Neutral Citation Number: [2019] EWHC 1768 (Comm)

Case No: CL-2018-000470

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before: **MRS JUSTICE COCKERILL DBE**

- -

Between :

BRIDGEHOUSE (BRADFORD NO.2)	**Claimant**
- and -	
BAE SYSTEMS PLC	**Defendant**

- -
- -

David Lord QC and **Sebastian Kokelaar** (instructed by **Richard Slade & Co plc**) for the **Claimant**
Fiona Parkin QC and **Patrick Harty** (instructed by **Ashurst LLP**) for the **Defendant**

Hearing dates: 13 and 14 May 2019

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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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MRS JUSTICE COCKERILL DBE

MRS JUSTICE COCKERILL DBE:

Introduction and factual background

1. This is the hearing of BB2's Appeal pursuant to section 69 of the Arbitration Act 1996 ("the 1996 Act") against an award dated 14 June 2018 ("the Award") issued by Mr John V. Redmond ("the Arbitrator"). The Appeal is, rather unusually, brought by agreement between BB2 and BAE.

2. On 20 December 2012 BAE and BB2 entered into an agreement ("the Agreement") pursuant to which BAE agreed to procure the sale by one of its subsidiaries to BB2 of two properties (Hawarden Airfield, Broughton, and Filton Main Site, Bristol) for the sum of £93 million. Under the terms of the Agreement the sale is due to complete on a date to be determined between 21 January 2020 and 1 July 2022.

3. BB2 was incorporated specifically for the purpose of entering into the Agreement with BAE. It does not carry on any business and does not own any assets other than its rights under the Agreement. Its sole shareholder is Mr Andrew Ruhan and its sole director is Mr Gabriel Ruhan.

4. The Agreement formed part of a wider transaction known as Project Bradford, which involved the disposal by BAE to companies within the Bridgehouse Capital group of a portfolio of properties that were surplus to BAE's own requirements for a total sum exceeding £200 million.

5. Clause 19 of the Agreement was an arbitration clause. It provides, in summary, that *"any dispute…arising out of the provisions of this agreement"* shall, if it cannot be resolved consensually, be referred to an independent person jointly appointed by the parties, who shall act as an arbitrator in accordance with the 1996 Act.

6. Clause 20.1 of the Agreement is the key provision for this appeal. It provides:

> "20. TERMINATION
>
> 20.1 If the Buyer:
>
> (a) suffers an Event of Default (defined in Clause 20.2);…then BAE may, by notice in writing to the Buyer, determine this agreement.
>
> 20.2 Events of Default – meaning
>
> For the purpose of clause 19 an Event of Default occurs if the Buyer suffers any of the following:…
>
> (g) being struck off the Register of Companies or being dissolved or ceasing for any reason to retain its corporate existence.

> 20.3 Effect of termination notice
>
> If notice is served pursuant to clause 20.1 then this agreement shall immediately determine and BAE shall be entitled to release the monies outstanding to the credit of the Accounts for its own benefit but any determination shall be without prejudice to any right of action or other remedy of the Parties in respect of any antecedent breach by the other of any of the provisions of this agreement."

7. Prior to 2014 BB2 failed to comply with its statutory obligations under s. 441 Companies Act 2006 to file accounts. As a result, on 16 December 2014, the Registrar of Companies published a notice under s. 1000(3) of the Companies Act 2006 ("the 2006 Act") stating that BB2 would be struck off the register unless cause were shown to the contrary.

8. Section 1000 of the 2006 Act confers a power on the registrar to strike off a company, which he has reasonable cause to believe is not carrying on business or in operation. The registrar appears to have formed such a belief in relation to BB2 because its accounts and/or annual return were not filed on time.

9. The notice was sent to BB2's registered office, but it did not come to the attention of Mr. Gabriel Ruhan. The reason for this was that BB2's registered office was the office of lawyers who had previously worked for Mr. Andrew Ruhan, but who had ceased to do so in circumstances of considerable acrimony.

10. Despite this situation, neither Mr. Andrew Ruhan nor his brother Mr. Gabriel Ruhan had ensured that BB2's registered address had been updated at Companies House. Felicitously, lawyers who were working for Mr Andrew Ruhan on other matters noticed the strike off notice and drew it to the attention of BB2. BB2 then filed accounts and an annual return (signed by Mr Gabriel Ruhan and recording the same registered address) and the strike off action was discontinued. However, BB2 still did not change its registered office. Nor did it file accounts when next due - for the year ending 31 December 2015.

11. On 15 March 2016 the Registrar of Companies therefore sent another notice to BB2 pursuant to section 1000(3) of the Companies Act 2006 stating that, unless cause was shown, the company would be struck off and dissolved at the expiration of two months from the date of the notice. Notice was (again) sent to the same registered address. For the same reason it apparently did not come to the attention of Messrs Ruhan. This time there was no fortuitous spotting of the problem by anyone acting for BB2.

12. BB2 says that it was unable to show cause because the notice did not come to its attention in time – because again it was sent to a registered office which was not functioning as such. In any event, it did not show cause. Accordingly, it was dissolved and struck off the register on 31 May 2016.

13. It is not in issue that the registrar had power to strike BB2 off the register or that this striking off was effective at the time.

14. BAE became aware of the proposal to strike off on 25 May 2016. On 2 June 2016 it served a notice of termination pursuant to clause 20 of the Agreement ("the Notice").

15. An application for administrative restoration of BB2 to the register pursuant to section 1024 of the 2006 Act was then submitted to the Registrar of Companies on 24 June 2016.

16. One of the requirements for restoration is that: *"if any property or right previously vested in or held on trust for the company has vested as bona vacantia, the Crown representative has signified to the registrar in writing consent to the company's restoration to the register."* An applicant is required to file a statement of compliance confirming *"that the requirements for administrative restoration are met"*. In its application for restoration, BB2 told the registrar that: *"The Company holds no assets and therefore a bona vacantia waiver/consent letter is not required in this instance"*.

17. The application was successful and BB2 was restored to the register on 28 July 2016.

18. This appeal concerns the effect of that restoration on BAE's previously valid and effective termination in the light of section 1028 of the Act. S. 1028(1) provides that:

> "The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

19. BB2 challenged the validity of BAE's termination of the Agreement. On 1 November 2016 BAE issued proceedings against BB2 in the Chancery Division for a declaration that the Agreement had been validly terminated by service of the Notice. Those proceedings were stayed by Chief Master Marsh on 2 February 2017 pursuant to an application by BB2 under section 9 of the 1996 Act, because of the existence of the arbitration agreement.

20. BAE then commenced arbitration proceedings against BB2 on 3 March 2017. Mr John V. Redmond ("the Arbitrator") was appointed as arbitrator by the President of the Law Society (in default of agreement between the parties).

21. The issues which the Arbitrator had to decide are set out at paragraph 13 of the Award. There are four of them:

> "Issue A1: Whether BAE had a right to exercise its right under Clause 20.1 prior to the release of the Properties from the BAES Leases Trust
>
> **Issue A2: Whether an Event of Default under clause 20.2(g) arose immediately upon BB2 being struck off the register on 31 May 2016 (as BAE contended) or (as BB2 contended) only after a reasonable period of time had expired without an application for restoration to the register having been made**;

> Issue A3: Whether the service of BAE's notice was ineffective because BB2 did not exist, or was served in breach of a "good faith" obligation;
>
> **Issue A4: Whether any effective termination had to be re-assessed retrospectively as a result of BB2's restoration to the Register by virtue of section 1028(1) of the 2006 Act such that the Notice is to be regarded as ineffective**."

It is issues A2 and A4, highlighted in bold above, which are in issue in this appeal.

22. The Award was published on 14 June 2018. It runs to 188 paragraphs and 42 pages. On Issue A2, the Arbitrator held that an Event of Default had arisen immediately upon BB2 being struck off the register (paragraphs 52 to 60 of the Award).

