Neutral Citation Number: [2021] EWHC 2871 (Ch)

Case No: CH-2020-000217

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

IN THE MATTER OF CARILLION PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

ON APPEAL FROM THE INSOLVENCY AND COMPANIES COURT
ICC JUDGE JONES' ORDER DATED 7 AUGUST 2020

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC2A 1NL

Date: 27/10/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY **Appellant**

- and -

CARILLION PLC (in liquidation) **Respondent**

- -
- -

Javan Herberg QC and Ajay Ratan (instructed by **The Financial Conduct Authority**) for the **Appellant**
Catherine Addy QC, Farhaz Khan and Benjamin Archer (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Respondent**

Hearing dates: 13 and 14 July 2021

- -

Approved Judgment

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

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10:30am on 27 October 2021

Mr Justice Michael Green :

INTRODUCTION

1. Does regulatory action by the Appellant, the Financial Conduct Authority (the **FCA**), against a company in liquidation constitute an "*action or proceeding*" that requires the permission of the insolvency court under s.130(2) of the Insolvency Act 1986 (the **Act**)? That is the question in this appeal by the FCA from the Order of ICC Judge Jones (the **Judge**) made on 7 August 2020. For the reasons set out in his reserved judgment reported at [2020] EWHC 2146 (the **Judgment**), the Judge concluded that permission was required and went on to grant that permission. That latter decision is not challenged by either party. I am therefore only concerned with the purely legal threshold issue as to whether the FCA needs the permission of the court to proceed with its proposed regulatory action under its powers in the Financial Services and Markets Act 2000 (**FSMA**).

2. The appeal arises in relation to the spectacular collapse of the Respondent, Carillion PLC (**Carillion**) which was put into compulsory liquidation on 15 January 2018. The Official Receiver (**OR**) was appointed, and still acts, as the liquidator. Carillion through the OR is represented by Ms Catherine Addy QC, leading Mr Farhaz Khan and Mr Benjamin Archer.

3. The FCA is represented by Mr Javan Herberg QC leading Mr Ajay Ratan. At the time of the Judge's Order and when this appeal was launched, the FCA was contemplating issuing statutory notices against Carillion and some of its directors in respect of alleged market abuse and breaches of the Listing Rules pursuant to ss.91 and/or 123 of FSMA. On 18 September 2020, the FCA issued a Warning Notice and published a brief statement about that Warning Notice which summarised the action that the FCA proposed to take against Carillion and others. In relation to Carillion, the published Warning Notice statement made clear that a public censure was proposed, not a financial penalty. The Warning Notice itself was issued pursuant to the Judge's permission to do so by the Order of 7 August 2020 and the fact of its issue is now in the public domain. There is therefore now no need for the privacy restrictions that were in place in respect of the hearing before the Judge and which required his published Judgment to be redacted.

4. Mr Herberg QC said that this is an important point of statutory construction that has significant implications for the FCA's performance of a wide range of its functions under FSMA. He also said that this was the first time anyone had suggested that permission was required and the OR had been involved in at least two prior cases in which final notices were issued against companies in liquidation without being required to seek permission to do so from the court. This is therefore a novel point, as the Judge recognised, and could potentially affect a number of other enforcement actions by the FCA.

5. Ms Addy QC did not accept that the Judge's decision would extend to any other powers of the FCA than the specific ones under consideration. She also submitted that it was irrelevant that the OR had not raised the issue earlier as it was a pure point of statutory construction that had to be clarified in accordance with the law.

6. The OR's evidence explained why it had been raised in this liquidation. This was because Carillion was the largest trading liquidation in UK history with a massive deficiency in relation to creditors. Proofs of debt received by the OR exceed £7.1 billion while realisations as of last year totalled only some £575 million. The cost to the public purse will be considerable. The income received by Insolvency Service under the Insolvency Proceedings (Fees) Order 2016 has already been expended and all the realisations have been accounted for by way of liquidation expenses. Any costs that would have to be incurred if Carillion, acting by the OR, was required actively to participate in FCA enforcement proceedings would necessarily have to be met from public funds, as would other existing and contemplated litigation. Therefore, Ms Addy QC submitted, it is important that these matters have the scrutiny of the insolvency court before such costs have to be incurred.

7. Clearly the scale of the liquidation and the particular facts in relation to Carillion cannot influence the proper interpretation of s.130(2) of the Act. But they do provide some perspective and explain why the point has been taken.

8. In very broad terms, the FCA's case is that s.130(2) of the Act is limited to court actions and proceedings or materially similar actions and proceedings, such as arbitration. It says that the statutory purposes of s.130(2) do not include, and were not intended by Parliament to include, regulatory action taken by the FCA under FSMA. The FCA's decision-making processes and the issue of warning notices and decision notices are not analogous to court proceedings; rather they are purely internal processes and the target of the FCA's enforcement decisions can refer the matter to the Upper Tribunal which would then decide for itself, in a *de novo* decision, what action the FCA can take. That reference is not subject to s.130(2) because it has necessarily to be taken by, in this case, the company in liquidation, not the FCA.

9. Mr Herberg QC's general overarching point was that Parliament cannot have intended that an ICC Judge should have to decide whether a public authority such as the FCA with specific statutory responsibilities and obligations should be allowed to continue with regulatory action it had decided to take against a company in liquidation. He asks rhetorically how an ICC Judge is supposed to balance the competing public interests and whether such a Judge would be equipped to do so. Parliament could not have intended to have given that role to an ICC Judge when it had so comprehensively prescribed for the FCA's role under FSMA.

10. Ms Addy QC said that the Judge was correct for the reasons that he gave. The Judge was right to conclude that, having regard to the language, context and purpose of s.130(2), the FCA's then intended exercise of its statutory powers "*cries out*" as a "*proceeding*".

11. The background facts are dealt with in paras. [19] to [22] of the Judgment and I need say nothing more about them for the purposes of this appeal. I do however need to explain the relevant statutory regimes that are in play.

THE FCA'S RELEVANT POWERS UNDER FSMA

12. The Judge set out fully the relevant provisions of FSMA in paras. [27] to [49] of his Judgment. I will only expressly refer to some of the more important provisions.

13. By ss.1B to 1E of FSMA, the FCA's general duties and objectives are stated. In relation to its Warning Notice against Carillion, it seems to me that it is purporting to advance its strategic objective of ensuring that relevant markets function well (s.1B(2) FSMA) and its operational objective of protecting and enhancing the integrity of the UK financial system (ss.1B(3) and 1D FSMA).

14. Among its functions, the FCA operates the UK listing regime which requires those on the Official List of the London Stock Exchange to comply with the Listing Rules made by the FCA under FSMA. By s.91 FSMA, the FCA is empowered to bring enforcement action in relation to breaches of the Listing Rules. The FCA considers that the publication of enforcement outcomes even against companies in liquidation can be a particularly effective way of raising awareness of regulatory standards that it is seeking to maintain.

15. The FCA is also the competent authority under FSMA to enforce the Market Abuse Regulation[1]. It can do so pursuant to its powers under s.123 FSMA. Again the FCA places a high priority on preventing and detecting market abuse which is an important aspect of carrying out its statutory objectives of protecting consumers, enhancing market integrity and promoting competition.

16. The FCA's internal decision-making process is discussed in more detail below. If the FCA wishes to take action in respect of breaches of the Listing Rules or the Market Abuse Regulation it must give the person against whom action is proposed to be taken a warning notice: see ss.92 and 126-127 FSMA.

17. The manner in which the three-stage internal decision-making process is implemented is set out in the FCA's Handbook: the Decision Procedure and Penalties Manual (**DEPP**). But the main stages are prescribed by FSMA itself.

18. Warning notices are dealt with in s.387 FSMA. Such a notice must state the action the FCA proposes to take and give reasons for that proposed action. By s.387(2), the warning notice must specify a reasonable period (of not less than 14 days) within which the person concerned may make representations to the FCA in response to the notice. By s.387(4), the FCA must decide within a reasonable period whether to issue a decision notice.

19. Decision notices are dealt with in s.388 FSMA. A decision notice must state the reasons for the decision being taken. It must also give an indication to the recipient of any right to refer the matter to the Upper Tribunal and the procedure on such a reference. By s.133 FSMA, on a reference, the Upper Tribunal:

> "(a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse

> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination."

