3.45 that the statement of affairs or a specified part must not be delivered to the registrar of companies."*

13. Rule 3.45 IR 2016 sets out the power of the court to provide that the statement of affairs or any part of it must **not** be delivered to the Registrar. It provides, so far as relevant:

> "***(1) [Application to court]*** *If the administrator thinks that the circumstances in rule 3.44 apply in relation to the disclosure of–*
>
> > ***(a)*** *the whole or part of the statement of the company's affairs;*
> >
> > ***(b)*** *.... or*
> >
> > ***(c)*** *....*
>
> *the administrator may apply to the court for an order in relation to the particular document or a specified part of it.*
>
> *(3)* ***[Court order]*** *The court may order that the whole of or a specified part of a document referred to in paragraph (1)(a) to (c) must not be delivered to the registrar of companies.....*
>
> *(4) ...."*

14. The relevant circumstances set out in r3.44 IR 2016 are:

> "*…the disclosure of information which would be likely to prejudice the conduct of the administration or might reasonably be expected to lead to violence against any person.*"

15. The Registrar's position and duties are set out in Part 35 CA 2006.

16. The Register is dealt with by s. 1080(1) and (2) CA 2006, which impose on the Registrar a duty to keep the Register:

> "*1080. The register*
>
> (1) *The registrar shall continue to keep records of—*
>
> *(a) the information contained in documents delivered to the registrar under any enactment, and*
>
> *(b) certificates issued by the registrar under any enactment.*
>
> *(2) The records relating to companies are referred to collectively in the Companies Acts as "the register".*"
>
> *(a) the information contained in documents delivered to the Registrar under any enactment [, and]*
>
> *(b) certificates issued by the Registrar under any enactment.*

17. The question of delivery and its effect and the Registrar's discretion in this respect is dealt with by sections 1072 CA 2016. They provide:

> "***1072 Requirements for proper delivery***
>
> *(1) A document delivered to the registrar is not properly delivered unless all the following requirements are met—*
>
> *(a) the requirements of the provision under which the document is to be delivered to the registrar as regards—*
>
> *(i) the contents of the document, and*
>
> *(ii) form, authentication and manner of delivery;*
>
> *(b) any applicable requirements under—*
>
> *section 1068 (registrar's requirements as to form, authentication and manner of delivery),*
>
> *section 1069 (power to require delivery by electronic means), or*
>
> *section 1070 (agreement for delivery by electronic means);*
>
> *(c) any requirements of this Part as to the language in which the document is drawn up and delivered or as to its being accompanied on delivery by a certified translation into English;*
>
> *(d) in so far as it consists of or includes names and addresses, any requirements of this Part as to permitted characters, letters or symbols or as to its being accompanied on delivery by a certificate as to the transliteration of any element;*
>
> *(e) any applicable requirements under section 1111 (registrar's requirements as to certification or verification);*

(f) any requirement of regulations under section 1082 (use of unique identifiers);

(g) any requirements as regards payment of a fee in respect of its receipt by the registrar.

(2) A document that is not properly delivered is treated for the purposes of the provision requiring or authorising it to be delivered as not having been delivered, subject to the provisions of section 1073 (power to accept documents not meeting requirements for proper delivery).

18. Section 1073 CA 2006 sets out the Registrar's power to accept documents even if they do not meet the requirements of proper delivery. It provides:

"1073 Power to accept documents not meeting requirements for proper delivery

(1) The registrar may accept (and register) a document that does not comply with the requirements for proper delivery.

(2) A document accepted by the registrar under this section is treated as received by the registrar for the purposes of section 1077 (public notice of receipt of certain documents).

(3) No objection may be taken to the legal consequences of a document's being accepted (or registered) by the registrar under this section on the ground that the requirements for proper delivery were not met.

(4) The acceptance of a document by the registrar under this section does not affect—

(a) the continuing obligation to comply with the requirements for proper delivery, or

(b)subject as follows, any liability for failure to comply with those requirements.