23. He further held that the Agreement had been validly terminated by the service of the Notice, and that the termination was not affected by BB2's subsequent restoration to the register. The Arbitrator concluded that section 1028(1) did not automatically undo the termination of the Agreement (see paragraphs 153 to 185 of the Award). In light of this, it was not necessary for him to deal with BAE's argument that the parties had contracted out of section 1028(1).

24. On 11 July 2018 BB2 issued the present appeal against the Arbitrator's award. The Appeal is brought by agreement with BAE.

25. On 3 August 2018 BB2 issued a Part 8 claim in the Chancery Division (Insolvency and Companies List) seeking relief under section 1028(3) ("the Section 1028(3) Application"). Section 1028(3) confers a power on the court to *"give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register"*. The relief under section 1028(3) is sought in the event that the appeal against the Award fails.

26. It was envisaged by BB2 that the Section 1028(3) Application would be determined, if necessary, at the same time as its appeal against the Award. Accordingly, on 3 August 2018 BB2 also issued an application for an order that the present appeal be transferred to the Insolvency and Companies List and heard together with the Section 1028(3) Application ("the Transfer Application").

27. On 4 September 2018 BAE issued an application pursuant to section 9 of the 1996 Act for an order staying the Section 1028(3) Application ("the Stay Application").

28. The Transfer Application was heard and dismissed by me on 26 October 2018. At the same time as dismissing the Transfer Application I also gave directions for the hearing of this Appeal.

29. The Stay Application was heard by Mr Stuart Isaacs QC (sitting as a Deputy Judge of the High Court) on 14 March 2019. On 21 March 2019 he handed down a judgment granting the stay. On 10 April 2019 BB2 issued an Appellant's Notice seeking

permission to appeal against that decision from the Court of Appeal. So far as I am aware, that application has yet to be determined.

The questions of law

30. The agreed questions of law that fall to be determined on this appeal are set out in Appendix 1 to the letter from BAE's solicitors (Ashurst) to BB2's solicitors (Richard Slade and Company) dated 10 July 2018, which records the terms upon which BAE agreed to the bringing of the appeal and which were later embodied in the Order of Teare J dated 7 December 2018. They are as follows:

> "Issue A4
>
> (1) Was the Arbitrator correct to conclude that the answer to Issue A4, namely *"Is any effective termination to be re-assessed retrospectively as a result of BB2's restoration to the Register by virtue of section 1028(1) Companies Act 2006 such that the Notice is to be regarded as ineffective?"*, is *"No"*. In particular:
>
> a. Was the Arbitrator correct to conclude that section 1028(1) cannot undo the termination of a contract – where that termination was effected pursuant to an express contractual right to terminate in circumstances in which the company (that was a party to that contract) had been struck off the Register – after that company has been restored to the Register?
>
> b. If the Arbitrator was wrong and the correct answer to Issue A4 is *"Yes"*, can the parties to a contract lawfully and effectively agree that – regardless of the deeming provisions of section 1028(1) – one party shall have the contractual right to terminate upon the other party being struck off the Register of Companies and, if it does terminate, that termination will not be affected by the deeming provisions of section 1028(1) if the other party is subsequently restored to the Register?
>
> c. If the answer to the question at paragraph 1(b) above is *"Yes"*, did the parties to the Agreement in fact either expressly or impliedly agree that – regardless of the deeming provisions of section 1028(1) – BAE's termination of the Agreement would be lawful and

effective notwithstanding the restoration of BB2 to the Register?

Issue A2

(2) Was the Arbitrator correct to conclude that the answer to Issue A2, namely *"Did a clause 20.2(g) Event of Default arise immediately upon 31 May 2016 (being the date on which BB2 was struck off the Register) as BAE asserts, or as BB2 contends, only after a reasonable period of time had expired without an application for restoration having been made"*, is that an Event of Default arose immediately upon 31 May 2016? "

The approach to be adopted on the appeal

31. The first point raised by BB2 was as to the approach to be adopted in this appeal. It referred me to the judgment of Eder J in *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm), but submitted that in the present circumstances the approach adumbrated there is of limited application given that the Appeal has been brought by agreement between the parties and the arbitrator is not a market man but a lawyer.

32. I broadly accept this submission. At least two of the issues are true questions of law, where no margin of appreciation applies. The others are questions of contractual construction. The arbitrator is indeed a lawyer, so no question of market knowledge or feel comes into play. And the parties have freely agreed to bring this appeal in circumstances where the main issue in the appeal was not the subject of much attention in the arbitration hearing. This is, therefore, an appeal where the Court can in effect view the issues as if *de novo*.

33. The parties have approached the appeal from slightly different angles. BAE submits that Issue A2 logically precedes Issue A4 and dealt with it first. I entirely see the force of that approach. However, I will take the issues in the order preferred by BB2, which reflects the parties' agreed issues for the appeal.

Question (1)(a): the effect of section 1028(1)

34. This was the main issue on the appeal; but it was not the main issue before the arbitrator. As I understand matters, issue A2, along with other issues which are not live in this appeal represented the main issues argued in the arbitration. During the course of argument, however, the arbitrator raised this issue, some argument took place following that, during the course of which a number of the authorities were cited; and the arbitrator then made it a main ground of his decision. His decision was

therefore reached without all of the material on statutory interpretation which I have had cited and with not all of the authorities available to him.

The statutory background

35. Part 31 of the 2006 Act contains provisions relating to the dissolution and restoration of companies. Section 1000, as I have mentioned, confers a power on the Registrar of Companies to strike off an apparently defunct company. This power may be exercised where the Registrar has reasonable cause to believe that the company is not carrying on business or in operation, and has sent notices to the company to which it either has not responded within the requisite time or in response to which it has confirmed that it is not carrying on business or in operation.

36. Under s. 1012 all property and rights vested in a company that has been struck off and dissolved are deemed to be *bona vacantia* and vest in the Crown (or the Duchy of Lancaster or Duke of Cornwall in some cases).

37. Under previous Companies Acts (for example the Companies Acts 1900, 1908, 1929, 1948 and 1965) any application for the restoration of a company had to be made to court. The Court was provided with a discretion to restore a company to the register by one of two different routes. The two routes were intended to provide a *"clear demarcation between the reversal of a formal winding up process and the rectification of the effects of a striking off procedure"* where there had been no formal winding up of a company's affairs.

38. Thus, and taking the provisions of the Companies Act 1985 by way of example, the court had a discretion to order restoration as follows:

    i) Pursuant to s. 651, which provided for the Court to declare a company's *"dissolution to have been void"* and that thereafter *"such proceedings may be taken as might have been taken of the company had not been dissolved"*; and

    ii) Pursuant to s. 653 which permitted a person who *"feels aggrieved"* by the striking off to apply to the court. It contained in s. 653(3) the same formulation as s. 1028(1) of the Companies Act 2006 (namely that upon the delivery of the restoration order to the registrar, the company *"is deemed to have continued in existence as if its name had not been struck off…."*).

39. Over time however, that demarcation between the two routes had been eroded. Administrative restoration (whereby a company is restored to the register by the Companies Registrar) as provided for by ss. 1024 and 1025 Companies Act 2006 was an innovation of that Act, having been recommended for introduction as a result of consultations and reviews undertaken by the Company Law Review Steering Group ("CLR") in 2000.

40. As a result, the 2006 Act now has a twofold approach to restoration:

    i) Section 1024 entitles a former director or member of a company struck off pursuant to sections 1000 or 1001 to apply to the Registrar to restore the company to the register. This procedure is called administrative restoration. It was first introduced by the 2006 Act.

ii) Section 1029 and following provide for restoration by the court on the application of a variety of other interested people.

41. The focus in this case is on administrative restoration, albeit that the "backstory" of the legislative provision remains relevant.

