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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF CORE VCT PLC (IN LIQUIDATION)

IN THE MATTER OF CORE VCV IV PLC (IN LIQUIDATION)

IN THE MATTER OF CORE VCT V PLC (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London, EC2A 1NL
Date: 22/03/2022

Before :
INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

(1) LAURENCE PAGDEN

(2) SIMON JAMES UNDERWOOD

(as Joint Liquidators of Core VCT Plc, Core VCT IV Plc and Core VCT V Plc)

Applicants

-and-

(1) MARK ROBERT FRY

(2) NEIL JOHN MATHER

(as the Former Joint Liquidators of Core VCT Plc, Core VCT IV Plc and Core VCT V Plc)

Respondents

- -

Daniel Lewis (instructed by **Harcus Parker Limited**) for the **Applicants**
Adam Deacock (instructed by **Pinsent Masons LLP**) for the **Respondents**

Hearing date: 21 December 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.

.....
INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

Introduction

1. This is an application by the current liquidators of Core VCT plc, Core VCT IV Plc and Core VCT V plc (the "Companies") for leave pursuant to section 212(4) of the Insolvency Act 1986 (the "Act") to bring claims under section 212(3) for alleged misfeasance or breach of duties against the Companies' former liquidators in their respective members voluntary liquidations ("MVLs").

2. At the conclusion of the one-day hearing, I gave judgment in favour of the Applicants, granting leave to bring their proposed claims against the Respondents under section 212 of the Act, with reasons to follow. These are my reasons.

Background

3. The background to the Companies' MVLs was succinctly set out in paragraph 3 of Lord Justice David Richards' judgment in the Court of Appeal [2020] EWCA Civ 1207 when the Court considered an appeal of the lower court's decision to restore the Companies to the register following their dissolution and to appoint the Applicants as liquidators:

> "(3) The three companies, Core VCT plc, Core VCT IV plc and Core VCT V plc (the Companies), were established as venture capital trusts for investment in small and medium enterprises. They raised a total of some £66 million from about 2,700 retail investors through the issue of shares listed on the London Stock Exchange. The Companies were managed by Core Capital LLP (CC) until 31 December 2013 and by Core Capital Partners LLP (CCP) from 1 January 2014, whose founders and managing partners were Mr Fakhry and Stephen Edwards, both of whom were also members of each of the Companies.
>
> By resolutions passed by overwhelming majorities at meetings of members of the Companies, each was placed in members' voluntary liquidation on 16 April 2015. The liquidators appointed at the meetings were Mr Fry and Neil Mather, both partners in Begbies Traynor Group plc (the former liquidators).
>
> The final general meetings of the Companies were held on 10 August 2016. The liquidators' final account for each Company was sent to the members in advance of the meetings and approved by overwhelming majorities at each meeting, as was the release of the liquidators. In accordance with section 201 of the Insolvency Act 1986 (the Act), the liquidators' final accounts and returns were sent to, and registered by, the registrar of companies, and on 18 November 2016 the Companies were deemed to be dissolved.
>
> After the final meetings were convened but before they were held, Simon Hussey, a member of Core VCT plc (holding 0.04%

of its shares), set out a number of concerns in a letter dated 29 July 2016 to the former liquidators. Mr Hussey and other members raised these concerns at the final meetings. The concerns related to the management of some of the Companies' investments before they went into liquidation, the transfer of some of the investments to an associated company in 2011, which had been approved by resolutions of the members at that time, and the terms on which the Companies' remaining investments were sold to an associated company in the course of the liquidation.

Timothy Grattan, a member of each Company (holding 0.331% of shares in Core, 0.25% of shares in Core IV and 0.32% of shares in Core V), had voiced concerns about the transfer of investments in 2011 at the annual general meetings in that year, and he voiced other concerns at the annual general meetings in 2013 and 2014. Mr Hussey and a number of other members had raised some of the concerns set out in the letter dated 29 July 2016 with Mr Fakhry in correspondence and at meetings in the period September to December 2015. Following the final meetings, there was an informal meeting with Mr Fry and his colleagues, attended by Mr Hussey and Mr Grattan, to discuss the concerns and some email correspondence that continued into September 2016. The former liquidators were not persuaded to take any steps with regard to these concerns.

The restoration applications

On 18 June 2018, Mr Grattan issued three Part 8 claim forms by which he sought orders that included the restoration of each of the companies to the register of companies, pursuant to section 1029 of the Companies Act 2006, and the appointment of the respondents Laurence Pagden and Simon Underwood (the present liquidators) as liquidators of each company, pursuant to section 108 of the Act (the restoration applications). These applications were supported by witness statements of Mr Grattan and Mr Hussey, the latter running to 42 pages with over 3,000 pages of exhibits. These statements detailed what were described as "serious questions that need to be answered" about the management of the Companies' investments, the transactions undertaken in 2011 and the conduct of the liquidations.