(5) For the purposes of—

(a) section 453 (civil penalty for failure to file accounts and reports), and

(b) any enactment imposing a daily default fine for failure to deliver the document,

the period after the document is accepted does not count as a period during which there is default in complying with the requirements for proper delivery.

(6) But if, subsequently—

(a) the registrar issues a notice under section 1094(4) in respect of the document (notice of administrative removal from the register), and

(b) the requirements for proper delivery are not complied with before the end of the period of 14 days after the issue of that notice,

any subsequent period of default does count for the purposes of those provisions.

19. Section 1074 CA 2006 deals with the position where part of a document should not be delivered:

1074 Documents containing unnecessary material

(1) This section applies where a document delivered to the registrar contains unnecessary material.

(2) "Unnecessary material" means material that—

(a) is not necessary in order to comply with an obligation under any enactment, and

(b)is not specifically authorised to be delivered to the registrar.

(3) For this purpose an obligation to deliver a document of a particular description, or conforming to certain requirements, is regarded as not extending to anything that is not needed for a document of that description or, as the case may be, conforming to those requirements.

(4) If the unnecessary material cannot readily be separated from the rest of the document, the document is treated as not meeting the requirements for proper delivery.

(5) If the unnecessary material can readily be separated from the rest of the document, the registrar may register the document either—

(a) with the omission of the unnecessary material, or

(b) as delivered."

20. Section 1076 CA 2006 deals with the Registrar's power to replace a document on the file which does not comply with the requirements for proper delivery or contains unnecessary material.

1076 Replacement of document not meeting requirements for proper delivery

(1) The Registrar may accept a replacement for a document previously delivered that–

(a) did not comply with the requirements for proper delivery, or

(b) contained unnecessary material (within the meaning of section 1074).

(2) A replacement document must not be accepted unless the Registrar is satisfied that it is delivered by–

(a) the person by whom the original document was delivered, or

(b) the company (or other body) to which the original document relates,

and that it complies with the requirements for proper delivery.

(3) The power of the Registrar to impose requirements as to the form and manner of delivery includes power to impose requirements as to the identification of the original document and the delivery of the replacement in a form and manner enabling it to be associated with the original.

(4) This section does not apply where the original document was delivered under Part 25 (company charges) (but see section 859M (rectification of register)).

21. Section 1093 CA 2006, deals with the Registrar's power to correct inconsistencies on the Register. It provides (so far as material):

> "***1093 Registrar's notice to resolve inconsistency on the register***
>
> *(1) Where it appears to the registrar that the information contained in a document delivered to the registrar is inconsistent with other information on the register, the registrar may give notice to the company to which the document relates—*
>
> *(a) stating in what respects the information contained in it appears to be inconsistent with other information on the register, and*
>
> *(b) requiring the company to take steps to resolve the inconsistency…".*

22. Section 1094 CA 2006, deals with the Registrar's power administratively to remove material from the Register, including "unnecessary" material. It provides (so far as material):

> *"**1094 Administrative removal of material from the register***
>
> *(1)The registrar may remove from the register anything that there was power, but no duty, to include.*
>
> *(2)This power is exercisable, in particular, so as to remove—*
>
> *(a)unnecessary material within the meaning of section 1074, and*
>
> *(b)material derived from a document that has been replaced under—*
>
> *section 1076 (replacement of document not meeting requirements for proper delivery), or*
>
> *section 1093 (notice to remedy inconsistency on the register).*
>
> *(3) This section does not authorise the removal from the register of—*
>
> *(a) anything whose registration has had legal consequences in relation to the company as regards…"*

23. Section 1096 CA 2016 provides for rectification of the register by court order. So far as material it provides:

> "*1096. Rectification of the register under court order*
>
> *(1) The registrar shall remove from the register any material—*
>
> *(a) that derives from anything that the court has declared to be invalid or ineffective, or to have been done without the authority of the company, or*
>
> *(b) that a court declares to be factually inaccurate, or to be derived from something that is factually inaccurate, or forged,*

and that the court directs should be removed from the register."