42. An application for administrative restoration may be made for a period of six years from the date of dissolution of the company. This is made clear by section 1024(4).

43. Administrative restoration is only available if certain conditions are satisfied. These conditions are set out in section 1025. They are:

> "(2) The first condition is that the company was carrying on business or in operation at the time of its striking off.
>
> (3) The second condition is that, if any property or right previously vested in or held on trust for the company has vested as *bona vacantia*, the Crown representative has signified to the registrar in writing consent to the company's restoration to the register. ...
>
> (5) The third condition is that the applicant has—
>
> (a) delivered to the registrar such documents relating to the company as are necessary to bring up to date the records kept by the registrar, and
>
> (b) paid any penalties under section 453 or corresponding earlier provisions (civil penalty for failure to deliver accounts) that were outstanding at the date of dissolution or striking off."

44. Section 1028(1) – the key provision in this appeal - deals with the effect of administrative restoration. As already noted it provides that:

> "the general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

45. Section 1028(3) contains a power for the court to *"give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register"*. An application under section 1028(3) may be made any time within three years after the date of restoration of the company to the register (and thus up to nine years after the removal from the register).

46. The provisions now contained in sections 1028(1) and (3), and sections 1032(1) and (3), have a long history, which goes back to the Companies Act 1880. Similarly-worded provisions have appeared in successive Companies Acts since then.

47. As noted above, the previous method of restoration remains in place alongside administrative restoration. Section 1029 permits an application to be made to court to restore a company to the register, which has been dissolved after a winding up or following administration, or which has been struck off by the registrar. Such an application may be made by a wide range of persons, including a director, a person having a claim against the company or any person who but for the company's dissolution would have been in a contractual relationship with it.

48. The general effect of an order by the court restoring the company to the register is the same as the general effect of administrative restoration, i.e. the company is deemed to have continued in existence as if it had not been dissolved or struck off the register: section 1032(1). Further, section 1032(3) provides, echoing s. 1028(3): *"The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."*.

49. Upon restoration to the register (whether pursuant to the administrative procedure or a court order) any property which has vested in the Crown as *bona vacantia* automatically re-vests in the company: see *Re C.W. Dixon Ltd* [1947] Ch 251 and *Smith v White Knight Laundry Ltd* [2002] 1 WLR 616. Section 1034 contains special provisions that deal with the effect of restoration on dispositions effected by the Crown of property vested in it as *bona vacantia* whilst the company was dissolved.

The arguments

50. BB2's approach was to consider the various authorities in turn with little emphasis on the statutory purpose. It submitted that:

    i) The authorities make abundantly clear that the deeming provision in clause 1028(1) operates retrospectively as well as prospectively.

    ii) The language of section 1028(1) is unrestricted. The provision is intended to be general in its application - it expressly says so. Had it been the intention of Parliament to create exceptions to the general effect of administrative restoration, it would have said so in clear terms.

    iii) The absence of any such exceptions in the wording of the section is entirely consistent with the policy behind it, which is to place the company and every other person in the same position (as nearly as may be) as if the company had never been struck off or dissolved.

    iv) The Arbitrator fell into error in paragraph 181 of the Award where he concluded, in effect, that the actions taken by a party to a contract, in accordance with the contract, prior to the restoration, are immune from the retrospective effect of the deeming provision contained in section 1028(1).

v) Any actions taken by a contractual counter-party during the period between the striking off/dissolution and the restoration of the company, the validity or effectiveness of which depends on the striking off/dissolution having occurred, must be reassessed on the footing that those events are deemed not to have occurred. The logical consequence of this reassessment must be that such actions are 'undone'.

vi) Contrary to what the Arbitrator appears to have thought, this is not a question of rendering legitimate actions illegitimate.

vii) To the extent the Arbitrator's reasoning was driven by concern about the complications which might arise in certain situations if BB2 were right about the effect of section 1028(1), he was wrong to bring this into account because the reality of the situation is that this is a unique situation.

51. Against this, it was BAE's case that:

i) On its true construction, section 1028 does not require the retrospective reassessment of what is otherwise an effective termination of the Contract while the company was dissolved such that the termination is somehow rendered invalid.

ii) There is no credible reason why Parliament would have chosen to legislate to such an effect. There is no public policy which supports BB2's construction and every reason why Parliament should not have legislated to prohibit such clauses.

iii) Such a result would be absurd and cause grave injustice.

iv) BB2 fails to show how it says that its construction of s. 1028(1) actually works or why it should work in such a manner.

v) BB2 elides "legislative purpose" with (what it asserts is the) "legislative effect" and has thereby failed to identify any "purpose" behind s.1028(1) which would justify the construction of the statutory provision it contends for;

vi) BB2 cannot explain why the termination is "ineffective" or how, as a matter of the law, a contract which it was accepted by BB2 had been terminated ceases to be so.

vii) BB2's approach would mean that such a termination provision does not provide a party with a right but creates a trap: a party who was entitled to serve a notice in reliance on such a clause would be retrospectively deemed not to have been entitled so to act and therefore would have done so in (very possibly repudiatory) breach of contract.

Discussion

52. The parties naturally placed different emphasis on three different aspects of the exercise: statutory intention, the *dicta* in the authorities and the effects of the position

contended for. All three of course have to be synthesised so far as permissible and possible.

Statutory Intention

53. Taking first the question of the statutory intention. This is of course important, because the goal of statutory interpretation is to give effect to the purpose of the statute. However, even so, the facts have to come into this consideration, as the authorities make clear. See for example *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 603 [32] per Lord Nicholls:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. … In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: …. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, on its true construction, applies to the facts as found"

54. To similar effect is *Luke v Inland Revenue Commissioners* [1963] AC 557 at 577, deprecating a fully literal approach:

> "To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

55. Although the authorities indicate a synthesised approach, that has to be performed with some discrete analyses as the building blocks. I shall therefore consider first what can be deduced as to statutory purpose, before proceeding to consider the authorities and then what may be termed the "proof of the pudding" arguments.

56. In part this initial exercise is hampered by the fact that, although administrative restoration is new, it partakes of rules which are much older. So the "statutory purpose" analysis cannot be conducted quite so cleanly as it could if the entire scheme and wording were new.

57. However, what emerges from the CLR's March 2000 report, *Developing the Framework*, is that administrative restoration was really seen as targeted at cases where there is no third party interest or where there is anticipated to be no significant third party effect. The paradigm was where a company did not realise that it had been struck off and might have dealt with a party which thought it was an existing entity:

> "10.116 … in the case of restoration to the register, we believe that court intervention will continue to be necessary in many cases. Restoration can have far-reaching consequences and impact on the rights and interests of a range of third parties. Such parties may include members of the company, its creditors…. the registrar and, as regards the revesting of any bona vacantia, the Crown. There may be other parties affected by the resuscitation of the company, such as a landlord or third party guarantor for a company's obligations. We consider that any case which involves striking a judgment as to the appropriate balance between these two interests is properly a matter for the courts.
>
> 10.117 However it has been put to us that there is a particular category of applications for restoration where no such complications arise. These cases arise where: there is no significant third party interest in the application other than the company's own; the consent of the Treasury Solicitor … is available for the revesting of bona vacantia and where the sole object of the application is to rectify the registrar's own initiative in striking off when in the light of events it has become clear that a company thought to be inoperative was operating after all. In these cases restoration can be viewed as a purely administrative procedure for which a court process is redundant and imposes unnecessary burdens of time and expense.
>
> 10.118 …. If the company is ignorant of the position then after it has been struck off it will continue to operate as though it were still on the register until it does become aware that it has been struck off. In these circumstances, restoration is often a fairly straightforward matter; it is unlikely to be contested and it does not give rise to any consequential effects on third parties."