The applications were heard by Fancourt J on 20 July 2018, with only the applicant represented. Notwithstanding the requirement to give notice of the applications to the former liquidators under the *Practice Note: Claims for an Order Restoring the Name of a Company to the Register (Companies Court Practice Note 1 of 2012)* [2012] BCC 880, no notice was given to them. This was deliberate, as counsel appearing for Mr Grattan explained to Fancourt J. The reason given was that the purpose of the restoration and appointment of new liquidators was, in part, to investigate the conduct of the former liquidators. Counsel drew

> the judge's attention to the relevant paragraph of the Practice Note. Inadvertently, the judge was wrongly told that the registrar of companies had consented to the absence of notice to the former liquidators. Counsel explained to the judge why, having regard to the matters alleged in the witness statements, the former liquidators were not proposed for appointment as liquidators. Fancourt J made a composite order for the restoration of the Companies to the register and for the appointment of the present liquidators (the restoration order). The order was received by the registrar of companies on 25 July 2018, whereupon the restorations became effective."

4. On 11 September 2018, Mr Fry and Mr Fakhry applied to remove the Applicants as liquidators. The application was dismissed by Mr Jeremy Cousins QC on 15 March 2019. Mr Fakhry appealed that decision. On 15 September 2020, the Court of Appeal handed down its judgment, granting the appeal. The Court ordered that general meetings of the Companies should be convened in order that members could vote on whether each Company should remain restored to the register for the purposes of pursuing claims against the Respondents and various other parties, and whether the Applicants ought to remain as liquidators. On 11 November 2020, the Court of Appeal ordered that hearings should be listed expeditiously before the Chief ICC Judge or such other judge as he nominates, to give directions as to the convening of the general meetings and that subsequently there should be a further hearing, which has since been described as the "Sanction Hearing" when the court would determine how the votes cast at those meetings should be treated and whether, in light of the votes of members, the court should set aside the order restoring the Companies to the register.

5. Some nine months later, by 23 August 2021, none of the steps ordered to be taken expeditiously by the Court of Appeal had been taken. However, on that date, the Applicants gave the Respondents notice of a hearing taking place the following morning at which they intended to apply urgently for leave under section 212(4) of the Act to bring proceedings against the Respondents for misfeasance. The application was brought urgently, on the basis that the limitation period was about to expire.

6. The application was heard by Falk J in the interim applications list. She criticised the Applicants for bringing the application to court without proper notice to the Respondents. She made an interim order granting the leave sought, for the sole purpose of holding the ring, with directions for the application to be relisted and heard *de novo* on the first available date after 1 October 2021. She stated in her judgment:

> "in reaching this conclusion, I stress the significance of the risk that the members would ultimately lose out if there is a good claim and I do not permit action within the limitation period. Effectively, I am seeking to preserve the position for them. I regard it as very unsatisfactory that the application is being dealt with on short notice and I'm very conscious of not encouraging parties to wait until the last minute, but I have to look in the round at the position of members."

7. Following Falk J's order, on 24 August 2021, the Applicants issued claim forms against a number of parties including the Respondents, as well as an application against them pursuant to section 212 of the Act. They have not, as yet, served any of the proceedings. Following a hearing before Master Pester in December 2021, the Applicants have until 24 December 2021 to serve the claim forms.

8. Pursuant to the order of Falk J, the application for leave to bring misfeasance proceedings against the Respondents (the "s.212(4) Application") came back for hearing before me on 19 November 2021. By that date, the Applicants had still not complied with the Court of Appeal's order: no steps had been taken to convene meetings of the Companies' members and a hearing had not been requested, expeditiously or at all, for directions to be given in respect of those meetings. No steps had been taken, even informally, to canvass the views of the Companies' members regarding pursuit of the proposed litigation.

9. I was not prepared to consider an application, said to be in the interests of the Companies' members, when, in breach of the Court of Appeal's order, those members' views had not been sought. I was also not prepared to dismiss the s.212(4) Application without giving the Companies' members the best opportunity that then remained possible (bearing in mind the very limited time within which the claims could be served), to consider whether the Companies should remain in liquidation and effectively whether the issued claims and proceedings under section 212 should be pursued by the Applicants. I expedited the directions hearing to 3 December 2021.

10. On 3 December 2021, there was insufficient time for members to be given the full period of notice of a general meeting to which they were entitled under the Companies Act 2016. I gave directions for the convening of members' meetings, including an order abridging the period of notice for each meeting and directions regarding the content of the circular and other documents to be sent to members. I adjourned the s.212(4) Application to the last day of term, in order to provide an opportunity for the meetings to be held the day before, on 20 December 2021, thus giving members as much notice as possible, bearing in mind the limitation concerns.