Registrar of Companies v Swarbrick

24. In *Registrar of Companies v Swarbrick* [2014] EWHC 1466 (Ch); [2014] B.C.L.C. 655, Mr Richard Spearman QC sitting as a Deputy High Court Judge dealt with an application by the Registrar to set aside an order (the "Previous Order"). The Previous Order had been made in circumstances where the Court had determined that administrators' proposals that had been filed contained unnecessary material, in terms of confidential information about a sale by the administrators to a third party, and that that material could not readily be separated from the rest of the document. Accordingly, the court held that the document was not properly delivered and ordered, pursuant to s1076 CA 2016, that the Registrar remove the proposals as filed and replace them with a version that omitted the unnecessary material. The Registrar's application to set aside the earlier order was made on various grounds. There were various issues, for example, whether the material was "unnecessary" and whether the Court could retrospectively make an order under r2.33A Insolvency Rules 1986 (now rule 3.45 IR 2016). For present purposes, however, the key issue was the extent of the Court's supervisory jurisdiction over the Registrar in the exercise of his powers and duties.

25. The Judge first approached the issue of the effect of an order under, what is now, r3.45 IR 2016 and held that such an order could be made with retrospective effect. In his judgment, the Registrar was then required to comply with such an order:

> *"[54] In my judgment, once an order is properly made by the court under rule 2.33A, and is served on the registrar, he is required to comply with it. By an order properly made, I mean an order that is not susceptible to being set aside, whether on grounds of the merits, the jurisdiction to make the order, the exercise of the courts discretion, or any other basis.*
>
> *[55] If the effect of an order is to require the registrar to act contrary to a statutory duty, or to do something that he has no power to do, I would regard it as an order that ought not to have been made and therefore as susceptible to being set aside….*
>
> *[56] Typically, an order under rule 2.33A will be made before the statement is sent to the registrar. In that case, so long as the order remains in force, the registrar will be obliged to deal with the statement as if it contained the matters set out in paragraph 49 and rule 2.33(2), even though, in light of the order of the court, it does not do so.*
>
> *[57] I see no reason why the registrar should not equally be bound by an order under rule 2.33A if it is not made until after the statement has been sent to him. This does not impugn his conduct in placing the statement on the register, but merely means that henceforth he satisfies his duties by placing a redacted version on the register. If necessary, I would hold that the effect of such an order being made after a paragraph 49 statement has been sent to the registrar is that, for purposes of section 1080 of the CA 2006, the original statement is no longer properly regarded as a document delivered to the registrar under any enactment*

> *and is replaced for those purposes by the redacted version. Accordingly, the registrar is not in breach of duty by complying with the order.*
>
> *[58] If I am wrong in saying that the registrar is required to comply with an order that has properly been made under rule 2.33A, I would nevertheless expect him to do so without the need for further recourse to the court. However, if, to get the registrar to comply, it were necessary to seek relief against him by way of judicial review or according to ordinary public law principles, I consider that it should be possible to rely on traditional public law grounds of illegality, irrationality, and, it may be, proportionality. To take the present case by way of example: the registrar accepts that the disputed material need never have been sent to him or placed on the register at all, and he does not contend that the court was wrong to hold that its retention on the register would prejudice the conduct of the administration. If the registrar chooses not to give effect to the order when to do so would not place him in breach of any statutory duty and when he has power to do so, on what basis can he contend that he is acting legally, rationally and proportionately?*".

26. Having considered that the r2.33 Insolvency Rules 1986 disposed of the matter, the Judge went on to consider the wider picture.