58. The November 2000 paper, *Completing the Structure*, indicates (at paragraph 8.33) that focus was nonetheless on protecting the position of any affected third parties – again the focus being on the paradigm case:

> "…section 653(3) provides that after restoration the company is "deemed to have continued in existence as if its name had not been struck off". This latter approach may provide better protection for third parties who have dealt with the company unaware that it had been struck off."

59. The CLR's Final Report of June 2001 concluded at paragraphs 11.17 and 11.19 yet again with the "dealing in ignorance" point in mind:

> "11.17 …. We have since given further consideration to the effect restoration would have on those who continue to deal with the dissolved company in ignorance of its position. As a consequence we recommend that the resultant single statutory procedure for restoration should produce a similar result to that currently provided in section 653(3)
>
> 11.19 There was also wide support for a new procedure of "administrative restoration" … Application for this procedure would be restricted to the company itself (or rather to a person authorised to apply on behalf of a company) and where there is no third-party opposition. It is proposed that administrative restoration should have the same legal consequences as obtained under s.653(3)."

60. In the light of these passages (and the other passages to which I was referred in argument) I am not entirely persuaded by BAE's written submission, that the policy behind s.1028(1) Companies Act can be said to be the protection of third parties. The more nuanced view advanced in argument is that the purpose behind the introduction of administrative restoration was to provide an administrative route through restoration where it was highly unlikely that a third party would be impacted. However, it is true that the intention behind the adoption of the deeming provision appears, consistently with this, to have been that it better protected the interests of third parties – albeit with the paradigm being the position focussed upon.

61. Nonetheless, I do accept the proposition advanced on behalf of BB2 that the deeming provision, which was effectively adopted from previous legislation, is really what is critical here, and that that deeming provision cannot sensibly be read as operating differently in this context than it does in other contexts.

62. I have not been provided with material on the statutory genesis of this much earlier provision. It is therefore not possible to put alongside the materials on administrative restoration similar materials dealing with the original purpose of the deeming provision itself.

63. It is therefore critical to look at what the authorities have to say about how that provision operates.

The authorities

64. BB2 placed reliance on a number of authorities in which these provisions have been considered. I will deal with them in the order in which they were decided and am grateful to Mr Lord QC and Ms Parkin QC (and their respective juniors) for the helpful summaries of those cases provided in their skeleton arguments.

65. In essence, it was Mr Lord's case that what one sees in the authorities is a single strand, whereby the courts emphasise the breadth of the deeming provision, and which he says equates to a conclusion that the deeming provision is there as a matter of public policy, that it is mandatory and that it always applies.

66. In contrast to this, Ms Parkin argued that the authorities have to be regarded as very much on their facts, and that they support no conclusion that the deeming provision is unlimited in its ambit. She contends that like circumstances to these have never arisen, and that there is nothing in the authorities which is inconsistent with the conclusion for which he contends.

67. In broad outline I prefer this latter view, for the reasons explained below.

68. The first case which was considered is *Tyman's Ltd v Craven* [1952] 2 QB 100. This was concerned with section 353(6) of the Companies Act 1946, which conferred on the court a power to restore a company to the register following a striking off on the application of a member or a creditor. Such an application could be made at any time within 20 years. The section further provided that *"upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off"*. In other words, it had essentially the same deeming provision with which I am concerned, albeit in a different context.

69. After the company had been struck off the register and dissolved, an application was made in its name for a new lease of certain commercial premises. By the time the application was heard the company had been restored to the register by an order under section 353(6), but the landlord nevertheless contended that the application was a nullity because the company had not been in existence when it was made. The issue was therefore one of the corporate capacity of a dissolved company *vis a vis* a third party which had not appreciated its dissolved status.

70. The Court of Appeal held by a majority (Evershed MR and Hodson LJ, Jenkins LJ dissenting) that the effect of the deeming provision contained in section 353(6) was to validate retrospectively all acts done in the name or on behalf of the company during the period between dissolution and restoration. The majority rejected the landlord's argument, based on the final words of section 353(6), that such validation required an order of the court.

71. Evershed MR said this (at p.111 – 113):

> "More generally the final words of the sub-section seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were position" which, according to the ordinary sense of those general words, is prima facie their consequence.…

> Whatever, then, might have been the situation if the present application had come before the county court judge before the order of restoration… it seems to me that on October 31, 1951, it was no longer open to the respondent to allege the non-existence of the company on the preceding July 23; for, by the terms of the subsection, the company had then to be deemed to have continued in existence as if its name had never in fact been struck off the register."

72. In his concurring judgment Hodson LJ said this (at p. 126):

> "For my part, I think the words of section 353 (6) are clearly designed to produce an "as you were" position, and think that the latter part of the subsection is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost. An example of this would be a case where a company had lost an opportunity of obtaining a concession or renewing a lease during the interval between its dissolution and an order under the subsection. A provision in the order could deal with such a case. That the last four lines of the subsection do not cut down the retroactive effect of that which precedes them is, to my mind, indicated by the introductory words "and the court may by the order." The directions and provisions to be made by the order would naturally be supposed to make good what had previously been stated, namely, that the company should be deemed to have continued in existence as if the name had not been struck off."

73. Certainly this starting point provides support for Mr Lord's position, in particular as to the aim to achieve an *"as you were"* position. It must however be borne in mind that it pertains to a question of validating a company's acts – the paradigm. It did not consider the rather different situation of invalidating a third party's acts.

74. The two succeeding cases have similarities in that they too deal with questions of validation. *Re Lindsay Bowman Ltd* [1969] 1 WLR 1443 concerned an application for an order pursuant to section 353(6) of the Companies Act 1946 to restore a company to the register following an administrative striking off. A creditor had entered into a contract purportedly with the company while it was dissolved. He sought a direction that the restoration of the company should be expressed to be without prejudice to any remedy which he might have against the directors.

75. Megarry J declined to restore the company (essentially because the company was plainly insolvent and no-one could properly, in the words of the then statute, feel *"aggrieved by the company having been struck off the register"*). *En route* to this conclusion he opined that he could not have made such an order. He noted (at 1446A-C) that the effect of an order restoring the company to the register under section 353(6)

was that it was *"deemed to have continued in existence as if its name had not been struck off"*. He went on to say:

> "This, as I read it, is a necessary and automatic result of the order; and such a deeming carries with it all the consequences that flow from it. If I may borrow the classic sentence that Lord Asquith of Bishopstone uttered, in an entirely different context, in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] *A.C. 109*, 132:
>
> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

76. He also said at 1446G – 1447A:

> "The statutory fiction that results from an order under the subsection is that the company continued in existence throughout; and this, with all that flows from it, is the necessary consequence of the order. One of the consequences is that any liabilities properly incurred by a director in the name of the company would be liabilities of the company and not of the director. What the concluding limb of the subsection empowers me to do is to give directions or make provisions for placing the company and others in the same position as nearly as may be as if the name of the company had *not* been struck off. …all that the subsection empowers me to do is to give a direction or make a provision which supports and carries out the statutory fiction as nearly as may be."

77. The effect of the restoration would be to render the contract what it had purported to be, namely a contract with the company. That would have deprived the creditor of a claim it would otherwise have had against the director who purported to enter into the contract but that result was effectively to hold it to the bargain which it had intended to make.

78. In *Re Priceland Ltd* [1997] BCC 207 the London Borough of Waltham Forest had let shop premises to J Sainsbury Plc, which had assigned the lease to Priceland Ltd. When the time came for a rent review notice to be served, Priceland had been struck off. The council therefore served the notice on all the possibly relevant parties, including, among others, Sainsbury's and the dissolved company. The dissolved company's directors then negotiated with the applicant, participated in an arbitration with it and agreed broad terms of settlement, including the restoration of the company.