11. By the time of the hearing on 19 November 2021, the Applicants' failure to issue the requisite applications earlier at court, meant that there would be insufficient time to list the Sanction Hearing before the adjourned s.212(4) Application hearing. However as explained in my *ex tempore* judgment that day, some three years after the Applicants' appointment as liquidators and 18 months after the Court of Appeal's order, the order I made appeared to me to provide the best opportunity for the court to be given some indication as to whether the Companies' members wanted the Companies to remain restored to the register and whether they wished the Applicants to remain in office to continue their investigations and pursuit of the proposed litigation. There was a risk that voting might be so marginal as to render it impossible for the court to "take the temperature" of the views of members at this hearing of the s.212(4) Application, but there was equally a chance that the voting might provide a clear indication of their wishes.

Outcome of the members' meetings

12. The meetings took place, as planned, the day before the adjourned hearing. Mr Pagden filed a witness statement reporting the outcome. The first resolution, for the Companies to remain in liquidation for the purpose of investigating the conduct of its managers and former liquidators gained, in the case of each Company, not less than 85% approval. The second resolution as to whether the Applicants should remain in office as liquidators, gained the support of 86.9% of votes in Core VCT IV plc and 90% of Core VCT V plc. Fewer than 43% of the votes of members of Core VCT plc were cast in favour of the Applicants remaining in office.

Concerns giving rise to the s.212(4) Application

13. The proposed proceedings under section 212 of the Act, concern the realisation of the Companies' assets to which David Richards LJ referred in the Court of Appeal. In June 2011, the Companies' members were sent a circular which proposed that a number of their investments be transferred to a new vehicle called Core Capital I LP ("New Core I"). The Companies would hold a minority partnership interest in New Core I, with the majority interests being held by private equity firms described in the evidence as "17 Capital" and "Access Capital". Mr Pagden's evidence states that a 20% interest in New Core I was held by parties associated with Mr Fakhry and Mr Edwards.

14. From 6 January 2014 onwards, the Companies' investments were managed by a private equity fund, Core Capital Partners LLP, now known as ESO Capital Advisers LLP (the "Manager"). Its joint managing partners were Mr Fakhry and Mr Edwards.

15. On 10 March 2015, the Companies sent members a circular stating that the boards of the Companies intended to put a proposal to them for the solvent winding up of the Companies in order to facilitate the return of capital whilst ensuring the preservation of VCT tax status of each Company (the "2015 Circular"). The 2015 Circular referred to the appointment of liquidators:

> "who will assume all decision taking responsibilities for each Company. However, the Manager (Core Capital Partners LLP) will retain sole responsibility for the investments and for further realisation proposals consistent with the terms of the investment management agreement currently in place between the relevant Company and the Manager.
>
> … Peter Smaill, the current Chairman of Core VCT, will continue to be a member of the Advisory Panel of Core LP and Ray Maxwell, the current Chairman of Core VCT IV, will continue to attend meetings of the Advisory Panel of Core LP. In addition, each of them will each remain as a director of his current Company and, from the commencement of the winding-up, each will be appointed as a director to the boards of the other two Companies of which he is not currently a director (so as to maintain the minimum number of directors - for a public limited company - for each Company during the winding up process).

> They will both also provide the following services to the Companies (i) oversight of NAV; (ii) resolution of any conflicts of interest; and (iii) monitoring of fees and costs. In providing these services (and for their continuing role as directors of each of the Companies), Peter Smaill and Ray Maxwell will each receive a fee of £1,000 per day capped at £22,500 per annum (with the costs, in each case, to be split equally between the three Companies).
>
> The Liquidators have agreed that, if they are appointed, the Manager will retain sole responsibility for investment and realisation proposals consistent with the terms of the investment management agreement currently in place between the relevant Company and the Manager.
>
> The Liquidators will not be personally liable for the outcome of implementing any proposals of the Manager or recommendations of the Advisory Committee, nor is it expected that they be required to seek independent advice (although, for the avoidance of doubt, the Liquidator's ability to do so will not be fettered).
>
> **Duration of Winding Up of each of the Companies**
>
> Once the Resolutions have been passed and the Liquidators have been appointed to each of the Companies, the ongoing role and the responsibility of the Manager will be essentially preserved for the duration of the period of the winding up. Whilst this period cannot be defined, the Manager is incentivised through the current investment management arrangements to achieve successful realisations of all of the remaining investments. Accordingly, the Manager is actively pursuing further disposals."

16. The 2015 Circular included notices of the proposed general meetings on 16 April 2015 at which resolutions were to be put to members for the Companies to enter MVL and for the Respondents to be appointed liquidators. The liquidators' minutes of the meetings included an appendix recording questions asked by members. Among those questions were the following:

> "Q: Is the conflict between VCT shareholders and Limited Partnership holders more significant? Is it in Core's interest to sell out relatively cheaply to a new set of shareholders?
>
> A: Everything is heavily regulated, there is a meticulous decision making process. There is not enough money in the VCTs for Core to risk their reputation. Terms of Limited Partnership clearly prescribed.
>
> Q: What is the plan if the Limited Partnership is not sold?