27. As regards s1094 CA 2016 he determined that, as a result of the r2.33 Order, the material in question was "unnecessary material" and that it was not disputed that that material was not readily separable from the other material. In this regard, he set out the general effect of the delivery of unnecessary material to the Registrar:

> *"[70] …I make three observations in this context. (i) First, the consequence of including unnecessary material that cannot readily be separated from the rest of the document is that the document is treated as not meeting the requirements for proper delivery: see section 1074(4). Further, in the case of a statement required to be served under paragraph 49 that could have the effect that the administrator is guilty of a criminal offence: see paragraph 49(7). Accordingly, there are strong incentives for the sender of a document to avoid falling foul of this provision. This gives it teeth notwithstanding the fact that it may not be straightforward for the registrar to detect unnecessary material. (ii) Second, where unnecessary material can readily be separated from the rest of the document, it is reasonable to suppose that it will more easily be discernible by the registrar, who then has power to omit it (see section 1074(5)(a)). In these circumstances, also, the provision would not appear to be lacking in effect. (iii) Third, even where the document contains unnecessary material that can readily be separated from the rest of the document, the registrar is not obliged to omit that material, but may instead register the document as delivered: see section 1074(5)(b). This lends support to the view that section 1074 may be designed to cater primarily for the more egregious instances where extraneous material is included in a document delivered to the registrar. It is not aimed at ensuring that in no circumstances is unnecessary material placed on the register."*

28. As regards the Registrar's discretion under s1096 CA 2016 to accept a replacement document for one that had already been delivered, the Judge went on to consider the

extent of the court's supervisory jurisdiction. Having considered *In re Calmex Ltd* [1989] 1 All ER 485, *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888, *igroup Ltd v Ocwencase* [2004] 1 WLR 451 and *In re A Company (No 007466 of 2003)* [2004] 1 WLR 1357, the Judge extracted a number of propositions:

> "*[81] In my judgment, the following propositions can be extracted from these authorities. (i) The court has no general, inherent supervisory jurisdiction in relation to the registrar's performance of his duties. (ii) The court has jurisdiction in accordance with ordinary public law principles to control the way in which the registrar carries out his statutory duties, subject to any specific exclusions of that jurisdiction or the evidence on which it could be founded, so as (for example) to prevent a wrong that has been perpetrated on a company as a result of it having been wound up in error from being continued. (iii) Conversely, the court has no such jurisdiction in respect of valid documents which have been duly delivered to the registrar in accordance with the relevant legislation and which are properly relied on by the registrar in the discharge of the registrar's statutory functions and which the registrar is under a statutory duty to retain as part of his records available for public inspection.*
>
> *[82] In my view, however, these cases do not provide a definitive answer as to whether and in what circumstances the court has jurisdiction to make an order against the registrar where that is necessary and appropriate to protect the rights or interests of a third party. In particular, I consider that the language of proposition (iii) above (which I have derived from the judgment of Lightman J in the igroup case [2004] 1 WLR 451) raises questions as to when documents are properly relied upon by the registrar or are subject to a statutory duty."*

29. Having considered the issue raised in paragraph [82] of his judgment at length, the Judge returned to the facts of the case before him and concluded as follows:

> *[101] Turning back to the facts of the present case, I have held that rule 2.33A provides a basis for ordering the relief sought by the administrators, and that an order made under that rule is or ought to be all that they require to enable them to achieve the result they seek, namely the replacement of the proposals with a revised paragraph 49 statement that omits the disputed materials.*
>
> *[102] If, contrary to the above, something more is required to achieve that result, I consider that the court does have jurisdiction, which it would be appropriate to exercise if necessary to give effect to an order that has been properly made by the court under rule 2.33A in the circumstances of the present case, to require the registrar to exercise the power contained in section 1076 of the CA 2006 to accept a replacement for a document previously delivered that both (1) did not comply with the requirements for proper delivery and (2) contained unnecessary material (within the meaning of section 1074)."*

Discussion

30. I accept and agree with Ms Toman's position that there is no power in the court in this case to deal with the issue that has arisen by way of an order for rectification of the register under s1096.

