Neutral Citation Number: [2022] EWHC 944 (Ch)

Case No: CR-2018-007097
922/2018, 923/2018 and 924/2018

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

The Rolls Building
London EC4A 1NL
Date: 21/04/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

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Between :

(1) LAURENCE PAGDEN
(2) SIMON UNDERWOOD
(as joint liquidators of Core VCT plc, Core VCT IV plc and Core VCT V plc) **Applicants**

- and -

(1) SOHO SQUARE CAPITAL LLP
(2) WALID KHALIL FAKHRY
(3) STEPHEN PETER EDWARDS
(4) SIMON JAMES HUSSEY
(5) JAMES NICHOLAS HOLLOND **Respondents**

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Daniel Lewis (instructed by **Harcus Parker Limited**) for the **Applicants**
Matthew Weaver QC (instructed by **Pinsent Masons LLP**) for the **First to Third Respondents**
The Fourth Respondent **Simon Hussey** appeared in person

Hearing dates: 25 March 2022

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Approved Judgment

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

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton:

1. This is the hearing of an application dated 18 January 2022 issued by Laurence Pagden and Simon Underwood, as the current joint liquidators ("Joint Liquidators) of Core VCT plc ("Core"), Core VCT IV plc ("Core IV") and Core VCT V plc ("Core V") (together "the Companies") pursuant to section 112 of the Insolvency Act 1986 ("IA1986") (the "Application").

2. For reasons explained below, the hearing has been described as the "Sanction Hearing", held pursuant to paragraphs 6 and 7 of the order of the Court of Appeal in these proceedings dated 11 November 2020.

Background

3. The Companies were incorporated variously in 2005 and 2006 as vehicles for investments in small and medium-sized enterprises.

4. In July 2011, in order to comply with VCT funding rules, the Companies transferred their beneficial holdings in their most significant investments to a limited partnership, Core Capital I LP ("New Core I"). This resulted in the Companies holding a 29.56% interest in New Core I. The investments were managed by the First Respondent, Core Capital Partners LLP, now known a Soho Square Capital LLP (the "Manager").

5. In March 2015, the Companies' directors recommended putting them into members voluntary liquidation ("MVL") in order to sell the assets held by New Core I plus some additional investments held directly by the Companies. Members were informed that the Manager would retain sole responsibility for investment and realisation proposals and that the proposed liquidators would not be personally liable for the outcome of the Manager's investment and realisation decisions.

6. On 16 April 2015 each of the Companies resolved to enter MVL with Mark Fry and Neil Mather as joint liquidators (both licensed insolvency practitioners, then with Begbies Traynor: "the Former Liquidators"). More than 99% of each Company's members who exercised their right to vote, voted in favour of the proposals.

7. In November 2015, the assets held by New Core I, together with the Companies' directly-held assets were sold to Core Capital Partners II LP (the "Purchaser") (the "Sale") for approximately £48 million. The Companies received approximately £12.8 million for their interest in New Core I and approximately £3.8 million for their directly-held assets.

8. Following the Sale, between 88% and 94% of the Companies' members voted in favour of resolutions approving the Former Liquidators' final report and accounts and releasing them from liability. On 18 November 2016, the Companies were dissolved.

9. In June 2018, Mr Grattan, with the support of Mr Hussey (each of whom held approximately 0.3% of Core's shares) applied to court to restore the Companies to the register and for the appointment of the Joint Liquidators (the "Restoration Application"). The hearing took place before Fancourt J on 20th July 2018 without notice having first been given to the Former Liquidators. Fancourt J made the order sought.

10. On 11 September 2018, the Second Respondent to the Application, one of the Manager's founders and managing partners, Mr Fakhry and Mr Fry applied to remove the Joint Liquidators. On 15 March 2019, Jeremy Cousins QC, sitting as a Deputy High Court Judge, dismissed Mr Fakhry's and Mr Fry's application. Mr Fakhry appealed.

11. On 15 September 2020, the Court of Appeal granted the appeal in the Restoration Application and ordered that general meetings of the Companies be convened for the members to vote on whether:

    i) the Companies should remain restored to the register for the purposes of investigating claims against various parties including the Former Liquidators; and

    ii) the Joint Liquidators should remain in office

    (the "Meetings").