> A: There is no pressure for a fire or quick sale, likely timescale of within 3 years. Not comfortable giving dates or amounts of sale.
>
> Q: There are concerns of selling out cheap.
>
> Q: Is it the Limited Partnership or the Liquidator who decides when to pay shareholders?
>
> A: Liquidator."

17. The resolutions were passed at the relevant meetings. A few days later a Mr Somerville wrote to the Respondents referring to discussions at the end of the meetings and setting out, in detail, his concerns regarding potential conflicts of interest, in particular in relation to one of the holdings, Allied. His letter concludes:

> "Surely, in light of the myriad of conflicts besetting the Fund Manager of the Core VCTs in relation to Allied you will need to consider whether the Fund Manager is in an impossible position and as such is not capable of being capable of fulfilling its obligations to all the Core VCTs at once at any given moment. I urge you to consider whether the Fund Manager should be stripped of its responsibilities to the Core VCTs in that regard."

18. Three weeks after the Respondents' appointment as liquidators on 16 April 2015, the Manager sent them a proposal document recommending the sale of the Companies' directly held assets (including Allied) as well as those assets which it held via New Core I to Core Capital Partners II LP (the "Purchaser"). The proposal stated that the total consideration would be £48 million based upon the Managers' own valuation of the assets at £62 million to which a discount of 23.8% was applied.

19. The proposal includes a "Conflict of interest declaration":

> "The state and nature of the portfolio imply continuing involvement by [the Manager] to deliver value
>
> - Many companies in turnaround and earlier stage
> - Exits will require significant support
>
> The ongoing involvement of the manager creates a conflict of interest
>
> - Fees and carry will be paid to manager
> - Manager will be required to make a significant investment in the portfolio
>
> The Conflict needs to be cleared with both [New Core I] and the Core VCTs
>
> - [New Core I] Advisory board will need to approve any transaction for [New Core I]
> - Begbies Traynor will need to approve the sale of Allied and Cordingland"

20. The statement regarding the Manager needing to make a significant investment in the portfolio appears to be a reference to Mr Fakhry and Mr Edwards and other entities in which they held an interest (including a BVI company which the Applicants state they have been informed may be owned by Mr Fakhry's mother or a family trust), allegedly holding a 35% interest in the Purchaser.

21. The Respondents instructed BTG Financial Consulting LLP ("BTGFC") (which, like the LLP of which the Respondents were members, formed part of the Begbies Traynor Group) to review the Manager's valuation. BTGFC concluded, by reference to various models based on the Manager's figures, that the assets were worth between £52 million and £68 million.

22. The sale completed on 25 August and realised £47,006,597.

Grounds for the s.212(4) Application

23. The Applicants contend that a conflict of interest arose as a result of the Manager advising the prospective vendor, New Core I and valuing the assets for sale to the Purchaser in which the Manager's own managing directors directly or indirectly held a 35% interest (the "Alleged Conflict"). The Alleged Conflict was not disclosed to the Companies' members who were informed that the assets would be sold to a new group of institutional investors and that the Manager would take on the management of the new vehicle and work on continuing to grow the portfolio and make new investments.

24. In October 2015, a minority shareholder, Mr Kippin raised questions concerning the sale, including expressing his concern that "Core purchased the holding for a further fund they ran" and as such had an incentive to offer a low price. One of the Respondents' managers prepared a draft reply which he sent to Mr Fakhry for comment before forwarding to Mr Kippin. The Applicant interprets the reply that was sent, as positively denying that the Manager had any financial interest in the Purchaser:

> "[The Manager] did not purchase the assets that were previously held by the VCTs. A new set of investors purchased these assets and, as disclosed in the Fund Manager's circular, [the Manager] will manage the new fund for the new investors. I would refer you to Paragraph 5 of the [2015 Circular] which deals with the financial arrangements between [the Manager] and the new fund. The directors considered that in achieving the sale there was no motivation by [the Manager] to suppress the price paid by the new investors, as this would adversely impact their deferred management fee interest in the form of the distribution they would receive from B Shares they held.
>
> … The liquidators worked closely with the Fund Manager (who by their nature are closely involved in the investments) in order to achieve the sale. The price paid for the portfolio of assets was set in negotiations between the new investors and the existing investors, on normal commercial terms. The liquidators used

> tools appropriate to the circumstances to consider the values attributable to each investment, including forecasting, but these resources are not available to third parties. Likewise the liquidators are unable to disclose details of any party who expressed interest in acquiring the VCT assets. However the liquidators can confirm that a significant level of scrutiny has been applied by them to all aspects of the transaction.
>
> …The liquidators are satisfied with the Fund Manager's role and the directors' statement that the transaction was in the best interests of shareholders".

25. The Applicants claim that in breach of their duties as liquidators to realise the Companies' assets for the best price reasonably achievable, and despite knowing of the Alleged Conflict, the Respondents failed to disclose it to the Companies' members, took no steps to investigate it, but instead agreed that the Manager would retain sole responsibility for investment and realisation proposals and further agreed that the Manager was not expected to seek independent advice.