79. The council then applied under section 653(2) of the Companies Act 1985 to restore Priceland to the register essentially in order retrospectively to validate the service of the rent review notice, so that it could then recover the reviewed rent from Sainsbury's. Section 653(3) of the 1985 Act again contained provisions equivalent to those now contained in section 1028(1) and (3), and section 1032(1) and (3).

80. The issue thus concerned whether restoration should be granted, rather than the effect of restoration if granted. Sainsbury's opposed the application on the grounds that Priceland had not been carrying on business or in operation at the time it was dissolved and that it would not be just to restore the company to the register, or alternatively that the court should exercise its power to give a direction that the order for restoration should not operate to validate the rent review notice sent in June 1991.

81. On the evidence before him Laddie J concluded that Priceland had been carrying on business or in operation at the time of its dissolution, so that the condition for restoration under section 653(2) was satisfied. He further concluded that the court should exercise its discretion to restore, but declined to make the direction sought by Sainsbury's, essentially by analogy with the reasoning of Megarry J in *Lindsay Bowman*: because it would be inconsistent with the statutory fiction that Priceland had continued in existence as if it had never been struck off.

82. *Tymans*, *Re Lindsay Bowman* and *Re Priceland* are therefore authorities which are not entirely consistent with the broader form of BAE's statutory purpose argument – they show that the deeming provision can operate effectively against the wishes of a third party, and to that extent to the prejudice of the third party.

83. However, they do not, as BB2 would submit, stand as authority for the proposition that restoration produces a reversal in all circumstances. In these cases what is happening is a validation of acts performed by the company when technically it had no right to do so, and in circumstances where the third party might normally be expected to be pleased rather than otherwise by the result. They are cases where the disgruntled third party may be said to be effectively being kept to his bargain, in the sense of being kept to a state of affairs consistent with what happened during a time when the parties did not know of the striking off and assumed that the company was capable of operating normally. These cases indicate that a third party who so acts cannot therefore "take advantage" of the removal from the register by disavowing the commitment it had made in that period; to that extent therefore third parties can be disadvantaged by the deeming provision.

84. The next case considered in argument was *Top Creative v St Albans District Council* [1999] BCC 999. In that case a company which had been formed solely to do work for the local authority had commenced proceedings for damages against the authority. During the course of those proceedings it was wittingly allowed to fall off the register, its director not having appreciated that might affect the litigation. It sought to have the litigation removed from the warned list pending restoration. That application was refused by the judge. The Court of Appeal, however, said this was wrong. BB2 relied on it as an example of a case showing that the deeming provision does not merely apply to acts taken in ignorance of the position. BAE however relied on it as showing

that the deeming provision has limits in that if the statutory fiction was unbounded there was no basis for adjournment.

85. A case on which BB2 relied heavily was *Orchidway Properties Ltd v Fairlight Commercial Ltd* [2002] EWHC 1716 (Ch). In that case Jacob J had to consider, on an appeal from the Master, the effect of the statutory deeming provision (on this occasion as featured in the Companies Act 1985). The context was a joint venture agreement, which was said to have been terminated either by repudiation or frustration brought about by the dissolution of one of the parties (Orchidway). The parties had agreed the joint venture for the purposes of exploiting any property development projects entered into. At the time of dissolution there were no such projects, but shortly afterwards one party sold a piece of land which would have been covered by the joint venture.

86. In an extempore judgment Jacob J rejected the argument that the agreement had been repudiated by the dissolution. He said at p.7:

> "It was submitted that the effect of a dissolution of the company is that all ongoing contracts of the company at least come to an end upon the dissolution, and the effect of section 653(3) cannot revive any such contract. …
>
> I do not see that. If the argument was that a company continues as if its name had not been struck off but the contracts went with the dissolution, that would be to ignore the provision almost in its entirety. The whole point of restoring the company to the register in many cases is so that ongoing commercial relationships are kept going."

87. He then dealt with the argument based on frustration, saying:

> "I turn to the alternative argument based on frustration. The Master upheld a submission that there was a frustration upon dissolution. His reasoning was that in effect the frustration was unfrustrated by virtue of section 653(3). The argument for Fairlight here is simple: once a contract is frustrated, it is gone forever. That is what happened when the company was dissolved. It might have a new contract if one is entered into after it is restored, but there is not one.
>
> I find this argument more difficult. In the end, however, I think the Master was right on the point. This subsection does operate to undo things which otherwise would have happened. If the company is deemed to have continued to be in existence, the frustration caused by its dissolution is deemed not to have happened. I think therefore that the Master was right."

88. BB2 submitted that this case was, as near as possible, on all fours with the current case. This is a submission which I am unable to accept. It is certainly correct that this is not a *Tyman's* type case, and that it is in that sense much closer to the present case. But it is also a very different case, on a number of fronts.

89. First, and importantly, this was a case where any argument as to termination of the contract was dependent on common law termination or frustration. It was not a case, such as the present, where there was a specific contractual regime saying what would occur. Secondly, it was held that there was no repudiation; so that contract was not brought to an end by what might be seen as an equivalent route. Thirdly, Jacob J did not himself reach a conclusion on frustration; that was not in issue before him. All that was in issue before him on the appeal was the consequence, on the basis that there was already in existence a determination that the contract had been frustrated.

90. This case in my judgment therefore provides little if any assistance to me – save in one respect. Jacob J did indicate (obviously *obiter*) that he saw a faultline in the deeming provision and a possibility for it not to apply. In the context of repudiation, he said:

> "If the company had done nothing [about a notice calling upon it to perform its obligation], that would have been a repudiatory breach…
>
> I do accept that if something which could be regarded as a repudiation happened in what might be called the intervening period, then the contract may go, but in this case there was no such event."

91. BAE placed more emphasis on the next case, *Contract Facilities Ltd v Rees & Ors* [2002] EWHC 2939 (QB), which it contended was determinative against BB2's case. In that case the claimant company was, unbeknownst to its directors and shareholders, struck off the register and dissolved in December 1995. In September 1996 the company purported to enter into an agreement with the defendants to purchase some nursing homes. The fact that the company had been dissolved was discovered shortly before the date set for completion of the purchase (28 November 1996). The company failed to complete on that date, whereupon the defendants indicated that they regarded the contract as void. The company was restored to the register in March 1997 and then commenced proceedings against the defendants for specific performance, or alternatively damages for breach of contract. It was contended for the defendants that the company had committed a repudiatory breach of contract by being struck off.

92. HHJ Weeks QC (sitting as a deputy judge of the High Court) found that, even if it had been in existence on the completion date, the company would not have been in a position to complete because (as a non-existent company) it did not have the funds to do so. He further held that the company had repudiated the contract by communicating its inability to complete to the defendants in advance of the completion date, and by failing to complete on the completion date (time being of the essence), and that the repudiation had been accepted by the defendants.

> "As a non-existent company, it could not have complied with any of its obligations in clause 4(d), in particular the obligation to pay... "By admitting its non-existence, Contract proclaimed its inability to perform."

93. Accordingly, the contract had been terminated prior to the restoration of the company to the register. This termination was unaffected by the statutory deeming provision contained in section 653(3).

94. The judge said this at paragraphs 76-7:

> "I do not, however, think that the statute requires me to go further and disregard either supervening events or collateral matters which may accompany non-existence. …
>
> In the present case the contract was, in my judgment, lawfully terminated before Contract was restored to the register. The restoration to the register resurrects the company, but I do not think that it can also resurrect a contract that has come to an end. Nor do I think that the statute requires me to assume more than that Contract was in existence. Specifically it does not require me to assume against all the evidence that Contract could perform a contract under which it was required to pay over £1 million. If the dissolved company had a lease which was forfeited under a proviso for re-entry if the lessee, being a company, was dissolved, then it may be that the forfeiture would be invalidated. But if the lessee was unable to pay its rent because it was dissolved, and the lease was forfeited for non-payment of rent, then subject to any question of relief, I do not think that section 653 requires the forfeiture to be treated as invalid."