The reference to the Upper Tribunal is not therefore an appeal; it is a fresh consideration of the matter.

20. Subject to any such reference to the Upper Tribunal and subject to the FCA deciding not to take action following the warning or decision notice (in which case it must issue a Notice of Discontinuance – s.389 FSMA), the FCA must issue a final notice, which then becomes operative: s.390(1) FSMA. In respect of a financial penalty, s.390(9) FSMA provides as follows:

> "(9) If all or any of the amount of a penalty payable under a final notice is outstanding at the end of the period stated under subsection (5)(b), [the FCA] may recover the outstanding amount as a debt due to it."

There is no dispute that, if the FCA imposed a financial penalty on a company in liquidation, it would need the permission of the court under s.130(2) of the Act if it wished to issue proceedings for recovery of the debt outside of the liquidation process. Both parties accepted that such a debt could be proved in the liquidation (see para. [58] of the Judgment) though it is unclear whether it would have priority as an expense.[2]

21. The FCA is required to establish a decision-making procedure: see s.395(1) FSMA. It has done so in the form of DEPP. By s.395(2):

> "that procedure must be designed to secure, among other things, that –
>
> > (a) a decision falling within any of paragraphs (a) to (c) of subsection (1) is taken -
> >
> > > (i) by a person not directly involved in establishing the evidence on which the decision is based, or
> > >
> > > (ii) by 2 or more persons who include a person not directly involved in establishing that evidence."

Even though one or more of the FCA's investigators could be involved in the decision to issue a statutory notice, the FCA uses an internal decision-making committee, called the Regulatory Decisions Committee (**RDC**) to make these decisions. The RDC's procedures and constitution are set out in Chapter 3 of DEPP. In practice investigators do not participate in the RDC's decision-making process, although they will have considered that the evidence is sufficient for the matter to be referred to the RDC and will have provided the details of their investigation to the RDC.

22. The RDC is not a tribunal, although it does hear oral representations from both the FCA investigation team and the recipient of a warning notice. It is a committee of the FCA and is accountable to the FCA's board. The Chair of the RDC is an employee of the FCA, as are its legal advisors. Even though there is a certain degree of independence

[2] Whether this is so did not need to be determined in this application. It would involve considering the Supreme Court's judgment in *In Re Nortel Gmbh (in administration)* [2013] UKSC 52.

from the investigation (as required by s.395(2)(a) FSMA), the RDC is not structurally or functionally separate from the FCA. The Judge placed reliance on the RDC process, in particular the right to make representations to the RDC after issue of a warning notice, as being akin to a judicial process and therefore having the features of "*proceedings*". However Mr Herberg QC submitted that the RDC is clearly not a judicial body and it is common for administrative decisions to be taken after giving persons affected by such decisions the opportunity to make representations.

INSOLVENCY MORATORIA

23. Since the mid-19th century, in the context of the winding up of companies, the Companies Acts have provided for a stay on "*actions*" and/or "*proceedings*" being brought against the company in liquidation without the leave of the court. As the company is in the hands of a liquidator who could be expected to carry out their duties in respect of the collection, realisation and distribution of the company's assets in an orderly and responsible way in the best interests of creditors, those assets should not have to be used and depleted in dealing with unnecessary actions and proceedings outside of the liquidation process.

24. Thus s.87 of the Companies Act 1862 provided as follows (emphasis added):

> "87. Actions and Suits to be stayed after Order for winding up.
>
> When an Order has been made for winding up a Company under this Act no Suit, Action, or other Proceeding shall be proceeded with or commenced against the Company except with the Leave of the Court, and subject to such Terms as the Court may impose."

25. A "*Suit*" as distinct from an "*Action*" was in those days a reference to proceedings brought in the Court of Admiralty, which was separate from the High Court until they were brought together by the Judicature Acts – see *The Longford* (1889) 14 PD 34, per Bowen LJ at p.38. Following the absorption of the Court of Admiralty into the High Court in 1875, the language of "*Suit*" became otiose and it was dropped from the later equivalent provisions, leaving just "*actions*" and "*proceedings*". It is important to point out that the wording in the 1862 Act was focused on court processes hence the need to specify both "*Suit*" and "*Action*", together with the related, *eiusdem generis,* category of "*other Proceeding*".

26. The successor provisions were consolidated into s.231 of the Companies Act 1948 in the following similar terms (emphasis added):[3]

> "231. Actions stayed on winding-up order.
>
> When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against

[3] The intervening provisions in similar terms were: s.142 of the Companies (Consolidation) Act 1908 (removing the word "suit"); and s.177 of the Companies Act 1929 (this extended the stay to provisional liquidations).

> the company except by leave of the court and subject to such terms as the court may impose."

27. That language largely remains in the current s.130(2) of the Act which provides as follows (emphasis added):

> "130. – Consequences of winding-up order.
>
> (1) …
>
> (2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose."

By s.228 of the Act, the same stay applies in respect of unregistered companies.

28. Before a winding-up order is made, the court can impose a stay on the application of the company, a creditor or contributory. Section 126 of the Act provides as follows:

> "126.- Power to stay or restrain proceedings against company
>
> (1) At any time after the presentation of a winding-up petition, and before a winding up order has been made, the company, or any creditor or contributory, may-
>
> (a) Where any action or proceeding against the company is pending in the High Court or Court of Appeal in England and Wales or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and
>
> (b) Where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;
>
> And the court to which application is so made may (as the case may be) stay, sist or restrain the proceedings accordingly on such terms as it thinks fit."

There is a similar provision for unregistered companies in s.227 of the Act.

29. On the face of it, s.126 looks to be limited to an "*action or proceeding*" in court but it appears that a distraint is considered to be a "*proceeding*" within the meaning of the section: see Lord Russell of Killowen's speech in *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, at 1448D-F where he expressed surprise that this was so but that there "*was a consistent stream of authority over a long period of time*" that supported this construction (see also Lord Simon of Glaisdale at 1446A-D). But the remedy of distress is difficult to define and may be an exceptional case based on the historical assumption that it is a "*proceeding*", which assumption was shared by Parliament in re-enacting the sections with the same words in subsequent

Companies Acts[4]. That House of Lords' authority was relied upon by Mervyn Davies J in holding that the levying of distress on a company's goods was a "*proceeding*" within s.130(2) of the Act and so could not be done without the leave of the court: see *In re Memco Engineering Ltd* [1986] 1 Ch 86. Mr Herberg QC said that distress was *sui generis* and in any event akin to a "*proceeding*". Ms Addy QC said that it shows that "*proceeding*" should be broadly construed.

30. Both parties referred to the moratoria provisions in relation to companies in administration. Mr Herberg QC submitted that the wider wording used for administrations does not affect the meaning of the narrower wording used in s.130(2); whereas Ms Addy QC submitted that the two were essentially the same and should have the same reach, with the differences in wording being explained by reference to the modern approach to legislative drafting.

31. Company administrations were brought into law by the Insolvency Act 1985, which was almost immediately consolidated into the Act. This followed the recommendations of the Cork Report[5] which included the proposal that, upon the appointment of an administrator, "*a general stay of proceedings against the company will be imposed similar to that at present imposed by section 231 of the Act of 1948.*" (para. 637 of the Cork Report)

32. This "*general stay*" was enacted in s.11(3) of the Act. In its original version this provided as follows (emphasis added):

> "(3) During the period for which an administration order is in force—
>
> (a) no resolution may be passed or order made for the winding up of the company;
>
> (b) no administrative receiver of the company may be appointed;
>
> (c) no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose; and
>
> (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid."

33. This is clearly more expansive wording than s.130(2), covering not only "*proceedings*" but also any "*execution or other legal process*". It also expressly includes the remedy of distress which does not necessarily require a prior court process.

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[4] Note the addition of the words "*or its property*" in s.130(2) which may have been to make clear that distress was included within the stay.

[5] Its proper title is the Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, which Committee was chaired by Sir Kenneth Cork.