12. On 11 November 2020, the Court of Appeal ordered that hearings before an ICC Judge be listed expeditiously, to give directions for the convening of the Meetings and following the Meetings for there to be a further hearing (this "Sanction Hearing") to determine whether Fancourt J's order restoring the Companies should be confirmed or set aside and to consider how the votes cast at the Meetings should be treated.

13. The matter first came before me in November 2021 by which time the Joint Liquidators had taken no steps to comply with the Court of Appeal's order to convene the Meetings but in the meantime had issued, but not served, claim forms against parties including the First to Third Respondents (the "Claims") alleging breaches of statutory, fiduciary, equitable, contractual and tortious duties, misappropriation of assets and a failure to disclose interests; as well as dishonest assistance, procuring breach of contract; unlawful means conspiracy and knowing receipt. In August 2021 they had also applied ex parte and obtained an interim order from Falk J granting them permission to issue proceedings pursuant to section 212 of the IA1986 against the Former Liquidators (the "s212 Application") with directions for the application to be relisted and following proper notice to the Former Liquidators, heard *de novo* on the first available date after 1 October 2021.

14. On 3 December 2021, I directed the Joint Liquidators to hold the Meetings on 20 December 2021 to consider two resolutions:

    i) that each Company should remain restored to the Register for the purpose of investigating the conduct of the managers and the Former Liquidators (the "First Resolution"); and

    ii) that the Joint Liquidators continue in office with powers to act jointly and severally (the "Second Resolution").

15. The First Resolution was passed at each of the Meetings with a convincing majority. The Second Resolution was passed by the members of Core IV and Core V, but rejected by 58.5% of the members of Core.

16. Following the Meetings and a contested hearing, on 21 December 2021, I made an order granting leave pursuant to section 212(4) of the IA1986 for the Joint Liquidators to pursue the s.212 Application against the Former Liquidators.

17. The Claims, together with Particulars of Claim were served by the Companies, acting by the Joint Liquidators on 24 December 2021.

18. The Application now before me, was issued on 18 January 2021, supported by Mr Pagden's witness statement dated 7 February 2022.

19. The effect of the votes cast at the Meetings is that there is now no dispute whether the Companies should remain restored to the Register. The order of Fancourt J should therefore be confirmed.

20. As the votes of those who have been funding the Joint Liquidators did not have a material effect on the outcome of the Meetings, the parties agreed that the only remaining issue for the court to determine is whether the votes of those who are subject to the Claims, including the First to Third Respondents (the "Soho Respondents") should be counted.

21. The effect of the court's decision will determine whether the Joint Liquidators should stay (if the Soho Respondents' votes are not counted) or be removed from office and the vacancy filled by other insolvency practitioners (if they are).

22. The Soho Respondents submit that the court's jurisdiction to interfere with the voting rights of a shareholder are limited: the general rule being that a shareholder is free to vote, irrespective of motive, and that their votes should therefore be counted.

23. The Fourth and Fifth Respondents, Mr Hussey and Mr Hollond, take the view that as they are the proposed funders of the litigation and if successful, stand to gain from it, neither their votes, nor those of the Soho Respondents should be counted. Mr Hussey's witness statement sets out his concerns regarding the Soho Respondents' conduct and also states why he considers that many of the votes cast by them were not valid, their shares having been issued after the relevant Stock Exchange cut-off date and, contrary to a Stock Exchange announcement, not having been fully paid up but supported instead by a guarantee.

24. Having explored with Counsel and Mr Hussey, the potential effect that these allegations might have on the issues before the court for the purposes of the Application, all parties agreed that there was no need for the court to consider them, at this stage and, absent further evidence, should not do so. If I favour the Soho Respondents' case on the legal principles, then it may prove necessary for the court to make further directions to address Mr Hussey's concerns about whether their shares are valid. If I decide that the Soho Respondents' votes should not count towards the requisite majority, with the consequent effect that the Joint Liquidators remain in office, then, for current purposes, Mr Hussey's concern becomes academic.

25. The Joint Liquidators stated that they took a neutral stance. This was reflected in Mr Lewis' skeleton argument that dealt relatively briefly with what he considered to be the relevant legal principles. However, he expanded upon the points raised in his skeleton argument during the hearing, forcefully setting out the grounds upon which

the court should conclude that the votes cast by the Soho Respondents at the meeting of Core's members, should not be counted. He explained that he did so to assist the court, taking into account that Mr Hussey and the Fifth Respondent were not legally represented.