31. In this case, I do not consider there is any point in, or need to make, an order under what is now r3.34 IR 2016. The effect of such an order would be to provide that the statement of affairs to be lodged should not contain the Schedules. However, that is already the case as a result of r3.32(2) IR 2016. I need not address Ms Toman's second alternative any further, save to say that I have serious doubts that the conditions set out in r3.34 for the making of an order under r3.45 IR 2016 were met on the facts of the case and I would not have been prepared to imply that such conditions were met, as I was invited to do. In particular, it is not clear to me that the conduct of the administration would be damaged by the disclosure of the information in the Schedules.

32. In my view, it is clear, applying such general principles as were applied by Mr Spearman QC when considering "unnecessary material", that the Schedules were indeed "unnecessary material". Further, they were readily able to be separated from the statement of affairs.

33. Under s1074 CA 2016, the Non-Compliant SoA was not therefore improperly delivered and the Registrar had a discretion whether to register the statement of affairs in its complete state as delivered or with the unnecessary material removed. It is unclear whether that discretion was exercised at all but, if it was, it was on the face of things exercised wrongly in a public law sense of being exercised irrationally or in a *Wednesbury* unreasonable sense. If the IR 2016 prohibit delivery of the Schedules to the Registrar it is difficult to see how it could be lawful for him to register them. In those circumstances judicial review would lie. The most appropriate remedy would, in my view, be removal of the Schedules and not (as sought by the Administrators) removal of the entire SoA. No point is taken that judicial review is the necessary procedure and in those circumstances it seemed to me right to order removal of the Schedules only. In essence this is to follow the approach in the *Swarbrick* case, the main difference being that the requirement that the Schedules not be lodged for registration derives from an express rule in this case rather than (as in *Swarbrick*) from a court order under what is now r3.34 IR 2016.

34. However, that is not the only route to the conclusion that I reached and order that I made. In my view, an alternative (and preferable) analysis is that the Registrar, having registered the SOA including the Schedules, had a discretion to remove the Schedules under s1094 CA 2016. He should have done this and his refusal to do so is unlawful and irrational within *Wednesbury* principles. There may be an issue as to whether he had "power" to register the Schedules. It might be said that he did not have power to do so in the light of what I have said in paragraph 33 above. The counter-argument, which I prefer but on which I did not hear detailed argument, is that the "power" referred to within s1094 CA 2016 is a reference to jurisdiction rather than a reference to whether as a matter of discretion on the facts it could be exercised in a particular manner. The same argument applies as regards the procedure (i.e. an application within the proceedings or judicial review) which I have already addressed.

35. Finally, I should address the primary submission of Ms Toman, which I did not accept, namely that the appropriate remedy is to order removal of the "defective" Statement of Affairs (which included the Schedules) and its replacement with the Statement of Affairs which did not include those Schedules. First, I do not consider that the entire document can be replaced under s1076(1)(a), in that in my judgment it cannot be said that the defective Statement of Affairs was not properly delivered (see s1074(4) CA 2006). This flows from the fact that the Schedules were readily separable from the document as a whole. Secondly, whilst s1076(1)(b) does apply, the fact is that, as the *Swarbrick* case shows (In passages I have not cited), the court has to hedge round orders for replacement because the registrar has to be satisfied that a replacement document meets certain criteria other than not falling foul of the defect identified by the court. Thirdly, the real evil or defect is the Schedules. If, as they can be, separately removed under s1094, then that solves the problem with the least interference with the register.

36. I would have welcomed assistance from the Registrar on these matters. As I have said, I consider that the order by reference to s1094 was the preferable route on the facts of this case. In the end, however, I am satisfied that at least one of these alternative analyses applies and that this justifies the order that I have made.

Costs

37. I now turn to the question of costs. Having found that the Registrar had a discretion which he should have exercised to remove the Schedules or not to register them in the first place, I ordered that he should pay the costs of the application. His repeated position in correspondence that a court order was necessary was simply wrong.