34. Part II of the Act dealing with administrations has now been superseded by Schedule B1 to the Act[6]. The old s.11(3) has now become para. 43(6) of Schedule B1 to the Act. Para. 43 is headed "*Moratorium on other legal process*", probably because para. 42 is headed "*Moratorium on insolvency proceedings*". Para. 43(6) provides as follows (emphasis added):

> "(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except –
>
> (a) with the consent of the administrator, or
>
> (b) with the permission of the court."

Whereas under s.11(3) "*other legal process*" seemed to be a residual category, para. 43(6) of Schedule B1 promotes "*legal process*" to the primary definition, with "*legal proceedings*" relegated to a sub-set of it. Whether this is significant or not will be discussed below.

GROUNDS OF APPEAL

35. There are only two grounds of appeal and they mirror the way the Judge dealt with the matter.

(1) Interpretation of s.130(2) of the Act; the FCA contends that the Judge adopted too wide a construction of s.130(2) and says that its scope is limited to court or materially similar proceedings;

(2) The application of s.130(2) to the statutory notices issued by the FCA pursuant to its powers under ss.91 and/or 123 FSMA; the FCA contends that the overbroad construction of s.130(2) led the Judge erroneously to apply the stay to the FCA's regulatory processes.

36. The Judge's Order of 7 August 2020 defined what he decided by the following declaration:

> "Pursuant to section 130(2) of the Insolvency Act 1986 ("**the Act**"), the Authority may not commence the process of taking action against the Respondent under section 91 and/or section 123 of the Financial Services Act 2000 ("**FSMA**") by giving the Respondent a warning notice under section 92 and section 126 of FSMA ("a **Warning Notice**") and may not issue to the Respondent any subsequent Decision Notice under sections 92 and 127 and Final Notice under 390 FSMA (in each case, a "**Statutory Notice**"), except by leave of the Court and subject to such terms as the Court may impose."

37. So even though there are two grounds of appeal, there is only one real question to be decided on this appeal, namely whether the Judge correctly decided that the FCA's

[6] This was by s.248 of the Enterprise Act 2002

regulatory action by way of the statutory notices falls within the ambit of s.130(2) of the Act. I nevertheless will deal with the two grounds separately.

GROUND 1: THE INTERPRETATION OF S.130(2) OF THE ACT

(a) The meaning of "*proceeding*" in s.130(2) of the Act

38. Ms Addy QC accepted that, by virtue of the historical context of its predecessor section, in particular the distinction between "*Suit*" and "*Action*" in the 1862 Act, "*action*" in s.130(2) of the Act must refer to court proceedings against the company. Accordingly, the FCA's non-court regulatory action can only be within s.130(2) if it is a "*proceeding*". The question is whether there should be a broad or more narrow interpretation of "*proceeding*" in s.130(2).

39. Mr Herberg QC relied on the Court of Appeal's decision in *Bristol Airport Plc v Powdrill* [1990] Ch 744 (***Powdrill***), which was an airline administration case. The lead judgment was given by Sir Nicolas Browne-Wilkinson V-C, (as he then was), with which Woolf and Staughton LJJ agreed, and it principally dealt with whether leave was required under s.11(3)(c) before airport operators could exercise their statutory right of detention of aircraft under s.88 of the Civil Aviation Act 1982. Having decided that leave was required, the Vice-Chancellor also considered the meaning of "*other proceedings*" in s.11(3)(d) of the Act. At pp.765F-766D, he said as follows (emphasis added):

> "The administrators submit, and the judge held, that the detention of the aircraft required the leave of the court as being 'other proceedings . . . against the company or its property.'
>
> I have no hesitation in rejecting that view. In my judgment the natural meaning of the words "no other proceedings . . . may be commenced or continued" is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. It is true that the word "proceedings" can, in certain contexts, refer to actions other than legal proceedings, e.g. proceedings of a meeting. In *Quazi v. Quazi* [1980] A.C. 744 the House of Lords held that a divorce by Talaq in Pakistan constituted other proceedings within the statutory phrase "judicial or other proceedings." But in that phrase the word "other" must have referred to non-judicial proceedings since judicial proceedings had already been expressly referred to. No such special feature is present in section 11(3)(d).
>
> Further, the reference to the "commencement" and "continuation" of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word "proceedings" in the plural together with the words "commence" and "continue" are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature. Again it is clear that that the draftsman when he wished to refer to some activity other than "proceedings" was well aware of the word "steps" which he used in section 11(3)(c).
>
> The judge took the view that the words "other proceedings" covered

> "every sort of step against the company, its contracts or its property which may be taken and the intention of Parliament by section 11 is to prevent all such, without the leave of the court or the administrators."
>
> In my judgment, however anxious one may be not to thwart the statutory purpose of an administration, the judge's formulation must be too wide. If the word "proceedings" has this wide meaning, all the other detailed prohibitions in section 11(3) would be unnecessary. Moreover such a construction would introduce great uncertainty as to what constituted commencement or continuation of proceedings. Would the acceptance of a repudiation of a contract by the company constitute a "proceeding"? Would a counter-notice claiming a new tenancy under the Landlord and Tenant Act 1954 be a "proceeding"? In my judgment, the judge's view would produce an undesirable uncertainty which, in view of my construction of section 11(3)(c), it is unnecessary to introduce into the Act."

40. The Vice-Chancellor principally based his reasoning on the "*natural meaning of the words*", not on any authorities that had previously considered the width of the term "*proceeding*" in s.130(2) of the Act or its predecessors, which may have assisted in the construction of s.11(3)(d). Nevertheless it was common ground between the parties and accepted by the Judge (see para. [66] of the Judgment) that the Vice-Chancellor's conclusion that "*proceedings*" meant "*legal proceedings or quasi-legal proceedings such as arbitration*" applied with equal force to s.130(2) of the Act.

41. Ms Addy QC referred to statements in the authorities to the effect that the section should be construed widely: eg *Re International Pulp and Paper Co* (1876) 3 Ch. D 594; and *Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd* [1967] 1 WLR 1017. She pointed to examples of "*proceedings*" that have been found to require leave under either s.130(2), s.11(3)(d) or para. 43(6) of Schedule B1 to the Act, including:

(1) Criminal proceedings – see *R v Dickson* [1991] BCC 719 for s.130(2); and *Re Rhondda Waste Disposal Ltd* [2001] Ch 57 for s.11(3)(d);

(2) Proceedings brought by foreign public prosecutors - see *Re Arm Asset Backed Securities SA (No. 2)* [2014] EWHC 1097;

(3) Proceedings brought by a third party to revoke a patent owned by a company in administration – *Re Axis Genetics plc* [2000] BCC 943;

(4) References to a statutory adjudicator under s.108 of the Housing Grants, Construction and Regeneration Act 1996 – see *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] BCC 333;

(5) The levying of distress – *Re Memco Engineering Ltd* [1986] Ch 86, referred to above;

(6) Proceedings taken against a company in administration by a statutory regulator, the Gambling Commission – *In re Frankice (Golders Green) Ltd (in administration)* [2010] Bus LR 1608 (***Frankice***).

42. The latter case, *Frankice*, a decision of Norris J, was heavily relied upon by Ms Addy QC and the Judge. Mr Herberg QC says that it is distinguishable from the present both

because it is a decision in relation to the different wording in para. 43 of Schedule B1 to the Act but also on the different processes of the Gambling Commission and the FCA. He also says, "*to the extent necessary*", that it is clearly wrong and should not be followed. I will deal with those submissions below.

43. Mr Herberg QC submitted that the above cases show that the core case that is within s.130(2) is that of court proceedings. That is why criminal proceedings are included. But he says that the Vice-Chancellor in *Powdrill* cautioned against adopting a more expansive interpretation of non-court "*proceedings*" because of the uncertainty to which that would give rise. Mr Herberg QC went on to ask in the FCA's skeleton argument:

> "how are the boundaries of the category of "quasi-legal proceedings" to be defined? To put the point more precisely: how can it be ascertained whether non-court processes are sufficiently and materially analogous with court proceedings, such that they ought to be brought within the scope of the statutory stay?"