Votes cast by the Soho Respondents

26. The Soho Respondents voted in favour of the First Resolution (for the Companies to remain restored to the register). Mr Weaver QC submits that in doing so, they demonstrated that they were not simply voting in their own self-interest to try to stifle the Claims. Their votes against the Second Resolution, he said, were based upon their desire to replace the Joint Liquidators with an office holder whom they consider to be more independent, free from any conflict of interest and competent; all qualities that the Soho Respondents contend the Joint Liquidators have failed to demonstrate since their appointment in July 2018.

27. Mr Weaver provides the following examples of the Joint Liquidators' alleged shortcomings and/or reasons why they should not remain in office:

i) ***Conduct/Competence*:** the Joint Liquidators did not interview the Soho Respondents prior to issuing the Claims to understand more about the circumstances and reasons for the Sale. They failed to comply with the Court of Appeal's order, choosing instead to issue the Claims before convening the Meetings. Mr Weaver reminds the court of Falk J's criticism of the Joint Liquidators' decision to bring the s.212(4) Application urgently before the court without giving the Former Liquidators proper notice of the hearing. He refers also to my criticism of the Joint Liquidators' further delay in bringing that application back before the court, with the consequence that the only way the court could avoid limitation considerations rendering the decisions to be taken at the Meetings otiose, was by putting other court users at a potential disadvantage by carving out time for an urgent hearing and even then there remained insufficient time for members to be given the full period of notice of the Meetings. The Joint Liquidators then waited another four weeks before issuing the Application and a further three weeks after that to serve the evidence in support, all the while not disclosing whether, and if so, funding arrangements have been put in place and the effect that those arrangements would have on members, if the Claims are to be pursued.

ii) ***Independence*:** The Court of Appeal described the roles between the Joint Liquidators and those who appointed them as blurred. The Soho Respondents complain that the Joint Liquidators appear, in the various applications to court, to be closely aligned to the claimants who successfully obtained the restoration order and that they failed to prevent members receiving, in addition to the court-approved circular, partisan information prepared by an action group before the Meetings.

iii) ***Conflict of interest*:** As the Companies currently have no liquid assets, the bulk of the Joint Liquidators' fees will most likely fall to be paid from any recoveries made in the Claims. The Soho Respondents have consistently maintained that by the time any success fee (for the funding arrangement) and all costs of the liquidations and of pursuing the Claims have been paid, there is

> likely to be no return to the Companies' members. This scenario, Mr Weaver submits, gives rise to a compelling perception that the Joint Liquidators will have a financial interest in the pursuit of the Claims that may conflict with the interests of the Companies' members, and that the perception alone, should be sufficient to persuade the court that it would be inappropriate for the Joint Liquidators to manage the Claims.

28. Conversely, Mr Weaver says, the appointment of replacement liquidators would not prevent the Claims from being pursued and would cause no prejudice to the Companies' members. In his fifth witness statement, Mr Fakhry has invited the Joint Liquidators to select a firm from the eight largest in the country, from which replacement office holders would be appointed and he has undertaken to fund the replacement liquidators to the tune of £100,000:

> "for the express purpose of allowing them to carry out a review of the Part 7 Claim, to interview the relevant parties, to review the litigation funding agreements and to decide whether or not to continue with the claims. This funding would be on an entirely non-recourse basis."

An established principle

29. The Soho Respondents rely on the principle, established over a long history of cases, that a shareholder is entirely free to exercise its own judgment as to how to cast its vote. Mr Weaver referred the court to several authorities where the court affirmed this principle, described recently by Sir Geoffrey Vos C (as he was) in *Children's Investment Fund Foundation (UK) v Attorney General & others* [2018] Ch 371 as "uncontroversial".

30. In *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 WLR 1133, Walton J drew a distinction between a shareholder voting on a resolution and a director voting in his fiduciary capacity as director:

> "the distinction is this: when a director votes as a director for or against any particular resolution in a director's meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company and who is exercising his own right of property, to vote as he thinks fit. The fact that the result of the voting at the meeting (or at a subsequent poll) will bind the company cannot affect the position that, in voting, he is voting simply in exercise of his own property rights.
>
> Perhaps another (and simpler) way of putting the matter is that a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors; a shareholder who casts his vote in general meeting is not casting it as an agent of the company in

> any shape or form. His act therefore, in voting as he pleases, cannot in any way be regarded as an act of the company."