26. The Applicants claim that the Respondents did not obtain an independent valuation of the Companies' interest in Core I but instead relied a valuation prepared by another entity within their group that was expressly based on the Manager's valuation. They did not market for sale the Companies' interests in the assets directly owned by them.

27. As the eventual sale price was substantially less than either of the net asset value figures provided by the Manager or by BTGFC, the Applicants consider that the assets were sold at an undervalue which they say, for the reasons expressed by Mr Kippin, was not surprising, in light of the interest that Mr Edwards and Mr Fakhry held in the Purchaser.

28. Following the votes cast at the recent members' meetings, they now seek the court's permission to bring proceedings against the Respondents.

The Respondents' reply

29. The Respondents state that the Applicants misunderstand their role and the mechanics of the sale. They contend that the proposed cause of action is without merit and that there is no reasonable likelihood of any benefit to the estate.

The s.212(4) Application - relevant legal principles

30. The Respondents obtained their release as liquidators in 2016. The relevant provisions of the Act regarding release and the conclusion of an MVL in force at the time provided:

> "Section 94 - Final meeting prior to dissolution.
>
> (1) As soon as the company's affairs are fully wound up, the liquidator shall make up an account of the winding up, showing how it has been conducted and the company's property has been

disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving an explanation of it.

(2) The meeting shall be called by advertisement in the Gazette, specifying its time, place and object and published at least one month before the meeting.

(3) Within one week after the meeting, the liquidator shall send to the registrar of companies a copy of the account, and shall make a return to him of the holding of the meeting and of its date."

31. Section 171(6) provided:

"(6) Where—

(a) in the case of a members' voluntary winding up, a final meeting of the company has been held under section 94 in Chapter III, or

(b) in the case of a creditors' voluntary winding up, final meetings of the company and of the creditors have been held under section 106 in Chapter IV,

the liquidator whose report was considered at the meeting or meetings shall vacate office as soon as he has complied with subsection (3) of that section and has given notice to the registrar of companies that the meeting or meetings have been held and of the decisions (if any) of the meeting or meetings."

32. Section 173 provided, so far as relevant in this case:

"173.— Release (voluntary winding up).

(1) This section applies with respect to the release of the liquidator of a company which is being wound up voluntarily.

(2) A person who has ceased to be a liquidator shall have his release with effect from the following time, that is to say—…

(d) in the case of a person who has vacated office under subsection (6)(a) of section 171, the time at which he vacated office; …

(4) Where a liquidator has his release under subsection (2), he is, with effect from the time specified in that subsection, discharged from all liability both in respect of acts or omissions of his in the winding up and otherwise in relation to his conduct as liquidator.

But nothing in this section prevents the exercise, in relation to a person who has had his release under subsection (2), of the

court's powers under section 212 of this Act (summary remedy against delinquent directors, liquidators, etc.)".

33. Section 212 of the Act then provides, so far as relevant:

> "212. — Summary remedy against delinquent directors, liquidators, etc.
>
> (1) This section applies if in the course of the winding up of a company it appears that a person who—
>
> (a) is or has been an officer of the company,
>
> (b) has acted as liquidator or administrative receiver of the company, or
>
> (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,
>
> has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
>
> (2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company.
>
> (3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—
>
> (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
>
> (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.
>
> (4) The power to make an application under subsection (3) in relation to a person who has acted as liquidator of the company is not exercisable, except with the leave of the court, after he has had his release."

34. Other than Mr Deacock's reliance upon one case, to which I shall return, there is no dispute regarding the principles governing the exercise by the court of its discretion under section 212(4) of the Act. When determining whether to grant

leave, following the Court of Appeal's judgment in *Parkinson Engineering Services plc v Swan* [2010] Bus LR 857, the question should be decided principally according to two criteria:

i) whether there is a reasonably meritorious cause of action; and

ii) whether giving permission is reasonably likely to result in benefit to the estate.

35. Lord Justice Lloyd stated that the two criteria:

> "are not exhaustive but they are certainly relevant and likely to be among the most important factors."

36. Among other factors that the court may take into account in the exercise of its discretion, is delay in bringing the proposed proceedings against the former office holders.

37. Both Mr Lewis and Mr Deacock referred to the decision of Mr William Trower QC then sitting as a Deputy Judge of the High Court in *Hyde v Bannon; Re One Blackfriars Ltd* [2018] EWHC 901 (Ch) which concerned an application to bring proceedings against the company's former administrators under paragraph 75 of Schedule B1 to the Act. The Deputy Judge confirmed the two well-established criteria and rejected a submission that they present a "high hurdle" to overcome. He held that whilst, in some cases, the court may take into account whether a claim would survive an application for summary judgment, that is not a necessary test, nor does it provide an alternative to the test in *Parkinson*. In his judgment, in most cases, the two-part test equates to asking whether a reasonable litigant would commence and pursue the claim.