44. Ms Addy QC says that this falls into the trap of construing the Vice-Chancellor's words in *Powdrill* rather than the statute itself. I agree that the task is to determine what is meant by "*proceeding*" in s.130(2) but I do think that the Vice-Chancellor's narrow interpretation of the natural meaning of the word "*proceedings*" as including only "*quasi-legal proceedings, such as arbitration*" is significant.

(b) The purposes of the statutory stay

45. In my view, it is important to understand the purposes of the statutory stay in order to determine whether Parliament intended to bring a particular non-court process within its scope.

46. Ms Addy QC said, and the Judge held, that the purposes of the statutory stay are only relevant to the second stage of the court's consideration of whether to exercise its discretion to grant permission under s.130(2). Their point is that Parliament has decided that a compulsory liquidation is a court-controlled process and the court has an extremely wide discretion under s.130(2) to do what is "*right and fair in all the circumstances*" (see eg *Re Aro Co Ltd* [1980] 1 Ch 196 (CA), 209 and *Cosco Bulk Carrier Co Ltd v Armada Shipping SA and anor* [2011] EWHC 216 (Ch) at [47]) having regard to the purposes of the moratorium. Therefore, so the argument goes, because there is such a wide discretion at stage two, Parliament must have intended not to exclude from the ambit of s.130(2) any matter that might have a bearing on the liquidation over which it has decided the court should have oversight and supervision.

47. While I think it is obviously correct that the purposes of the statutory stay must be taken into account at stage two when the court considers the exercise of its discretion, that does not mean that it should not be taken into account in construing, at stage one, whether any particular process is caught by the stay. Ms Addy QC herself quoted from the Vice-Chancellor's judgment in *Powdrill* where he considered that it was appropriate to bear in mind the statutory objective in construing it. At p.758 he said:

> "The judge was very much influenced in his construction by the manifest statutory purpose of Part II of the Act. I agree with this approach...In my judgment in construing Part II of the Act it is legitimate and necessary to bear in mind the

> statutory objective with a view to ensuring, if the words permit, that the administrator has the powers necessary to carry out the statutory objectives, including the power to use the company's property."

Ms Addy QC had also referred, in relation to the applicable principles of statutory interpretation, to Leggatt LJ's (as he then was) general comments in *R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 at [33] (emphasis added):

> "The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation."

48. In *Mortgage Debenture Ltd v Chapman* [2016] EWCA Civ 103 (***Chapman***) David Richards LJ (with whom Lord Dyson MR and McCombe LJ agreed) compared the purposes of the liquidation (or bankruptcy) and administration moratoria (at [12] – [13]):

> "12 In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a pari passu basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the pari passu basis of distribution. Secondly, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate.
>
> 13. In the case of an administration, this is not a sufficient description of the purposes of the moratorium in paragraph 43(6). An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in *In re Atlantic Computer Systems plc* [1992] Ch 505, 528, the moratorium provides "a breathing space". Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so."

49. Despite drawing those distinctions between the purposes of the liquidation and administration moratoria, as was similarly done in *Re Atlantic Computer Systems plc* [1992] Ch 505 and *Re Pan Ocean Co. Ltd* [2015] EWHC 1500 (Ch) (a decision of the Judge), albeit at stage two when considering the exercise of the court's discretion, it is fair to say that David Richards LJ found that the ambit of the moratorium was, in that particular respect, the same in an administration as in a liquidation. At para. [25] he said:

> "25. In my judgement, the broader purposes to be served by a moratorium in an administration do not, either as a matter of the language of the provision or as a matter of principle, justify a different approach to defensive proceedings. As to language, there is no essential difference between section 130(2) ("no action or proceeding shall be proceeded with or commenced against the company or its property") and paragraph 43(6) ("No legal process (including legal proceedings....) may be instituted or continued against the company or property of the company"). If Parliament had intended that the latter moratorium should apply to defensive proceedings, it is hardly likely that, in the light of the earlier authorities regarding a company in liquidation, it would have used substantially the same language without qualification."

The Court of Appeal therefore held that essentially defensive steps being taken in litigation first brought by a company in administration were not within either s.130(2) or para. 43(6) of Schedule B1 to the Act.

50. Mr Herberg QC submitted that neither of the two identified purposes of s.130(2), namely the protection of the *pari passu* basis of distribution and the integrity of the adjudication process for claims within the liquidation, apply to statutory notices issued by the FCA under FSMA. He accepts that, if the FCA were to seek to recover any financial penalty under s.390(9) FSMA by court proceedings, that that would be within s.130(2) of the Act. But at the stage of issuing a statutory notice under FSMA that cannot be within either of the statutory purposes of s.130(2) and so should not be considered to be a "*proceeding*" within the meaning of the Act.

51. It is fairly obvious that regulatory action by the FCA cannot be adjudicated on in the liquidation. The exercise by the FCA of its statutory powers under FSMA has to be resolved according to the processes established in FSMA, including possibly by the Upper Tribunal if the matter is referred to it. It is not possible for a liquidator to take over that process and attempt to determine the appropriate regulatory action in the liquidation. All that can be said is that the liquidator may have to be involved in responding to the FCA's notices and may have to use the company's assets to do so. But such involvement does not undermine the two statutory purposes identified by David Richards LJ in *Chapman*.

52. The Judge considered that it was not particularly relevant that the matter could not be dealt with in the liquidation. He cited the example of criminal proceedings that are within s.130(2) of the Act (see *R v Dickson* (supra)) but which can clearly not be resolved by the liquidator. However, as Mr Herberg QC submitted, court proceedings, including criminal proceedings, are within the core case of "*proceedings*" within the natural and ordinary meaning of s.130(2) of the Act. When considering whether a novel, non-core case such as the present is within the meaning of "*proceeding*" in s.130(2), in my view it is important to test it against the statutory purposes of the section.

53. The Judge also seems to have adopted a far broader statement of the statutory purpose of s.130(2), saying a number of times in the Judgment that the "*underlying purpose*" is "*the protection of the insolvent estate for all creditors*" (see paras. [65], [68], [79] and [89]). The Judge based this proposition on his interpretation of the House of Lords' decision in *Re Smith (a bankrupt) Ex p. Braintree District Council* [1990] 2 AC 215 (***Smith***). However *Smith* was a case concerned with bankruptcy and the discretionary power of the Court under s.285 of the Act "*to stay any action, execution or other legal process*". The issue with which the House of Lords was dealing in *Smith* was whether a local authority's application to the magistrates' court to issue a warrant of commitment against a person who had failed to pay rates under s.102 of the General Rate Act 1967 was a "*legal process*" within s.285(1) of the Act.

54. Lord Jauncey of Tullichettle gave the only reasoned speech and he held that the warrant was such a "*legal process*" within s.285(1). At p.229H he said as follows:

> "The purpose of section 285 is to protect the estate for the whole body of creditors and to prevent unsecured creditors, after the initiation of bankruptcy proceedings, from taking steps by putting pressure on the debtor to obtain advantages over other creditors."

Importantly his Lordship considered that such a warrant was essentially for the purpose of enforcing the debt and coercing the debtor to pay the outstanding rates. At p.230D he explained this as follows:

> "Two matters emerge from the consideration of the foregoing sections, namely: (1) that the issue of the warrant cannot be viewed in isolation but must be considered as part of the whole procedure for recovery of unpaid rates by way of distress, and (2) that although there may be a punitive element present in the power to issue a warrant of commitment, the predominant purpose thereof is to coerce the defaulting ratepayer into making payment."

He then concluded on the width of the words "*other legal process*" as follows:

> "…the words "or other legal process" must be construed in the context of the underlying purpose of section 285, namely, the protection of the bankrupt's estate for all his creditors. It follows that proceedings by one creditor to enforce payment to himself are the sort of proceedings contemplated by the section. It cannot be in doubt that the issue of a warrant of distress would fall within the description "or other legal process." It would be both strange and illogical if the bankruptcy court could stay such proceedings but had no power to stay the next stage of the proceedings when distress had not been wholly successful. In my view, as a matter of pure construction, the words "or other legal process" in section 285(1) are quite wide enough to comprehend all the machinery provided by Part VI of the Act of 1967 for the recovery of unpaid rates, including proceedings for the issue of a warrant of commitment."