95. The parties read this judgment very differently. BAE placed emphasis on the sentence *"The restoration to the register resurrects the company, but I do not think that it can also resurrect a contract that has come to an end."*, which it says is determinative. BB2 on the other hand sees the case as drawing a distinction between a situation in which a contract is terminated on the grounds of supervening events that occurred whilst the company was dissolved, and a situation in which the dissolution itself was the ground or reason for termination. It says that in *Contract Facilities* the key reason why the contract had come to an end was the former, and it was not an inevitable corollary of the statutory fiction that the supervening event which led to termination did not occur. That, it submits, is different to the current case (and on its reading *Orchidway*) where dissolution was the reason for the termination. For the present I will simply say that I am not entirely persuaded by either submission and that on my reading (to which I will revert below) the judge was neither making a blanket statement about consequences for a terminated contract (in all circumstances) nor drawing a distinction based on the reason for the contract's disappearance.

96. The next authority was *Beauchamp Pizza Ltd v Coventry City Council* [2010] EWHC 926 (Ch). Beauchamp Pizza operated a nightclub from premises in Coventry. It held a premises licence under the Licensing Act 2003. It was struck off the register and dissolved on 23 June 2009. The dissolution caused the company's licence to lapse automatically pursuant to section 27(1)(d) of the 2003 Act. The company's director remained unaware of the dissolution for some time and continued to operate the club without taking steps to have the licence reinstated. The council (as licensing authority) eventually drew the matter to his attention, whereupon an application for administrative restoration was made. This was granted on 9 November 2009.

97. A dispute then arose between the company and the council as to whether section 1028(1) had had the effect of automatically reviving the licence upon the company's restoration to the register. The company contended that it had, because the event that triggered the licence to lapse was deemed not to have occurred. The council contended that it had not, because this would be inconsistent with the provisions of the 2003 Act, which established a comprehensive and self-contained code for the creation and termination of licences and provided that where a company which had been granted a premises licence under the Act was dissolved, the license would lapse and carrying on the nightclub's activities would be a criminal offence. It was however also a feature of this code within the Licensing Act that the licence was (i) lapsed, not revoked (ii) capable of restoration and (iii) capable of transfer within a set period after it lapsed.

98. The deputy judge found in favour of the company. There appears to have been no argument on statutory construction, but after a review of some of the authorities he said at paragraphs 26 and 28:

> "26. Thus the effect of a statutory provision in the language now contained in section 1028 of the Companies Act 2006, namely that "the company shall be deemed to have continued in existence as if its name had not been struck off" was not only fully retrospective in that it deemed the striking off never to have occurred and the validity of all acts occurring since to be reassessed on that basis, but this effect was fully automatic, neither (by implication) requiring any direction of the court to bring it into effect nor permitting any direction to be made producing a contrary effect. …..
>
> 28. The effect of these authorities, in my judgment, is that upon restoration to the register of a company which has been struck off, the factual position throughout must be taken to be that which the Companies Act deems to have been the case, namely that the company is "deemed to have continued in existence as if it had not been dissolved or struck off the register". Consequences which followed from the company having been struck off or dissolved must be retrospectively assessed on the footing that these events are deemed not to have happened. The logical consequence of that reassessment so far as the position under the Licensing Act is concerned is that the claimant company is deemed not to have been dissolved and its premises

> licence is therefore deemed not to have lapsed by virtue of that dissolution."

99. At paragraph 29 he considered whether there was a conflict between the two statutory regimes, concluding:

> " Does that produce a conflict between the two statutes ...? In my view it does not. The reason for this can I think be stated quite shortly. The dissolved status of the company, which is an effect of the relevant provisions of the Companies Acts, is, by virtue of the same Acts, a reversible condition. Parliament must be taken to have notice of this when it enacted the Licensing Act. The fact that a mechanism for transfer of the licence of a dissolved company was included in section 50 is not in conflict with and does not preclude the possibility that the licence may be revived retrospectively by the restoration of the company to the register."

100. Accordingly in my judgment this case is of relatively little assistance. It is clear that it was dealing with automatic consequences of a lapse, not consequences deriving from a third party's positive act. Further, under the statutory scheme the license did not, properly speaking, come to an end, but entered a form of suspended animation. In both respects it is a very different case to the present one.

101. The most recent Court of Appeal authority was *Joddrell v Peaktone Ltd* [2013] 1 WLR 784. In that case Mr Joddrell sued Peaktone without knowing that it had been struck off the register. After the company had been restored to the register by order of the court, it applied to have the claim struck out on the basis that it was a nullity. It argued that, even if the effect of restoration was retrospectively to validate the issue of proceedings, it did not retrospectively validate service. The Court of Appeal (unsurprisingly) rejected this argument.

102. In his judgment Munby LJ (with whom Lewison and Etherton LJJ agreed) concluded that the previous jurisprudence relating to the deeming provision now contained in section 1032(1) continued to apply and that the decision of the Court of Appeal in *Tyman's v Craven* was directly on point. He stated that:

> "44…the words "general effect" in section 1032(1) cannot be read, … as cutting down the otherwise unrestricted language of the subsection. The significance of these words is to signal that the "general" provision in section 1032(1) is subject to what follows in sections 1032(2) and 1032(3).
>
> 46…the sweeping effect of section 1032(1) is illustrated by section 1032(3), which enables the Companies Court to make directions "for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register". That, as it seems, to

> me, is a powerful and illuminating indication of the policy which Parliament had in mind."

103. Although BB2 obviously places reliance on the dictum, it does not seem to me that the Court of Appeal was intending or purporting to lay down in this case on very different facts a rule of application in manifestly different circumstances. I accept BAE's submission that this case is no more than a manifestation of the *Tyman's* line of authority – and of the statutory purpose of perfecting the imperfect.

104. The most recent authority relied upon was *Hounslow Badminton Association v Registrar of Companies* [2013] EWHC 2961 (Ch), a decision of Vos J (as he then was). In this case the claimant company was struck off by the registrar and dissolved. Unaware of this, some time later two of its directors purported to grant a charge over property belonging to the company. When the charge was submitted to the registrar for registration it was rejected on the grounds that the company had been dissolved. An application for administrative restoration was then made, and the company was restored to the register. A renewed attempt was made to register the charge. The registrar again rejected it on the grounds that it had been delivered more than 21 days after its creation contrary to the terms of the 2006 Act. The company then commenced proceedings against the registrar for an order under section 1028 that the charge be deemed to have been duly delivered on 9 November 2011, or alternatively for an order under section 873 of the 2006 Act extending time for the registration of the charge. The registrar resisted the application under section 1028.

105. Following a review of the authorities Vos J concluded that, following the restoration of the company, the charge was deemed to have been validly delivered to the registrar on 9 November 2011. He stated at paragraph 43:

> "When a decision is taken either by the Registrar or by the court, in my judgment it matters not which, to restore the company to the Registrar [sic], the authorities make clear that the effect of sections 1028(1) and 1032(1) is very extensive indeed. Everything that would have happened, had the company continued in existence, is effectively deemed to have happened."

106. Again, this authority strays some distance from the current case. Although it does make clear that in terms of effects there is no difference between the processes of administrative restoration and court order, it is in its essence a *Tyman's* type case. It is not a case of contractual termination.

107. In the light of this review of the authorities I have concluded that there is nothing in them which deals directly with a situation such as the present one, or which produces a statement of principle which should be taken as binding here. It is clear that the deeming provision is of very wide effect and that, where it arises in situations where what is in issue is the validity of an act performed by a company at a time when it was removed from the register or dissolved prior to restoration, that restoration and the

deeming effect of the restoration will operate to give force to acts which would not otherwise have had force.