38. At paragraph 23 of his judgment, the Deputy Judge noted the reason for permission being required:

> "… It is required because the former officeholder has received a discharge or release and no longer has the assets of the estate in his possession. He is therefore no longer able to indemnify himself in respect of unmeritorious claims, a point made by Sales J in Re Hellas Telecommunications (Luxembourg) II SCA [2011] EWHC 3176 (Ch) (at [96])."

39. Mr Deacock submitted that among the factors the court should take into account when considering this case, is the absence of any expert or other valuation evidence to show that the Companies' assets were sold, as alleged, at an undervalue. He referred to *McGuire v Rose* [2014] BPIR. 650 where the Court of Appeal considered an application by a bankrupt under section 304 of the Act for permission to bring proceedings against his trustee in bankruptcy for sales of property at an alleged undervalue. The Court of Appeal agreed with Lewison J's observation, at first instance, that any claim that a property had been sold at an undervalue must be established by more than the mere assertion of the claimant to that effect. In the circumstances of the case before the Court of Appeal, the absence of valuation evidence gave rise to a fatal flaw in the bankrupt's application.

Applying the principles to the s.212(4) Application

40. Mr Deacock submitted that the court and the Companies' members have been put in an unreasonable and untenable position. The members are not party to the s.212(4) Application and have not had an opportunity to ventilate before the court, their thoughts and concerns, in the manner that they will be able to do at the Sanction Hearing, as and when listed. Whilst the court at the hearing on 19 November 2021 endeavoured to give the members some kind of voice regarding the future of the liquidations, that is simply not enough. This, he submits, is highly material to the exercise of the court's discretion under section 212(4) and on this ground alone, leave should be refused.

41. The Applicants claimed at the hearing in November to have been unable to comply with the Court of Appeal's order due to a lack of funding. As noted in my *ex tempore* judgment at the time, if that was the case, rather than simply ignoring and breaching the Court's order, they should have applied swiftly for directions or to vary the order. Their failure to do so and their actions alone resulted in members being given short notice of the general meeting and in the inconvenience to the court and its other users, of this application being expeditiously listed for hearing on the last day of term.

42. I continue to view as deeply unsatisfactory that the Applicants waited so long to bring this application to court, failed to comply with the Court of Appeal's order and failed to seek members' views in relation to the continuation of the proposed litigation. I echo the criticisms of Falk J regarding the manner in which they have approached this application.

43. Despite the members' meetings being called at short notice, it appears that a large number of votes were cast. In my judgment, the results of the members' meetings provide a sufficiently clear indication for the purposes of today's hearing that the Companies' members want the liquidations to continue and desire that the opportunity to pursue the claims be preserved. Consequently, I reject Mr Deacock's submission that this ground alone justifies the court refusing to grant leave in the s.212(4) Application. The Applicants' conduct will, however, remain an important factor to be taken into account in the exercise of the court's discretion when proceeding now substantively to consider the s.212(4) Application.

Part I - Is there a reasonably meritorious cause of action?

44. The Respondents rely on the following:

i) The 2015 Circular made it clear that they would not be expected independently to investigate the value attributed to the assets by the Manager. Whilst this was not formally resolved upon, the information was nevertheless given to members who must be bound by the decisions taken with their approval in the name of the Companies.

ii) When the Companies entered MVL, that did not terminate their contracts with the Manager. Consequently there was no question of the Respondents delegating their duties as liquidators to the Manager. The Manager was already contracted to perform the role for which it had been appointed. The Companies

remained bound, during their members voluntary liquidations, by decisions taken in accordance with their articles of association.

iii) It is counter-intuitive to suggest that when negotiating a sale on behalf of New Core I's stakeholders, the Manager did not wish to maximise the returns that would be available from the sale. It was incentivised to do so. It is not surprising, therefore, that the 2015 Circular proposed that the Respondents would not be expected independently to investigate the value agreed by the Manager for the investments.

iv) The likelihood of realising higher returns for members was restricted by the views of New Core I's "principal investors" who were described in the Manager's presentation to the Respondents as recommending a sale of the whole portfolio within parameters that they were prepared to accept including valuation of New Core I's assets at £56 million with an "acceptable discount" of 22%. The presentation included a statement that:

> "The investors also indicated their views that any transaction will only happen at a discount."

Together, the Companies only held a 29.56% interest in New Core I. When New Core I's majority investors decided to enter into the proposed sale, the Respondents were not able to prevent it, nor to influence it in any meaningful way.

v) The Applicants' reliance on the highest valuation figures provided by the Manager (who stated that the investments' net asset value was £63 million), and later by BTGFC (who provided a range of values between £52 million and £68 million) is misplaced. Despite being in office for three years, the Applicants have provided no valuation evidence. They cannot sensibly argue that the highest figure in the range provided by BTGFC should apply simply because it suits their claim. The sale was at a discount. In order to succeed in the proposed claim, the Applicants would need to show either that the application of such a discount was not legitimate or, if it is accepted that the discount was appropriate, that the net asset values figures were too low. Despite spending approximately £2 million in fees, and despite three years having passed since the Applicants were appointed, Mr Pagden's witness statement simply states, without any expert evidence, that it is not clear whether it was appropriate to apply a discount. Mr Deacock invited the court to take judicial notice that shares in a venture capital trust usually trade at a discount to their net asset value.