55. It seems to me that such a warrant, if applicable to a company, would be within s.130(2) on the basis that it is issued by a court pursuant to an application made to the court. It would be court proceedings within the core case of s.130(2). But I think that the Judge's reliance on the general purpose of the power in s.285(1), as expressed by Lord Jauncey, was misplaced. Lord Jauncey's main point was that the warrant could be used by the

local authority to coerce payment by the bankrupt debtor and that this would effectively amount to stealing a march on the other unsecured creditors of the bankrupt. Lord Jauncey's reference to the "*protection of the bankrupt's estate for all his creditors*" is really the same point as was made by David Richards LJ in para. [12] of *Chapman*, that the moratorium is to protect the *pari passu* basis of distribution. Lord Jauncey considered that the warrant was the next stage of enforcement after distress, recognising that the remedy of distress also potentially upsets the *pari passu* basis of distribution which is why it is within s.285 (and s.130(2)).

56. As that is what I think Lord Jauncey meant by protecting the insolvent estate for all creditors, I do not think that the general words mean that anything that may affect the insolvent estate, such as having to incur costs to deal with regulatory action, brings such "*proceedings*" within the underlying purpose of s.130(2). *Smith* was not referred to in *Chapman* and, in my view, when looking for the actual statutory purpose of s.130(2), the Judge should have relied on the analysis in *Chapman*, rather than the general statement in *Smith*, taken out of context.

(c) *Frankice*

57. The only decision where regulatory action by a statutory body has been found to be within the insolvency moratoria is *Frankice*, which was decided in circumstances of extreme urgency. Norris J managed to produce an impressively clear reasoned judgment overnight because there was a threat that the companies' gambling licences could be revoked or suspended by the Gambling Commission which would prevent the administrators trading and cause the collapse of an agreed sale of the companies' business and assets to a third party. That context is highly relevant to the decision that was made. Unsurprisingly Ms Addy QC relies heavily on *Frankice*, as did the Judge.

58. *Frankice* concerned whether the steps being taken by the Gambling Commission were within the scope of the administration moratorium imposed by para. 43(6) of Schedule B1 to the Act. The wording of para. 43(6) – "*No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued*…" – is clearly very different from s.130(2)'s "*no action or proceeding*". Norris J only considered the meaning of "*legal process*" in para. 43(6) and decided that the Gambling Commission's steps were a "*legal process*" caught by the moratorium. Norris J began his judgment by saying that he found it a difficult question.

59. In considering the scope of para. 43(6) of Schedule B1, Norris J referred to the examples of non-court proceedings that had been held to be within it. He summarised them by saying, at [38], that:

> "38. …it is plain that the relevant legal process or legal proceedings are not confined to proceedings before a court of law. It covers proceedings before tribunals, before arbitrators and before statutory adjudicators."

He then continued by considering the meaning of the word "*process*" in [39]

> "39. The question is: what guidance do those single instances give in relation to the instant case? For my part, I have looked at the words 'legal process…against the company'. I think the word 'process' suggests something with a defined beginning and an ascertainable final outcome and which, in the interim, is governed

> by a recognisable procedure. I think the word 'legal' indicates that that process must in some sense invoke the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature. One indicator of that might be that the process results in an appeal rather than, for example, reconsideration by means of judicial review, but I accept the submission of Mr Bompas that an appeal, of itself, does not determine whether a process is a legal or administrative one."

I note that *Powdrill* was cited to him, but he does not refer to it. The reference to the procedure being "*quasi-legal in nature*" may be derived from the Vice-Chancellor's definition of "*proceedings*" in *Powdrill* as including "*quasi-legal proceedings such as arbitration.*"

60. After considering two other cases where the court had ruled that regulatory action was not within the relevant moratorium – *In Re Railtrack plc (in railway administration)* [2002] 1 WLR 3002 and *Air Ecosse Ltd v Civil Aviation Authority* (1987) 3 BCC 492 – Norris J proceeded to state his conclusions at [47] – [48]:

> "47. In the instant case, I consider that the nature of the decision which the regulatory panel is called upon to make and the circumstances in which and the procedure according to which the decision is made, fall within the description of "legal process". It is difficult to articulate why I have formed this impression. There is undoubtedly a "process". It is governed by a procedure. The whole process has about it the stamp of a case being presented by the commission, being answered by the licensee and being decided upon according to legal advice and for declared reasons by an independent and impartial regulatory panel from whose deliberations employees of the commission are excluded.
>
> 48. It may well be that the commission in advancing its case to the regulatory panel will pray in aid matters of public interest, having regard to the licensing objectives which are set out in the Gambling Act 2005. But I do not think that the quality of the regulatory panel's decision is the same as the quality of the decision which the rail regulator himself had to take in *In re Railtrack plc* [2002] 1 WLR 3002 . It is much closer to an adjudication upon presented cases than to strategic decision-making undertaken irrespective of the wishes of either contending party. It has a defined beginning, namely the presentation of the preliminary findings and the preparation of the case for the regulatory panel. It has a defined and recognisably legal procedure for the conduct of the hearing itself. It has a defined outcome, namely a reasoned decision which reviews the material before the court, and it is subject to what is plainly a legal appeal."

61. Ms Addy QC relied on these passages as showing that a "*proceeding*" or a "*process*" is one that has a defined beginning and outcome, is governed by a set procedure and in some sense invokes the compulsive power of the law. While I can see that that appears to have been Norris J's reasoning, I think that he was strongly influenced by the word "*process*" in para. 43(6) in coming to that conclusion. Furthermore I think that the wider purposes of the administration moratorium, as later explained in *Chapman*, were significant in that result.

62. Ms Addy QC maintained that there was no material difference between the scope and effect of s.130(2), s.11(3)(d) and para.43(6) of Schedule B1 to the Act and the

differences in wording simply reflect the modern approach to drafting legislation which adopts clearer and simpler language. Section 130(2) has retained the same wording of "*action or proceeding*" since s.87 of the Companies Act 1862 whereas the administration provisions are obviously far more recent. Ms Addy QC referred to the Cork Report's proposal that the administration stay should be similar to s.231 of the Companies Act 1948. Norris J also said in para. [37] of *Frankice* that there was "*immaterially different*" wording as between s.130(2), the original s.11(3)(d) and para. 43(6) of Schedule B1. Ms Addy QC referred to *Blooms v Harms Offshore AHT "Taurus" GmbH & Co KG* [2009] EWCA Civ 632 at [21] but that case was about extraterritoriality and was not considering material differences of this sort.

63. Of more relevance is David Richards LJ's conclusion in para. [25] of *Chapman* that "*there is no essential difference between section 130(2) … and paragraph 43(6)*" despite his earlier finding that the administration moratorium had a broader purpose than the liquidation one. But this too was specific to the defensive proceedings that were under consideration in that case and I do not think that David Richards LJ was saying that there could not be another case where the broader administration purpose may lead to a wider scope for that moratorium.

64. On its face, the administration moratorium is wider in its terms as it expressly extends to the rights of secured creditors to enforce their security, as explained by Briggs J, as he then was, in *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch) at [49]. But that extension was created by the preceding provisions to s.11(3)(d) and para. 43(6).

65. I have to say that, however the provisions came to be drafted, I find it difficult to see how the word "*proceeding*" in s.130(2) can have exactly the same meaning as the phrase "*legal process (including legal proceedings, execution, distress and diligence)*" in para. 43(6). For a start, "*legal proceedings*" seem to be a subset of "*legal process*" which must be a wider term, so as to include at least "*execution*" and "*distress*" as well. As the purpose of para. 43(6) is wider than that of s.130(2) (see *Chapman*), in particular when the administrators are trying to save the company as a going concern or preserve its business in readiness for a sale, it is important to be able to prevent any interference or prejudicial action that may undermine that purpose and so the net should be drawn as widely as possible. Parliament's intention would have been to enable the court to control anything that might detrimentally affect the administrators fulfilling the purpose of the administration.