31. Mr Weaver recognises that in addition to cases where a majority of a company's members are endeavouring to perpetrate a fraud on the minority, or where the votes cast would bring about the immediate insolvency of the company (*Standard Chartered Bank v Walker* [1992] 1 WLR 561), the courts have created exceptions to the principle. He provides the following examples:

    i) in *Children's Investment Fund Foundation*, the Court distinguished between an ordinary shareholder (over whom the Court would not exercise any control in respect of voting) and a member of a charitable company in circumstances where that member was not exercising his or her own proprietary right when voting;

    ii) more recently, in *Re Dee Valley Group plc* [2017] EWHC 184 (Ch), the Court confirmed that in cases concerning schemes of arrangement, the normal principle does not apply: a scheme meeting is convened by order of the court and is subject to the control of the court. Members are required to act bona fide and exercise their power to vote "for the purpose of benefiting the class as a whole, and not merely individual members only". In the specific circumstances of a scheme, the court can intervene and enquire into a member's motives when voting; and

    iii) in the context of a derivative claim brought by minority shareholders, in *Smith v Croft (No.2)* [1988] Ch 144, the Court disregarded the votes of non-independent shareholders.

32. Having cited these examples, Mr Weaver submits that they only occur in specific and exceptional circumstances; whereas the circumstances of this case are not exceptional and there are no grounds to justify the court interfering with the manner in which members' votes are counted.

The court's jurisdiction to intervene

33. Mr Lewis took me to the Court of Appeal's decision in the Restoration Application at [2020] EWCA Civ 1207. At paragraph 64 of his judgment, David Richards LJ referred to Mr Fakhry's overarching submission that decision-making in a solvent company is vested by the Companies Act 2006 in its members. Having lost the vote at the members' meeting held prior to dissolution, a minority shareholder should not be able to apply to court for an order to achieve the same result that he failed to obtain at the meeting. There, Mr Fakhry submitted that the case is even stronger where remedies were available to the minority shareholders during the liquidation but they did not avail themselves of them. At paragraph 66 of his judgment David Richards LJ said:

> "As will be seen, I consider the role of members and the degree of control given to them by the legislation in a members' voluntary liquidation, reflecting their interests as members in the process, to be a central issue in this case. However, it is important not to overstate it. Three points are relevant in this

> respect. First, while members may by a simple majority remove a director or, in a members' voluntary liquidation, the liquidator, there is also vested in the court by section 108 of the Act the power to remove a liquidator, on cause shown, on the application of any person whom the court considers proper, including a member. No similar power exists as regards the removal of directors. Second, the court also enjoys the power to appoint a liquidator under section 108, either to fill a vacancy or in place of a liquidator. Again, no similar power exists as regards the appointment of directors. A liquidator appointed in this way may be removed by the members only through the mechanism set out in section 171(3). Third, the members do not enjoy powers to control the actions of liquidators. While the articles of association usually confer on the directors the power and responsibility to conduct the business of the company as they, in accordance with their duties, see fit, it is open to the members to exert control and instruct the directors in their conduct of the business by special resolution, altering the relevant articles either generally or *pro tanto*. The members enjoy no such powers over the liquidator even in a members' voluntary liquidation. The most they can do, short of taking steps to remove the liquidator, is to apply to the court for directions under section 112 of the Act. It is then for the court to decide whether any directions be given to the liquidator."

34. He noted, however, that the fact that the Companies' members had resolved to accept the final accounts of the Former Liquidators and to give them their release would not, of itself, preclude the court from exercising its power to restore the Companies to the register or to remove the Joint Liquidators (as Mr Fakhry was then trying to do) pursuant to section 108 of the IA1986.