vi) The BTGFC report started with the Manager's valuation of £63 million. BTGFC noted that this figure was subjective and impacted by factors such as some of the underlying entities being in turnaround. The report sets out various alternative valuations and discounts and provides four scenarios for modelling purposes. It notes that if any of those scenarios were to be realised, it would lead to a greater return to shareholders than a sale at the net asset value and price agreed by the Manager. The report also notes constraints imposed following early marketing activity:

> "based on marketing already undertaken by [the Manger] and the lack of appetite shown from 19 of 22 potential investors, this potential upside could be considered immaterial by investors in light of the current discounted offer."

vii) As the "principal investors" were able to dictate the terms of sale (and the Companies were not able to prevent such a sale (due to the inherent limitation of holding only 29.56%)), in order for a claim against the Respondents to carry any prospects of success, the Claimants would need to show that New Core I's assets should have been given a net asset value in excess of £63 million. There is no evidence before the court to support such a suggestion.

viii) Even if it could be shown that the Respondents were negligent in the role they took, or in steps they failed to take in relation to the sale of the Companies' assets, the terms of their client engagement letter limit their liability to £1 million. This amount is itself subject to potential reduction in proportion to the Respondents' contribution to the overall fault, taking into account any negligence by the Companies' other advisers – such as the Manager.

ix) The claim is purportedly being brought on behalf of the Companies' members. However, the members recognised that the Respondents would incur no personal liability in relation to the realisation of the investments and, by majority resolution, they approved the Respondents' actions and released them from liability.

45. The Respondents submit that in addition to these factors, when exercising its discretion, the court should weigh in the balance:

i) the Applicants' persistent failure, until recently ordered for the second time to do so by the court, to consult the Companies' members, resulting in this application being listed expeditiously at the 23rd hour;

ii) their failure to liaise with the court to list the Sanctions Hearing; and

iii) their flawed decision not to give the Respondents proper notice of their application before Mrs Justice Falk for permission under section 212(4).

Part I - Decision

46. Points (i) and (ix) at paragraph 45 above, concern the Companies' members being bound by decisions and resolutions already made by them. Section 212(4) is expressly directed at circumstances where a liquidator has been released. The members' decision to release the Respondents from liability is therefore no bar to the court granting leave. The Applicants claim that the members' decisions and resolutions cannot be said to have been made on the basis of informed consent. In my judgment, an issue that merits determination before the court, were it to find the Alleged Conflict made out, would be whether the Companies remain bound by the decisions and resolutions relied upon by the Respondents. Such decisions and resolutions should not, therefore, deter the court from granting leave under section 212(4).

47. Points (ii) and (iv) concern the Manager's existing contract to manage the Companies' 29.5% share of New Core I's assets and the Respondents' inability to prevent a sale favoured by the majority of New Core I's investors. The difficulty with this argument is that notwithstanding the Alleged Conflict, the Respondents did not seem even to consider objecting to the proposed sale. In my judgment, this area of concern merits further investigation.

48. Points (iii) and (v) to (viii) concern valuation. The Respondents state that it would have been counter-intuitive for the Manager not to have negotiated the best price when selling New Core I's assets to the Purchaser. Without valuation evidence, the court is not a position to decide whether those involved in both the Manager and allegedly also the Purchaser would have stood to lose or gain most on each side of the contract they are said to have negotiated. The Respondents rely on the Applicant's failure to put such evidence before the court, such an omission having been held to be fatal in *McGuire v Rose.*

49. In my judgment, the facts in *McGuire v Rose* are distinguishable from those before me. In that case, the Deputy Judge recognised that several different considerations can apply to applications under section 304 and 212(4) and that in the former, the court should not readily expose trustees in bankruptcy to potentially vexatious claims by individual bankrupts. In my judgment, such concerns do not arise in this case where one set of licensed insolvency practitioners seeks permission to bring proceedings against other licensed insolvency practitioners. The court in *McGuire v Rose* referred to its tortuous history and Mr McGuire having been warned many times that he would need valuation evidence to support his claim that the property was sold at an undervalue.

50. If the court grants leave under section 212, valuation evidence will inevitably be required. It is likely to take significantly longer and be far more expensive to obtain than that required by the court in *McGuire.* In my judgment, its absence, at this stage, should not be fatal to the Applicants' claims. The court's key concern in this case relates to a pre-agreed sale, said to have been negotiated in the shadow of the Alleged Conflict, that was not disclosed to the Companies' members, even when concerns were raised by them. These circumstances give rise to a serious concern, reflected in members' recent votes, that the sale was at an undervalue. It would, in my judgment be an inappropriate exercise of the court's discretion to stifle such a claim, by refusing leave simply on the basis that costly, expert valuation evidence is not yet before the court.