66. Returning to *Frankice* therefore, this broad purpose becomes evident and relevant. The administrators were continuing the companies' business and had agreed a sale of the business to a third party. A critical asset of the business was the gaming licences which could conceivably have been lost if the Gambling Commission had been allowed to proceed, thereby jeopardising the sale. Norris J had to construe "*legal process*" in that context, namely at the stage where the wider purpose of the administration was very much in play and he decided that para. 43(6) was sufficiently widely drawn to enable the court to control that sort of process. He ultimately wanted the sale to go ahead with the licences still in force but not to prevent the Gambling Commission from fulfilling its statutory function of continuing to investigate and, if necessary, take the matter in due course to a review hearing.

67. In my judgment, *Frankice* is distinguishable and Norris J's reasoning as to the reach of para. 43(6) of Schedule B1 is not applicable to the narrower and different wording of s.130(2). I also think that it is distinguishable on the facts, as Norris J held that the procedures of the Gambling Commission required any disputed issues to be determined by an "*independent and impartial regulatory panel.*" As explained under Ground 2 below, the FCA's procedures are different and do not involve such an independent and impartial decision-maker.

68. In the circumstances, it is not necessary for me to deal with Mr Herberg QC's alternative submission that *Frankice* is clearly wrong.

(d) Article 20 of the Model Law

69. Ms Addy QC relied on the Cross-Border Insolvency Regulations 2006 whereby the UNCITRAL Model Law on cross-border insolvency (the **Model Law**) was given the force of law in this country, as providing evidence that Parliament considered that regulatory action of the sort in issue in this case is within the s.130(2) moratorium. This point was not dealt with in the Judgment.

70. Under the Model Law, where a foreign main proceeding is recognised in Great Britain, Article 20.1 imposes a stay on the:

> "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities."

Article 20.2(a) provides that the stay imposed by Article 20.1(a):

> "shall be –
>
> (a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and
> (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case,
>
> and the provisions of paragraph 1 of this Article shall be interpreted accordingly."

So in relation to a company in liquidation, that means that the stay imposed by Article 20.1 is the same, in "*scope and effect*" as the s.130(2) stay.

71. However, there is a carve-out to Article 20.1 in Article 20.4 as follows (emphasis added):

> "Paragraph 1(a) of this article does not affect the right to—
>
> (a) commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor; or
> (b) commence or continue any criminal proceedings <u>or any action or proceedings by a person or body having regulatory, supervisory or</u>

> investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions."

Ms Addy QC points out that subparagraph (b) was an addition to the UNCITRAL Model Law as that had only contained subparagraph (a) as a carve-out. In other words, Ms Addy QC was saying that Parliament deliberately chose to introduce subparagraph (b) into the Model Law.

72. Unfortunately there is no evidence, even from the Consultation Documents as to the implementation of the Model Law into force in Great Britain, as to why Parliament chose to exclude from the stay "*regulatory…functions of a public nature*". Ms Addy QC submitted that Parliament deliberately wanted to distinguish between domestic and recognised foreign insolvency proceedings and it had to do it this way because it considered that both criminal proceedings and regulatory action were otherwise within the scope of Article 20.1 of the Model Law and s.130(2) of the Act. It is well-established that criminal proceedings are within s.130(2) – see *Re Dickson* (supra) and *Re Rhondda Waste Disposal Ltd* (supra). But I do not see that it is established on the authorities that "*regulatory, supervisory or investigative functions of a public nature*" are also within s.130(2).

73. It is not safe for me to make any assumptions as to Parliament's intentions in relation to Article 20.4 of the Model Law or what it understood of the scope of s.130(2). I imagine that the purpose of Article 20.4 was to make clear that British insolvency law would not affect or interfere with any foreign criminal proceedings or foreign regulatory actions or investigations. The criminal or regulatory authorities in the jurisdiction of the foreign main proceedings would presumably not take kindly to British law, the subsidiary law in these circumstances, preventing their public interest activities from continuing in that jurisdiction where they may otherwise be permitted. Having said that, Article 20.4 is not limited to those proceedings continuing in the foreign jurisdiction. Nevertheless, I do not think I can properly draw any conclusions from Article 20.4 as to the ambit of s.130(2) of the Act.

(e) Section 130(3A) of the Act

74. The Judge attached significance to a new subsection, s.130(3A) of the Act, which was introduced into the Act by para.29 of Schedule 8 to the Finance (No. 2) Act 2015. Section 130(3A) states as follows:

> "(3A) In subsections (2) and (3), the reference to an action or proceeding includes action in respect of the company under Part 1 of Schedule 8 to the Finance (No. 2) Act 2015 (enforcement by deduction from accounts)."

75. By Schedule 8 to the Finance (No. 2) Act 2015, HMRC was given a new power to recover debts due to it from a debtor's bank or building society account. HMRC is able to carry out such direct recovery by way of a "*hold notice*" and a "*deduction notice*": see paras. 4 and 13 of Schedule 8. As HMRC is able to go directly against the bank or building society holding the company's money in an account, HMRC might otherwise be able to gain unfair priority over other creditors by using this power. That seems to me to be the purpose of the amendment and wholly in line with the purpose of s.130(2) to protect the *pari passu* basis of distribution.

76. At para. [78] of the Judgment, the Judge considered that the amendment was supportive of the broad approach to s.130(2) that he had adopted. He said as follows:

> "78. There is no guidance explaining its inclusion. However, the following points can be made. First, it is to be concluded that it forms the type of decision and process made outside of legal proceedings which Parliament intends to be subject to the "*no action or proceeding*" prohibition. Second, it illustrates the width of the meaning of those terms in the context of quasi-judicial proceedings because this procedure is a unilateral decision process, albeit with procedures recognisable as traditional legal process. Third, as Ms Addy Q.C. submitted, the need for its express inclusion is that the "hold" notice directly affects a third party, the holder, and only indirectly (albeit of crucial importance) the debtor company in liquidation. Those points all lead to the conclusion that its insertion is not only in line with the case law considered above but it is also instructive."

77. As to the first point, Parliament clearly did intend that this process should be subject to the stay. That is why it was enacted. But that is because it might otherwise subvert the normal priority if HMRC was able to recover its debt from a third party holding the company's money. It is not dissimilar to the basis for distress being within the scope of s.130(2). The reason why the amendment was necessary is contained in the Judge's third point that s.130(2) refers to an "*action or proceeding…against the company or its property*" whereas this could be seen as an action or proceeding against a third party, albeit one that is holding the company's property.

78. But it is the second point that the Judge makes that I do not think is correct. I do not think that the amendment indicates anything about the width of s.130(2), save that Parliament thought it necessary to make express provision in this regard, indicating that either it considered that this was not already covered by the section or it was not sure whether it was already covered. At best, it is neutral as to the width of s.130(2).

(f) Conclusion on the width of s.130(2) of the Act

79. For the reasons set out above, I have concluded that the Judge did adopt too wide a construction of s.130(2). As explained in *Powdrill*, the scope of the word "*proceeding*" is limited to "*legal proceedings or quasi-legal proceedings such as arbitration.*" Therefore any court proceedings, including criminal proceedings, are included. Non-court proceedings will only be within s.130(2) if they are similar to court proceedings having regard to the statutory purposes of s.130(2) as set out by David Richards LJ in *Chapman*. Distress has historically been regarded as a form of legal proceeding and in any event clearly fits with the purpose of s.130(2) being not to disturb the *pari passu* basis for distribution to unsecured creditors. The fact that distress is within s.130(2) does not assist in determining whether the FCA's regulatory processes are also within, as they have no material similarity to each other.

80. In my judgment, the Judge was wrong to rely on a wide general purpose for s.130(2) derived from *Smith*, which was concerned with a different section and which in any event, on closer analysis, applied a narrower purpose that is consistent with *Chapman*. The Judge's adoption of that wide general purpose shaped his construction of s.130(2) so as to include any proposed action that might diminish the assets in the estate available to creditors. Furthermore, he wrongly considered that the specific purposes only needed

to be considered at stage two when the court is exercising its discretion and that they were irrelevant to the threshold question of construction at stage one.

81. I also think the Judge was wrong to rely on *Frankice* and he should have distinguished it from the case before him as to the scope of s.130(2), rather than para. 43(6) of Schedule B1 to the Act. Further, there was nothing in the s.130(3A) amendment point. Nor does Article 20.4 of the Model Law provide any assistance on this issue.