35. At paragraph 95 of the judgment, having stated that the correct course of action was for the Joint Liquidators to convene the Meetings, David Richards LJ considered the prospective treatment of the votes of those subject to the prospective Claims:

> "It is necessary to consider the position of those members who would be the subject of the proposed investigations and other members so closely associated with them that they would be likely to be influenced by regard for the personal interests of those subjects. This is the second reason given by the Judge at [111] for not convening meetings. This problem has been considered in the context of derivative actions and resolved by having regard only to the votes of shareholders independent of the proposed defendants: see *Smith v Croft (No 2)* [1988] Ch 114. This can be achieved either by not permitting such members to vote at the meeting or by noting their votes and the court deciding whether to disregard them."

36. Mr Lewis submits that these passages confirm the court's jurisdiction to perform a supervisory role in a members voluntary liquidation. It is clear from these passages

that David Richards LJ was of the view that the court has the power to decide whether a specific category of members' votes should be counted or disregarded; were that not the case, the Court of Appeal would not have made an order providing for this Sanction Hearing. In the passage cited at paragraph 33 above, the Court of Appeal drew a distinction between the rights of members of a "live" company and one that is in liquidation. If dissatisfied with decisions of an MVL liquidator, the most that a company's members can do is to take steps to remove the liquidator or to apply to court for directions under section 112 of the IA1986. Mr Lewis submits that contrary to the Soho Respondents' submission, the emphasis placed by the Court of Appeal on members' rights to apply to remove a liquidator under section 108 of the IA1986 demonstrates that it saw no distinction between insolvent and solvent liquidations; the distinction it drew was between "live" companies and those in some form of liquidation.

37. Mr Lewis recognised that a shareholder has a proprietary right in the form of a share that gives him a right to vote, but submitted that does not give members some higher right of participation in the company's affairs than a creditor in a creditors voluntary liquidation. David Richards LJ's reference at paragraph 95 of his judgment to *Smith v Croft (No2)*, a derivative action, is notable, as is his reference to *Raithata v Arnold Holstein GmbH* [2017] EWHC 3069 (Ch), that concerned the requirement of liquidators to hold a creditors' meeting for their own removal. The Court of Appeal, whilst not expressing a concluded view on the entitlement of the Soho Respondents' votes to count, clearly thought the approaches taken by the court in *Smith v Croft* and *Raithata* were of relevance.

38. In *Raithata* the respondents were potentially likely to be the subject of claims against them. In this case, Mr Lewis submits, the argument in favour of the court exercising its jurisdiction is more compelling, as the claims against the Soho Respondents have already been issued and served. In *Raithata*, Marcus Smith J held that the question of whether votes should be taken into account depended on whether doing so would be conducive to the proper operation of the liquidation and to justice between those interested in the liquidation. At paragraph 45 of his judgment, Marcus Smith J noted:

> "the fact that the body of creditors or part of the body of creditors seeking the removal of a liquidator may themselves face claims against them brought at the instance of a liquidator is highly material. I do not accept that this factor is determinative in all cases, but it is clearly highly material"

39. Mr Lewis also drew the Court's attention to five practical points for the court to consider in relation to the Application:

    i) he submits that the Soho Respondents' votes against the Second Resolution in relation to Core (for the Joint Liquidators to remain in office) overlook the practical effect of members having decided that the Joint Liquidators of the other Companies, Core IV and Core V, should remain in office. This, he says, will give rise to an unnecessary duplication of costs, with two sets of liquidators pursuing the same claims, in parallel;

    ii) analysing the votes cast in relation to Core's Second Resolution, the court can see that of the 734 shareholders who voted, only twelve in number voted

against the Second Resolution. The majority in number of those voting for the resolution were retail investors and members of the public. If the Joint Liquidators' claims against the Soho Respondents are well-founded, it would be "absurd" to suggest that the targets of those claims should be the ones determining who should or should not bring the claims against them;

iii) the Soho Respondents appear to recognise that if the Joint Liquidators are to be removed, someone must step into the breach, but the offer made is not a proper one. The identity of the proposed replacement liquidator is unresolved as is the method by which they will be paid. £100,000 will not go very far, nor is it being offered unconditionally. The money is to be spent on investigating whether the Claims should proceed. This, Mr Lewis submits, is entirely unsatisfactory. The targets of the Claims are to pay £100,000 to new officeholders to investigate whether to continue the Claims, which an overwhelming majority in number of unconnected members, have already concluded should be pursued;