51. Point (ix) concerns the Respondent's contractual limit on liability. In the absence of any authorities having been cited to me, I consider it is at least arguable that, if the court were to find that the Respondents recklessly disregarded their professional obligations (and I pause to emphasise that I make no suggestion that I consider that such a finding will be made) such conduct may fall outside the scope of the contractual provision such that any limitation on liability may not be fully effective.

52. ***Part I summary:*** The Respondents owed fiduciary and tortious duties to realise the Company's assets for the best price that could reasonably be achieved. The Applicants claim that notwithstanding, and despite knowing of the Alleged Conflict, they permitted not only the assets under the Manager's control but also the directly-held assets to be sold by the Manager and, without disclosing the Alleged Conflict, then sought resolutions of the Companies' members to bless the sale and to release them from liability. The allegations of conflict and alleged breaches by the Respondents of their duties resulting in an alleged sale of the Companies' assets at an undervalue are matters that require determination at trial following evidence. In the exercise of my discretion, and having taken into account the matters raised at paragraph 45 above, as well as my own criticism of

the manner in which the Applicants brought this application to court, I am satisfied that the circumstances I have described give rise to a reasonably meritorious claim against the Respondents.

Part II - Is the claim reasonably likely to benefit the Companies' members?

53. The Respondents submit that even if the Manager's highest value of the investments is used (£63 million) and no discount is applied, taking into account the proportion of the investments held by the Companies, the maximum value of the Applicants' claims is £5.5 million.

54. In his second witness statement, relying on a total valuation figure of £68 million, Mr Pagden states that the value of the claims is £8.1 million. The Respondents submit that due to an incorrect assumption regarding Allied, this figure is overstated by £1 million and at best, should be viewed at £7.1 million. Moreover, they say, there is no evidence before the court to suggest that a figure in the region of £68 million was realistic.

55. There must first be deducted from realisations, the costs of bringing the claims. The Applicants' funding agreements provide for a success fee of four times the level of funding. Mr Pagden's second witness statement refers to the Applicants having already received third-party funding to the tune of approximately £1.9 million. The Respondents submit that if funding continues in this vein and with the same success fee, the Applicants would need to achieve net realisations of over £7.5 million, just to pay existing funders, and that amount is £400,000 more than the £7.1 million, which Mr Pagden's evidence suggests should be capable of being realised (adjusted per paragraph 54 above). The Respondents therefore seek to show that even if a claim were to be successful based on the highest valuation of £68 million, taking into account also the unpaid remuneration and expenses of the Applicants, which stood in July 2021 at just over £1 million, it is clear that there is no realistic likelihood of benefit to the Companies' members.

56. The Applicants respond by saying that, as was explained to the Companies' members when asked to vote at the recent meetings, if leave is granted and if the claims are pursued, that will be with the benefit of litigation funding. There will be no cost to members, other than from any recoveries made. The Applicants state that they have been actively pursuing funding including with a lower multiplier for the success fee, but the final funding agreement has not yet been signed off. Until those negotiations have concluded, they are not in a position to provide reliable figures.

Part II – Decision

57. The Applicants rely on the absence of funding to justify their failure to comply with the Court of Appeal's order and to progress their proposed claim further. Whatever the cause, the fact of their delay, resulting in the absence of reliable figures being available to the court, weighs against them in the exercise of the court's discretion when considering this part of the s.212(4) Application. However, the costs incurred to date were disclosed to the Companies' Members at the recent general meetings and in the light of that information, they took a provisional view that they wished the claims to proceed.

58. The potential claims, of which the s.212(4) Application against the Respondents is just one part, are the only assets in the Companies' estates.

59. The court has been put in a difficult position: asked to consider this application without the benefit of expert or valuation evidence and without details of the likely effect of the funding of the proposed litigation on recoveries. The Applicants state that they believe they are very close to concluding funding. That funding will enable them to obtain valuation evidence and to explore, in detail, the merits of the proposed litigation. The Applicants remind the court that they are themselves subject to duties to act in the best interests of the Companies and should not pursue unmeritorious claims nor claims which will lead to no benefit to members.

60. These two unknown factors – valuation and the cost of funding - are key to the Applicants being able to ascertain whether the likelihood of succeeding, and the quantum of the likely recoveries that could be made in the litigation, justifies pursuing the claims.

61. At this stage of the proceedings, where it remains possible that a sufficiently attractive funding proposition may be concluded, and despite (in the absence of fresh valuation evidence) the likelihood of financial benefit currently appearing to be finely balanced, it is in my judgment reasonably likely that there will be some benefit to the Companies' members in the Applicants pursuing the claim.

Conclusion

62. Taking each factor into account, I am satisfied that the allegations set in the context of this case, have sufficient merit to proceed and, in light of the steps being taken to procure more advantageous funding arrangements, are reasonably likely, if successful, to benefit the Companies. The application passes the threshold test.