82. In all the circumstances, I allow Ground 1 of the appeal and hold that the Judge's construction of s.130(2) was overbroad and incorrect.

GROUND 2: DOES S.130(2) OF THE ACT APPLY TO THE FCA'S EXERCISE OF ITS POWERS UNDER SS.91 AND/OR 123 FSMA?

83. Having found that the Judge adopted too broad a definition of "*proceeding*" in s.130(2), it is then necessary to test whether the FCA's regulatory action under ss.91 and/or 123 FSMA comes within the correct narrower definition. The Judge considered various features of the regime for issuing statutory notices under FSMA and concluded that it "*cries out as a proceeding*". This seems to me to be largely based on his reliance on *Frankice* and the reasoning of Norris J as to why the Gambling Commission's procedure, with a "*defined beginning and an ascertainable final outcome and which in the interim is governed by a recognisable procedure*"[7], was a "*legal process*" within para. 43(6) of Schedule B1 to the Act.

84. Mr Herberg QC's main point was that Parliament has conferred on the FCA statutory powers which are, and can only be, exercised by the FCA through the specific regulatory process defined by FSMA. It is a self-contained statutory scheme controlled exclusively by the FCA which has to act in accordance with its stated statutory objectives and in the public interest. The particular matter may end up in the Upper Tribunal but that will only be because it is referred there by the recipient of the statutory notice. Parliament cannot have intended, so Mr Herberg QC submitted, that the insolvency court should act as a gatekeeper to the exercise of the FCA's statutory functions under FSMA. If the insolvency court did have that function, how is it supposed to balance the competing public interests as between the FSMA and liquidation regimes and priorities and in particular how does it judge whether it is right for the FCA to proceed, taking into account the fact that the FCA itself has considered that it should proceed?

85. Ms Addy QC said that the FCA's argument ignores the crucial point that s.130(2), as with the other insolvency moratoria, does not operate as a bar to the FCA proceeding but merely as a judicial filter. As was demonstrated in this case, the court will readily grant permission if it is appropriate to do so. The court has an unfettered discretion to do what is right and fair in the circumstances and to impose conditions where necessary. Where responsible regulators and officers of the court have to engage on such a matter, there should be no difficulty in reaching agreement as to how the matter should proceed. In this case the FCA and the OR were agreed as to the terms upon which permission should be given, if s.130(2) applied. It is perfectly reasonable to assume that such

[7] See para. [39] of *Frankice*

cooperation would also exist in any future similar situation to the present. Accordingly there is no practical difficulty in requiring the FCA to obtain the permission of the court.

86. While it may work well in practice, I do not think that that is a reason for requiring the FCA to have to seek the permission of the insolvency court to exercise its statutory powers. Nor do I think that Parliament could have intended that the comprehensive statutory regime of FSMA operated by the FCA acting in the public interest should be overlain with the requirement to seek the permission of the court to proceed if the company in question has gone into compulsory liquidation. (Note that there is no automatic stay applicable to companies in voluntary liquidation.)

87. There were certain specific criticisms of the Judge's approach made by Mr Herberg QC, namely:

(1) That he was wrong to consider the "*hypothetical question*" as to whether the proposed action would be within s.130(2) if Parliament had elected to leave such matters to the civil or criminal courts or to the Upper Tribunal;

(2) That he ought to have taken account of certain features of the statutory scheme operated by the FCA;

(3) That he ought not to have attached significance to the right to make representations in response to a warning notice;

(4) That he wrongly attached significance to the right to refer the matter to the Upper Tribunal;

(5) That he wrongly attached significance to the use of the word "*proceedings*" in FSMA.

(1) The "*hypothetical question*"

88. The specific powers being exercised by the FCA in this case concern alleged market abuse and breaches of the Listing Rules. In para. [81] of the Judgment, the Judge said as follows:

> "81. These are matters which could have been left to the civil courts or been the subject of criminal offences[8]. In either case there would have been legal proceedings. Instead, Parliament has chosen to authorise a statutory body to both prosecute and determine the alleged breach subject to the potential for the decision to be made by the Upper Tribunal upon referral. Parliament has entrusted the FCA and the Upper Tribunal to conduct the proceeding instead of the civil or criminal courts. If the matter had been left solely within the jurisdiction of the Upper Tribunal, it would have been undisputable that this will be a "*proceeding*". The fact that the procedures would not be identical to those under the Civil Procedure Rules, for example, would make no difference."

[8] I assume the Judge had in mind s.129 FSMA and ss.89-90 of the Financial Services Act 2012 (which replaced s.397 FSMA).

89. It is accepted that if the FCA had decided to apply to the civil court or to prosecute then both proceedings would be within s.130(2) of the Act and would require the permission of the court. But the fact that Parliament has devised a non-court statutory scheme for dealing with, amongst others, market abuse and breaches of the Listing Rules, only highlights the distinction with the alternative courses of action through the courts open to the FCA. Parliament decided that the FCA should be able to issue decision notices wholly outside any form of court process and it is irrelevant, in my view, that it could have chosen a different route through the courts. It would be odd if the non-court statutory scheme required the FCA to get the approval of the court to proceed against a company in liquidation.

90. I therefore think that the Judge was wrong to have relied on this point, whether hypothetically or not.

(2) Relevant features of the statutory scheme

91. Mr Herberg QC emphasised the features in relation to the RDC (the FCA's internal decision-making committee on these matters) that he said made it not like an independent and impartial tribunal, exercising a form of judicial process. This was to distinguish it from the "*independent and impartial regulatory panel*" that Norris J found to exist in *Frankice*. That panel had a procedure for the hearings before it, including in relation to the calling of witnesses and their cross examination, and it was said to accord "*with the requirements of natural justice and the Human Rights Act 1998.*" (para. [29]) There was also in *Frankice,* an appeal, properly so-called, to the first-tier tribunal.

92. By contrast Mr Herberg QC said that the processes of the RDC are not compliant with Article 6 of the European Convention on Human Rights. The RDC is not a tribunal; it is a committee of the FCA Board and accountable to the Board for its decisions generally: DEPP 3.1.1G. The Chair of the RDC is an employee of the FCA, as are its legal advisers. A certain degree of separation of the RDC from the FCA is prescribed: apart from the Chair, the other members of the RDC are not FCA employees (DEPP 3.1.2(1)G); they are appointed for fixed terms; and cannot be removed by the FCA Board save for misconduct or incapacity (DEPP 3.1.2(2)G). By s.395(2)(a)(ii) FSMA, as referred to above, a decision to issue a warning notice must include at least one person not directly involved in the investigation. But Mr Herberg QC said that this was a modest measure of independence that did not render the RDC into a judicial body and its decisions remained administrative decisions of the FCA.

93. Ms Addy QC said that the whole process prescribed by FSMA is in the nature of a "*proceeding*": once a warning notice is issued, the process has to go through various stages but has to conclude with the issue of a final notice (even if the matter is first referred to the Upper Tribunal – see s.390 FSMA) or a notice of discontinuance – see s.389 FSMA. She and the Judge focused on the fact that there has to be a definite end to the process and it cannot just fall away through effluxion of time or inaction. The procedure in DEPP 3 has to be followed by the RDC. Ms Addy QC compared that procedure with the separate Executive Procedure governed by DEPP 4 which does not involve the RDC. That provides for no separation between FCA staff investigating and recommending action and the FCA senior staff who make the decision.

94. In my view a valid distinction has been made between the RDC and the decision-making panel in *Frankice*. I do not think the RDC can be described as "*independent*

and impartial"; nor is it engaged on a form of judicial process to arrive at a decision. There is a certain amount of independence from the FCA but that is a sensible precaution to ensure that reliable and fair decisions are ultimately made by the FCA. It does not transform the RDC into a quasi-judicial body. And the fact that there is an established process that has to conclude in a formal way does not render it a "*proceeding*" within the meaning of s.130(2) of the Act.