iv) it is now too late to change horses, for a new officeholder to go over all the existing groundwork undertaken by the Joint Liquidators. The Court of Appeal did not consider it appropriate in September 2020 to appoint new liquidators simply "to hold the ring" and, Mr Lewis submits the rationale for the Court's conclusion on this point, is even more compelling today;

v) the Soho Respondents had an opportunity to debate and contribute to the information included in the court-approved circular sent to members before the Meetings. The circular included details of the Soho Respondents' criticism of the Joint Liquidators' conduct. When that information was put to investors it did not appear to deter almost all of them (in number and value for Core IV and Core V and in number for Core) from voting in favour of the Second Resolution. Why, he asked rhetorically, did one shareholder in particular, take such a different view from all retail investors and members of the public? The answer, he claims lies in the Soho Respondents' self-interest. They seek now to say that if they were motivated by self-interest, they would not have voted in favour of the First Resolution. He urged the court to appreciate, however, that by pressing the court not to ignore their votes, they are now seeking to achieve the same result by different means.

40. In summary, the Joint Liquidators see no impediment to the Court discounting the Soho Respondents' votes. They consider that was what the Court of Appeal had in mind when directing this hearing. If, contrary to their view, the Court considers that it should only interfere in the rights of members to have their votes counted in exceptional circumstances, then, in the Joint Liquidators' view, these are such circumstances. Mr Lewis referred to *Menier v Hooper's Telegraph Works* [1874] Law Rep 9 Ch 350, in which the court considered its right to protect the interests of minority shareholders, where the majority proposed to divide the company's assets between themselves, to the exclusion of the minority. At page 354, when concluding that the court may interfere with the members' vote, Sir G Mellish LJ stated:

> "I am of the opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of

> shareholders cannot sell the assets of the company and keep the consideration but must allow the minority to have their share of any consideration which may come to them."

41. Mr Lewis submits that to the extent that the court considers it necessary to establish that there has been an alleged fraud on the minority, the Claims include serious allegations of a failure by the Soho Respondents to disclose to Core's minority shareholders, their interest in the Purchaser, and claims against Mr Fakhry and Mr Edwards for breaches of duty and liability for knowing receipt. Such conduct, he submits, falls classically within the exceptional circumstances found in the authorities and justifies the court's intervention.

42. As regards the Soho Respondents' criticism of the Joint Liquidators, Mr Lewis submits that all these points were put to members in the court-approved circular but did not deter an overwhelming majority of independent members from voting in favour of both resolutions. Addressing the allegations in detail:

    i) ***Conduct/Competence*****:** none of these criticisms relate to any alleged failure by the Joint Liquidators to seek to maximise realisations for members. They are points that can be raised in the Soho Respondents' defence to the Claims;

    ii) ***Independence/Conflict of interest*****:** the allegation that the Joint Liquidators are in a position of conflict would apply to any claim brought by a liquidator and it makes no sense to suggest that a party pursuing a claim via litigation should be non-partisan or neutral. An offer to fund replacement liquidators will create a more troubling impression that the defendants to the Claims are removing the Joint Liquidators, against the wishes of the independent members, in order that they be replaced by their preferred appointees.

Decision

43. The Court of Appeal directed that this Sanction Hearing should consider the treatment of the votes cast at the Meetings. Two resolutions were before the Meetings. Whilst, for the reasons set out earlier in this judgment, the only one now falling to be considered concerns the retention of the Joint Liquidators as liquidators of Core, in my judgment, that should not incline the court to treat this hearing as if it were to consider an application under section 108 of the IA1986 to remove the Joint Liquidators. I see nothing in the Court of Appeal's judgment that directs or influences me to treat it as such. Were an application under section 108 to be before the court, there would be no question of the court's jurisdiction or power, if satisfied for the purposes of section 108(2) that cause had been shown, to remove the Joint Liquidators.

44. The Court of Appeal noted (at paragraph 95 of its judgment) that in derivative claims, the approach taken by the court in *Smith v Croft (No2)* has been applied so that interested members are not permitted to vote, or their votes are noted and the court decides whether to disregard them. I do not understand this part of the Court of Appeal's judgment to be suggesting that the approach taken by the court in *Smith v Croft (No2)* should necessarily be applied by the court at the Sanction Hearing in this case.