108. As Vos J puts it neatly in *Hounslow*: *"Everything that would have happened, had the company continued in existence, is effectively deemed to have happened"*. That is consistent with the statutory purpose, so far as it can be discerned, and with the wording of the section. It is also very different from saying: everything which has in fact happened, including acts by third parties in reliance on their knowledge of the then *status quo*, must be deemed not to have happened and unpicked.

109. In my judgment the authorities indicate ground for caution when one moves outside this territory. Firstly, they indicate that the deeming is directed towards the doing or undoing of *"incidents, which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it"* or *"consequences which followed from the company having been struck off or dissolved"*. It is directed to the direct or automatic effects of the removal from the register.

110. Secondly, there are the specific cautions both in *Orchidway* and *Contract Facilities*. In the former Jacob J (i) accepted that a repudiation might lead to the contract being incapable of revival and (ii) expressed a degree of uncertainty about the result in a case of frustration.

111. In the latter HHJ Weeks (i) held that a valid termination could not be deemed not to have occurred and (ii) indicated that while automatic forfeiture of a lease might be unwound, forfeiture for being unable to pay rent would not.

112. In my judgment these authorities reflect a line between direct and secondary consequences.

113. That line is also in my view consistent with two facets of the statutory wording. The first is the mismatch which exists between the wording of the statute and the words which are necessary to describe the effects which would be needed here if BB2 were right; BB2 described the exercise as to *"render ineffective"* the relevant clause while BAE referred to *"temporary termination"*. There is also not, of course, within section 1028(1) the wording *"for all purposes"* which was the hallmark of BB2's argument.

114. The second is that there is within the wording of the Act itself a clear indication that deeming is not, as BB2 suggested, mandatory and of universal application. For, while it is true that s. 1028(1) was unrestricted in its terms, this is not quite true of the section as a whole. That limitation is the wording of section 1028(3) and in particular the phrase *"as nearly as may be"*. Although plainly of very limited application – in that it is plain that where possible the statutory regime will be looking to achieve an *"as you were"* solution - it is a clear indication that there will be some situations where an *"as you were"* solution cannot be achieved.

115. Ultimately and despite some discomfort about the position in relation to situations such as automatic forfeiture, I have reached the conclusion that this line between direct and indirect consequences is the line which the statute and the authorities indicate needs to be drawn. The deeming provision will have very wide application indeed. It will be (as it has been in the authorities) taken to undo the automatic consequences of

a removal from the register or dissolution which is later undone in circumstances to which the deeming provision applies.

116. But there will be situations where consequences arise which are not automatic. A lease will become forfeit not because of the fact of the dissolution, but because, either consequent on that dissolution or independently of it, the lessee does not pay its rent. A contract will be repudiated for a similar reason and that repudiation will be accepted – as happened in *Contract Services*. Or, as in this case, a contractual party will have a choice as to whether to terminate a contract simply because of the removal from the register. The termination will not flow from, or be automatically a consequence of dissolution. It will occur where the party decides to make that decision and takes the step necessary to bring about that termination. Such consequences are, in my view, outwith the deeming provision.

117. I reach this conclusion independently of Bennion, and drawing most heavily, as BB2 did, on the authorities. However it seems to me that this conclusion coheres with what Bennion has to say at 17.8 when discussing the correct approach to a deeming provision:

> "The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.
>
> Whenever an Act sets up some fiction the courts are astute to limit the scope of its artificial effect. They are particularly concerned to ensure that it does not create harm in ways outside the intended purview of the Act."

118. It is also consistent with the dictum of Nourse J in *Inland Revenue Commissioners v Metrolands (Property finance) ltd* [1981] 1 WLR 637 at 646:

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

119. This passage is also a natural bridge to the final aspect of the consideration: consequences.

Factual consequences/Proof of the pudding

120. It was this question of consequences which provoked the Arbitrator into raising this issue; and it is plain from the Award that it was this issue which continued to trouble him. He said this:

> "178. … The cases do not, however, deal with the situation in which parties to a contract have agreed that striking off will give rise to a right to take specific action, which action had been taken prior to reinstatement. …
>
> 180. Upon administrative reinstatement to the register, the effect is that it can no longer be argued that the company has been dissolved or struck off the register. If a contract contains a clause similar to clause 20 of the Agreement, notice cannot be given determining the contract, because there is no Event of Default.
>
> 181. Actions already taken by a party to the contract, in accordance with the contract, cannot however be undone. If the statute had meant that the legitimate action of a party to a contract should be rendered illegitimate by an administrative act (which might happen up to 6 years later), I would have expected it to have said so in clear terms.
>
> 182. I conclude that the termination of the Agreement, which was effective, is not to be re-assessed retrospectively as a result of BB2's restoration to the Register."

121. Before me BAE picked up this ball and ran with it; its submissions leant heavily on arguments as to the consequences if BB2 was correct. Some of these arguments seemed to me to be somewhat overstrained. Further, Mr Lord QC pointed out that, in terms of numbers, this issue is of extraordinarily small effect. The overwhelming majority of companies removed from the register do not become restored; the numbers which do are in absolute terms very small indeed. Of those, as the authorities show, very few issues arise. This particular issue has never before occurred, despite essentially the same deeming provision having been in position since the nineteenth century.

122. Nonetheless, I concluded that there was a real core of truth in BAE's submissions on this point. The point has arisen in this case, and could very plainly arise in many others given sufficiently extreme facts as to defective corporate systems.

123. The bottom line is that BB2's approach would effectively deprive clauses such as the one exercised in the present case of effect, in circumstances where they give a very desirable certainty – particularly given that administrative restoration can occur at any point up to six years after the removal from the register. For all that it is true that this uncertainty can be ameliorated somewhat by the contractual counterparty itself applying to restore the former company to the register, this does not deal with certainty remotely perfectly.

124. Nor does it deal at all with the reasons why such a clause may be included in a contract in the first place. Those reasons may perfectly legitimately include a desire to be able to terminate a contract if it proves to be the case that the contractual counterparty is actually insolvent or also if it fails to file accounts and then answer the notifications sent by the Registrar. This kind of administrative shambles, which is certainly what occurred in this case, is a kind of situation which a contractual counterparty might well regard as a hallmark of an undesirable partner. This clause provides a form of risk management tool which parties may well wish to incorporate in their contracts and which the courts in this country have historically respected.

125. Secondly, the knock-on effects if BB2's argument is correct are, despite Mr Lord's best efforts to smooth them out, highly unattractive. If BB2 were correct it would follow that the notice terminating the contract would be invalid, and in breach of contract. Any party who had exercised this right would certainly be at risk of being met with an argument that it had itself repudiated the contract. It may be that there would be held to be a route out of this, by 1028(1) and/or (3) operating only so far as may be necessary, and stopping short of finding repudiation. But there may be circumstances where this would not work; and certainly the party who had at the time terminated quite validly would find itself exposed to the risk of such an argument. The lawyers who advised that the clause could be exercised might find themselves exposed to professional negligence actions. The company might also find itself exposed to actions from any new party with whom it had instead contracted in reliance on the termination, as those new contractual arrangements would themselves have to be unravelled.

126. This, then, brings to the practical arguments echoes of the statutory purpose issue and specifically the intention that administrative restoration (where third parties have no right to be represented) should apply only when third parties were not affected. And indeed in this case, as I have noted above, the administrative restoration application was made on the basis that there were no assets; which itself suggests that BB2 proceeded for this purpose on the basis that the termination was valid.

127. All in all therefore I accept that the consequences arguments indicate that considerable practical difficulties might be caused if the deeming provision were to operate in cases such as the present one. The results might not quite be absurd, but they do present as anomalous and potentially unjust. Mr Lord himself struggled to rebut the charge of potential injustice save by reference to the small number of cases to which this issue will apply. The consequences arguments therefore in my judgment support the conclusion which I had reached on the first two steps.