(3) The right to make representations

95. One particular feature that attracted the Judge towards his conclusion was the right to make representations in response to a warning notice: see s.387 FSMA and para. [83] of the Judgment. However this is a feature of many administrative decisions, as well as judicial ones. This was referred to by the Court of Appeal in *In Re Railtrack plc (in railway administration)* [2002] 1 WLR 3002 where it was considering whether a direction by the Rail Regulator under s.17 of the Railways Act 1993 fell within the scope of s.11(3) of the Act. Lord Woolf CJ (with whom Waller and Robert Walker LJJ agreed) held that they were bound by the Court of Appeal's earlier decision in *Powdrill* that the direction would have to have been "*either legal proceedings or quasi-legal proceedings such as arbitration*" to be within s.11(3)(d) and that it was not. At [24], Lord Woolf said:

> "I accept that the procedure for obtaining a section 17 direction from the Rail Regulator has many of the qualities of a procedure which is associated with legal or quasi-legal proceedings. However, I attach less significance to this than was given to it in the court below. The procedure is designed to achieve fairness, but fairness is today a requirement of virtually all administrative decision making and can be a requirement of administrative processes which would never be classified as legal or quasi-legal or involving arbitration."

96. Under DEPP 3.2.7G, fairness is an express requirement:

> "The RDC will follow the procedure described in this section, but subject to that it will conduct itself in the manner the RDC Chairman or a Deputy Chairman considers suitable in order to enable the RDC to determine fairly and expeditiously the matter which it is considering."

But by DEPP 3.2.11G, it is made clear that the RDC is not acting as a tribunal or conducting a judicial process:

> "The RDC has no power under the Act to require persons to attend before it or provide information. It is not a tribunal and will make a decision based on all relevant information available to it, which may include views of FCA staff about the relative quality of witness and other evidence."

97. In my judgment the right to make representations or the obligation of fairness does not convert the RDC into a judicial body and is just as consistent with administrative decision-making under a statutory scheme.

(4) The right to refer the matter to the Upper Tribunal

98. In para. [82] of the Judgment, the Judge said as follows:

> "The fact that the Upper Tribunal's jurisdiction is ancillary opens for argument the possibility that its referral role arises because of the principles of fairness within the context of an administrative, regulatory process and procedure. However, it is equally apparent this is not the case. A referral at the request of a recipient of a Decision Notice is not an appeal. The Upper Tribunal will address the matter afresh, effectively on the same basis as the FCA would have through the RDC. Whilst that same basis could be an administrative, regulatory process and procedure, the nature of the decision and the process applied by the Upper Tribunal, as by the FCA/RDC, "cries out" as a "*proceeding*"."

99. As I understand that paragraph, the Judge considered that, as the same decision is effectively being taken by both the FCA/RDC and the Upper Tribunal on a reference, and as the Upper Tribunal will necessarily be following a legal process to arrive at its decision, so the FCA/RDC must also be following the same sort of legal process. I do not think the two separate processes can be equated in that way.

100. The most important distinction is that the reference to the Upper Tribunal is made by the recipient of the statutory notice, not the FCA. That reference cannot be within s.130(2) because it is not "*against the company or its property*"; it would be by the company. Similarly a judicial review challenge to an administrative decision is brought against the public authority. The fact that an administrative decision can be challenged in a court or tribunal does not change the nature of the administrative decision-making process into a judicial one.

101. Ms Addy QC pointed out that upon a reference to the Upper Tribunal it is the FCA that has the burden of proof and it must first issue a Statement of Case[9]. Even though the referral is made by the recipient of the decision notice, once that has been made, it becomes a case that looks like it is being brought by the FCA against the referring party. That may be so, but I do not see that that changes anything about the nature of the FCA/RDC's original decision (nor indeed that it means that the reference is subject to the s.130(2) stay – which is not what Ms Addy QC was advocating).

102. Another point made by Ms Addy QC is that the right to refer the matter to the Upper Tribunal is itself part of the process initiated by the FCA. She referred to the decision of the Financial Services and Markets Tribunal (the predecessor to the Upper Tribunal) in *Jabre v Financial Services Authority*, 10th July 2006, in which the nature of such a reference is explained (emphasis added):

> "24. The Tribunal is not an appeal tribunal. It neither hears appeals from decisions of the statutory authority nor does it sit in an appellate role to hear appeals against decisions of tribunals of first instance. Instead it has been created to function as part of the regulatory process. It is there to consider the relevant evidence and to determine what is the appropriate action for the Authority to take in relation to the matter referred.
>
> …
>
> 28. The meaning of the expressions "the matter referred", or "the subject-matter of the reference" in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to "determine" what is the appropriate action for the

[9] See Tribunal Procedure (Upper Tribunal) rules 2008, Sch 3, paras 4-5

> Authority to take having considered any evidence relating to the subject-matter of the reference…"

103. Again, I do not see how the inclusion of the Upper Tribunal reference within the complete regulatory process - that is the process from warning notice to final notice or notice of discontinuance – converts it into a "*proceeding*" within the meaning of s.130(2) of the Act. In this case, it will be for the OR to decide whether to refer any decision notice that is issued against Carillion to the Upper Tribunal. That is their right. I do not believe that Parliament, by providing for a right to refer the matter to the Upper Tribunal, could have contemplated that a court might have to be involved at the start of such a process and that the FCA would be bound to seek permission from the court.

(5) The use of the word "*proceedings*" in FSMA

104. In para.[88] of the Judgment, the Judge referred to ss.93(6) and (7) (I think he meant ss.91(6) and (7)) and s.389 FSMA, "*and its heading*", because they contained the word "*proceedings*". Sections 91(6) and (7) FSMA are concerned with a 3-year limitation period within which "*proceedings*" must be begun by the FCA and such "*proceedings*" are treated as having been begun when a warning notice is given. Under s.389 FSMA, a notice of discontinuance "*must identify the proceedings which are being discontinued*". The use of the term "*notice of discontinuance*" does seem particularly apt to apply to "*proceedings*".

105. Mr Herberg QC impliedly criticises the Judge for relying on the use of the word "*proceedings*" in FSMA. But I think that is a little unfair. All that the Judge said in para. [88] is that "*it is no coincidence*" that the word was used but he was careful to say that there was no intention to cross refer to s.130(2) of the Act. He plainly did not think that this was conclusive but he took it into account in considering whether this reflected the contemplated "*nature of the decision and the decision making process*" within FSMA.

106. In any event, I do not think the references really add much to the analysis of whether the statutory scheme, starting with the issue of a warning notice, is a "*proceeding*" within the meaning of s.130(2) of the Act.

107. In my judgment, the Judge was wrong to conclude that the exercise of these specific powers under FSMA by the FCA was a "*proceeding*" that is subject to the stay in s.130(2) of the Act. Accordingly I allow Ground 2 of the appeal.

CONCLUSION

108. The appeal is allowed and I will replace paragraphs 1 to 3 of the Judge's Order with a declaration that the FCA does not require permission from the court under s.130(2) of the Act for the purpose of taking action against Carillion under ss.91 and/or 123 FSMA.

109. Both parties have sought to widen out the decision that I should make. The FCA says that there are many other regulatory actions that the FCA can take under FSMA, some of which have the same RDC process and some which do not. As the Judge's Judgment arguably also covers those other sections of FSMA, or at least as Mr Herberg QC put

it, there is uncertainty as to the scope of the Judge's reasoning, he suggested that the declaration that I make should cover all statutory notices issued under FSMA by the FCA.

110. I decline to do so. There are differences between the statutory schemes that were not properly before me. It is therefore safer to leave those matters to be determined in relation to another liquidation should the question arise and if the parties are unable to agree whether my judgment applies or whether it should be departed from or distinguished.

111. Ms Addy QC, for her part, suggested that if I had ruled in favour of her client, then I would also have necessarily decided that the FCA's regulatory action fell within para. 43(6) of Schedule B1 to the Act, as well as s.130(2) of the Act. As I have decided against her client, she may not want my declaration similarly extended the other way and I would not do that anyway. Part of my reasoning was that para. 43(6) of Schedule B1 is wider than s.130(2) of the Act and that the administration stay has a wider purpose, as exemplified by *Frankice*. Therefore I leave open the question as to whether the exercise of these statutory powers would be within para. 43(6) of Schedule B1 to the Act.

112. I conclude by thanking counsel and their teams for their excellent submissions, both written and oral.