45. In my judgment, the correct starting point for this Application under section 112 of the IA1986 must be to consider whether there is any basis upon which the court may or should interfere with Core's internal management and the votes cast by the funders and the Soho Respondents at the meeting of Core's members. I see nothing in paragraph 66 of the Court of Appeal's judgment to suggest otherwise. In that paragraph, having determined that the Court should not overstate the degree of control given to members in an MVL, it recognised the express statutory power given to the court to appoint a liquidator in an MVL where no equivalent power exists for it to appoint a director. The Court of Appeal also noted that contrary to members' rights in a "live" company to exercise a degree of control over the company's directors, in an MVL, the members have no power to control the liquidator. They can, however, apply to the court to remove a liquidator or for the court to give directions to the liquidator under section 112. This, in my judgment, is not inconsistent with Mr Weaver's submission that the court's jurisdiction to interfere in the rights of members to vote on matters in an MVL remains limited and should be closely guarded.

46. I consider, therefore that the principles set out by Sir Geoffrey Vos C at paragraph 46 of his judgment in relation to the "live" charitable company in *Children's Investment Fund v Attorney General* apply equally to the application for directions in relation to the manner in which Core's members voted at the Meeting*:*

> "Generally a member of a commercial trading company may vote his shares at a general meeting in accordance with his own interests or wishes. Even a vote to amend the articles of association may be cast in accordance with the member's own view of what is in the best interests of the company, and the court will only determine that the votes of a member have not been cast in such a case for the benefit of the relevant company if no reasonable person could consider that it was for its benefit."

47. In *North-West Transportation Company v Beatty* (1887) 12 App Cas 589, the Privy Council considered an application to set aside the sale to the company of a steamer by one of its directors. The sale was not alleged to be at an unreasonable price, nor was it alleged that the vessel was not suitable for the company's needs. The issue before the court concerned the ability of the vendor/director to exercise his majority shareholder vote in relation to the passing of a byelaw to facilitate the acquisition. The Supreme Court of Ontario had concluded that it was so oppressive, that the court should hold it to have invalidated the adoption of the byelaw. The Privy Council disagreed. Sir Richard Baggallay explained the principle as follows:

> "The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or

> different from, the general or particular interests of the company.
>
> On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."

48. The circumstances of this case do not closely mirror any of those in the cases cited before me where the court has been prepared to interfere in the right of a member to exercise its vote as it chooses (summarised at paragraph 31 above). However, in my judgment, it is clear from the authorities summarised at paragraphs 46 and 47 above, that the court's authority to do so is not limited only to those circumstances. When determining whether the circumstances justify the court doing so, it should consider whether the majority decision has been brought about by unfair or improper means, fraud or illegality or is oppressive towards the shareholders who oppose it, and whether no reasonable person could consider that the member's vote was cast for the company's benefit.

49. Mr Lewis highlighted elements of the Particulars of Claim bearing similarities to those in the authorities cited to me, where the court has been prepared to intervene to prevent a majority voting in respect of their own wrongdoing. However the question before the court is not whether to allow the claims to proceed but rather, whether the Joint Liquidators should be the ones pursuing them. The Soho Respondents have voted in favour of Core's liquidation continuing and invited the Applicants or failing them, the court, to identify/appoint suitable insolvency practitioners to replace them. In my judgment, the decision to vote against the Joint Liquidators remaining in office was not brought about by unfair or improper means, fraud or illegality. Could it therefore be described as oppressive towards the shareholders who opposed it? A system dependent upon majority voting unavoidably involves a majority voting against the wishes of a minority and thus an inherent element of the imposition of one group's will upon another or, in other words, an element of oppression. There was no statutory or common law requirement, nor any provision in the Company's constitution requiring the votes cast at the Meetings to be balanced or re-weighted by reference to the number of shareholders voting rather than the number of shares held. Where shareholders are entitled to vote entirely in their own self-interest, I consider that for the court to intervene in their proprietary right to exercise such a vote, the oppression contemplated in the authorities must involve an element of abuse or unfair subjugation of the minority's will.

50. Seeking to remove the Joint Liquidators in the run up to a trial would, in my judgment, give rise to such oppression: absent truly exceptional circumstances, no reasonable person could consider that a member's vote to remove liquidators so close

to that critical stage in litigation was being exercised for the company's benefit. However, in this case, the Claims are at an early stage, their funding still appears to remain uncertain and replacing the Joint Liquidators should not have the effect of stifling viable claims.