38. The applicants had not lodged a costs schedule at the time of the hearing before me. With a view to summary assessment, I laid down a timetable for one to be lodged and served and for the Registrar to lodge written submissions. Such submissions were lodged by the Treasury Solicitor. I then gave the applicants' an opportunity to reply but that opportunity was not taken up.

39. The Registrar, by the Treasury Solicitor ("TS") makes the following points:

    (1) The Applicants did not indicate sufficiently clearly the urgency of the matter and that a court application would be made. In my judgment, the Registrar by letters dated 16 October and 28 October made clear that he was not prepared to act and that a court application would be necessary. It is difficult to see how further communications would have persuaded him to take a different stance. The Administrators were clear that they reserved the right to make such application. Criticism is also made that an email of 4 November 2020 did not make clear how urgent the matter was. In my judgment, the urgency was clear from the situation. Further, it is said that little time was allowed between service of the proceedings and the hearing. However, that was a matter that I had dealt with in abridging time. Connected with this point, the TS suggests that the Applicants had used the Registrar's general enquiries email when they served the court papers and notice of the hearing date rather than the "liquidations" team email. However, I notice all responses exhibited by the Applicants had come from the "enquiries" email, someone with responsibility for that email forwarding the same promptly to be dealt with by the liquidations team. In short,

these are not matters which cause me to reduce the costs claimed or which cause me to revisit the order that I made that all the costs should be paid by the Registrar.

(2) Secondly, it is said that the situation was brought about by the applicants' own error in filing the SOA with the Schedules attached. In my judgment this is not a good point. The Applicants acted quickly on the misfiling and asked for the position to be sorted by not registering the statement of affairs. The Registrar agreed to this course but then registered further copies and refused to remove them from the register. The substantive need for the proceedings was because of the Registrar's failings. Further, the uncontradicted evidence (as opposed to assertion in correspondence) is that the Applicants did not lodge further copies of the statement of affairs with the Schedules but that the Registrar seems to have taken further copies attached to emails (for identification purposes) asking that the statement of affairs in that form previously lodged not be registered.

(3) The statement of costs lodged on behalf of the Applicants is in a sum of 10p short of £9,700 (ex VAT). The respondent submits that 1.6 hours of correspondence with the respondents, 12.1 hours of attendances on the client and counsel and 12.6 hours of work on the application are each unreasonable. However:-

a) Having considered the correspondence I consider that 1.6 hours for correspondence with the respondents is reasonable and proportionate;

b) The attendance on the client is in fact 3.9 hours, with a breakdown between telephone and letters. I consider these times to be reasonable and proportionate.

c) There is a further 8.2 hours of attendances on "others" (which with the attendances on client add up to the 12.1 hours referred to by TS). "Others" is likely to include attendances on the court as well as Counsel. In my view this time claimed is disproportionate as a whole and I would reduce it to 7 hours. This has the effect of reducing the claim by £260.40.

d) As regards the 12.6 hours work on the application this has to be read together with other items under the heading work on documents including 6 hours preparing for hearing, 1.8 hours preparing correspondence and 2.3 hours preparing documents following the hearing, all of which are challenged. This against the background of separate times being given for work on the skeleton argument and draft order an on the statement of costs.

e) I am unclear what the correspondence can be but have already considered correspondence as such and do not think it is proportionate to add onto it the 1.8 hours mentioned (even if it has simply been misallocated on the form). There will have been work on the bundles which were electronic. Overall, I consider it proportionate to reduce the sum allowed as to 1.8 hours (for the correspondence) amounting to £390.60, 1 hour of Grade A fee earner time for preparation for hearing,

a reduction of £217 and 1 hour of Grade A fee earner time on preparing documents after the hearing (amounting to £217).

40. The total reduction in the costs claimed is in the sum (ex VAT) of £1,085.

41. I therefore summarily assess the costs (ex VAT) at £8,614.90 which I have considered as a whole (as well as the individual components) and consider to be reasonable and proportionate.