51. Whilst it may appear morally unattractive for the Soho Respondents to exercise their majority vote to remove those who have commenced the Claims against them, that does not, in my view, amount to oppression of the type I consider to be necessary for the court to intervene. The Soho Respondents are content for the choice of replacement liquidators to be left to a third party and those liquidators will then determine whether to continue the Claims either using the funds offered by Mr Fakhry to do so – thus ensuring that those who have brought about the change, meet the costs of any duplicated effort - or by seeking funding elsewhere.

52. I reject the Soho Respondents' criticism of the Joint Liquidators' alleged lack of independence and conflict of interest. Once an insolvency office holder has satisfied himself that grounds exist for proceedings to be brought against former directors, he will necessarily adopt a partisan approach. I also accept that where, as is so often the case, the likelihood of a liquidator recovering his fees will depend to a lesser or greater extent on recoveries in the litigation, he will unavoidably have an interest in seeing the litigation through to a successful conclusion. Such an interest should not, in my view, usually give rise to a conflict requiring him to retire from the case.

53. However, the practical consequences pressed upon me by Mr Lewis, of permitting the Soho Respondents' votes to take effect do not, in my judgment, weigh sufficiently heavily in the balance to persuade me that there is cause for the court to intervene. Whilst I accept that the Soho Respondents' criticisms of the Joint Liquidators did not deter the independent members from voting in favour of their retention in office, bearing in mind the judicial criticism of the Joint Liquidators' failure to give proper notice of the s.212(4) Application to the Former Liquidators and delay in convening the Meetings, the concerns they have expressed about the Joint Liquidators continuing to drive the Claims does not, in my judgment, mean that no reasonable person could consider that the Soho Respondents' votes were cast for Core's benefit. Bringing a fresh, independent pair of eyes to review the merits of the Claims, potentially at no cost to the members (if the new liquidators choose to accept Mr Fakhry's offer of funding) could, in my view, readily be said to be for the company's benefit.

54. As for there being two sets of liquidators pursuing the Claims, I understand that approximately 80% of the value of the Claims lies with Core. With such a clear majority interest in any potential recoveries, it does not appear unreasonable to contemplate that four professional, licensed insolvency practitioners who owe duties to maximise recoveries for the members of the MVL in which they are acting, will be able to find an appropriate division of work to mitigate costs and avoid unnecessary duplication.

55. In case I am wrong in focussing on the court's jurisdiction to interfere in the votes cast by the Soho Respondents at the Meeting rather than on the specific resolution in question, and should instead treat the Application as if it were to remove the Joint Liquidators under section 108 of the IA86 or more along the lines of the approach taken by Marcus Smith J in *Raithahta* (which concerned an application to prevent a meeting of creditors to remove liquidators), it is perhaps helpful if I record that I am

not convinced that the outcome of my decision would be significantly different. As the Court of Appeal noted in this case, when considering an application to remove a liquidator, the existence of matters concerning the conduct of the party applying for the liquidator's removal that are worthy of investigation is highly material, but not determinative in all cases. It would be open to the court when considering such an application to place greater emphasis than I considered to be appropriate when considering the court's jurisdiction to interfere in votes cast by members at a meeting, on the number of retail investors and members of the public voting to retain the Joint Liquidators. However, it would also be open to the court to consider, as I have done, the potential benefits of bringing fresh scrutiny to the proposed Claims and their funding and to consider the Soho Respondents' criticism of the Joint Liquidators in greater detail than I have considered necessary or appropriate.

56. In my judgment, a potentially significant distinguishing feature between *Raithata* and this case is that in the former, the proposed replacement liquidator had been nominated by the party against whom claims were about to be brought and the court's confidence in that proposed replacement liquidator had been undermined. That is not the case here, where the Soho Respondents propose that the Joint Liquidators or the court select their replacement. Furthermore, in this case, I do not consider that replacing the Joint Liquidators will necessarily stifle the Claims. In short, I consider that there are reasonable grounds upon which the court could conclude that the removal of the Joint Liquidators would be conducive to the proper operation of the process of the liquidation and to justice as between all those interested in it.

57. In conclusion, I see no grounds in this case for the court to intervene in the votes cast at the Meeting of Core's members on 20 December 2021.