128. Again, it appears to me that this conclusion is consistent with what Bennion has to say about the relevance of consequences; which is that the Courts should avoid construing legislation in a way which produces an unreasonable result, even if that requires doing some violence to the language, both in relation to deeming provisions (in the passage already quoted) and at paragraph 12.6:

> "The law can deem anything to be the case, however unreal. The law brings itself into disrepute, however, if it dignifies with legal significance a wholly artificial hypothesis. In construing an ambiguous enactment 'one can, and surely should, assume that

> Parliament intended the less artificial result. …The presumption against absurdity means that the courts will generally avoid adopting a construction that leads to an artificial result."

129. Accordingly, I conclude that the answer to question 1(a) is that the Arbitrator was indeed correct to conclude that BAE's termination does not fall to be re-assessed retrospectively and that the appeal fails. Consequently Questions 1(b) and (c) do not arise, and I will deal with them only briefly for completeness.

Question 1(b): is it possible to contract out of section 1028(1)?

130. The Arbitrator did not decide this question, although paragraph 180 of the Award appears to indicate that he did not consider that it was possible fully to contract out of the deeming provision contained in section 1028(1), or at least that clause 20 of the Agreement did not fully achieve this result.

131. BB2 submitted that the correct analysis here was that, while there is nothing to prevent parties to a contract from agreeing that the striking off and dissolution of one of them shall entitle the other to terminate the contract, any such termination remains liable to be reversed in the event that the company is subsequently restored to the register. This, it says, is the logical consequence of the statutory fiction created by section 1028(1) and is clear from both the wording of the section itself and the public policy behind it. It points to section 101(4) Law of Property Act 1925 as an example of the kind of language to be expected if contracting out is permitted.

132. It submits that whether or not it is legally possible to contract out of a statutory provision depends on legislative intention. The starting point must always be the wording of the Act, but an important further consideration is whether the policy of the Act allows contracting out: see Bennion, section 7.4, *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 and *Equitable Life Assurance Society of New Zealand v Reed* [1914] AC 587.

133. BB2 submits that it is clear from the wording of section 1028 that Parliament did not intend that the parties to a contract should be able to agree to dis-apply or vary the general effect of administrative restoration to the register. The wording is in affirmative terms: *"the general effect of administrative restoration to the register <u>is</u> that the company <u>is deemed</u> to have continued in existence as if it had not been dissolved or struck off the register"*. As the authors of Bennion point out (at p. 227), this carries with it a clear implication that what is not stated expressly is implicitly denied. Accordingly, as the section does not expressly permit contracting out, it is impermissible.

134. BAE's position can be summarised thus:

i) The default position is that contracting out is permitted unless contrary to the policy of the statute.

ii) There is nothing in the statutory purpose to stand in the way of this: the purpose of s. 1028(1) is to protect persons who deal with the dissolved company, during the period of its dissolution. In the present case, the only party that has ever dealt with BB2 (whether during its dissolution or otherwise) is BAE.

iii) As such BAE is an intended beneficiary of the section and there is no reason why it cannot waive the potential benefit under that section.

iv) Thirdly, it is no part of the policy to prevent parties who do not need the protection (because they have considered the possibility of dissolution) for example by agreeing the consequences of dissolution

v) There is no reason why this specific contracting out should be prohibited as this is purely between the parties and relates to their private interests only;

vi) The liberty to renounce a right should be denied only where Parliament has expressly so indicated, which is not the case here.

Discussion

135. This question only has a practical relevance on the other hypothesis (namely that the Arbitrator was wrong). On that basis my answer is not merely *obiter*; it is hypothetical. That is because this argument has to be approached on the basis that my answer to the first question is other than it was. In other words, the question only arises if the answer to the first question is that section 1028 can undo a termination.

136. This therefore involves constructing the basis on which I might have found differently to my actual conclusion.

137. I conclude that this opposite conclusion could only have been reached on the basis that the authorities established that section 1028 established a mandatory rule of universal application. Were I to have done so, that would carry with it a conclusion that it was the Parliamentary intention that the consequences of dissolution or restoration should be capable of being unpicked at any point up to six years after the date of dissolution/removal. I would also have concluded (as I did to an extent) that BAE's submission about the statutory purpose of the relevant sections was not well founded and (as I did not) that BB2's submission as to legislative intention was correct.

138. What then, in that context, is the resolution of the tension between the parliamentary intention and the Court's tendency to defend freedom of contract?

139. It has seemed to me that - assuming the hypothesis I have just stated - the answer would be in BB2's favour.

140. It was essentially common ground that contracting out of an Act depends on the wording of the Act and that it will not be possible if that policy is against contracting out: Bennion section 7.4.

141. Here the wording of the section, as interpreted by the courts, points away from permitting contracting out. Section 1028(1) expressly provides that the effect of administrative restoration is to be of "general" application. "General" is a wide word,

and it has been given still wider application by the authorities: in *Jodrell v Peaktone* an interpretation that the word was intended to have a limiting effect was rejected.

142. The authorities on section 1028(3) bolster this, indicating as they do that the power conferred on the court by that section cannot be exercised to make any order which would negate the statutory fiction created by section 1028(1). It can only be used to achieve to the fullest extent the "as-you-were" position.

143. There is also authority which makes clear a party can only renounce a remedy or right conferred by a statutory provision if that right or remedy is nothing more than a private remedy or right, without any element of public policy. In this connection I was referred to *Johnson v Moreton* [1980] AC 37 at 58H – 59A per Lord Hailsham of St Marylebone:

> "The third proposition is that a person may renounce a right which exists solely for his own use or benefit. This again is not improved by legal Latin cant and saying "cuilibet licet" (or "quilibet potest") "renuntiare" (or "renunciare") "juri" (or "jure") "pro se introducto" as have numerous authorities…. The key however to the interpretation of the maxim lies, … in discovering whether the particular liberty or right conferred by the statute or rule of law is entirely for the benefit of the person purporting to renounce it. If there is a public as well as a private interest a contrary Latin maxim applies."

144. BAE did not point me to any authority which contradicted or materially qualified this proposition. That being the case, and given that it was common ground that there is a public policy behind the deeming provision contained in section 1028(1), even if the parties were not of one mind as to the exact nature of that policy, I should, in the light of this authority, have felt constrained to conclude that contracting out was not permissible.

145. The statutory fiction created by section 1028(1) is plainly not a remedy which exists solely for the benefit of the company. As is clear from the wording of section 1028(3), it exists for the benefit of, and affects, the company and *"all other persons"*, including the company's members, its directors, its creditors and any third parties who may have purported to deal with the company in ignorance of its dissolution. It would follow that, if the statement in *Johnson v Moreton* represents the law, the provision could not therefore be waived by the company.

Question 1(c): did BAE and BB2 contract out of section 1028(1)?

146. This question therefore arises on a double negative hypothesis (i.e that I answered each of the previous questions differently to how I have in fact done so). Were it to arise I would unhesitatingly accept the submissions of BAE.

147. The natural reading to a reasonable commercial person of the relevant term of the Contract is that it provides BAE with a right to terminate on BB2 being struck off. The fact that the Contract does not expressly refer to s. 1028(1) is not a factor of sufficient weight to tip the argument away from this fairly plain reading.

148. Further, I do not find persuasive BB2's argument that cl. 20.2(g) serves any sensible commercial purpose if its construction is accepted.

149. Taken as a whole, BB2's construction renders BAE's right to terminate on BB2's striking off, as set out in cl. 20.2(g), nugatory. It does not give effect to the terms which the parties agreed or their clear commercial intentions. If the question arose, this construction should be rejected and BAE's construction accepted.

Question (2): was the Arbitrator right to hold that an Event of Default arose immediately upon BB2 being struck off on 31 May 2016?

150. This question was, as I have earlier indicated, logically the first issue; because if right it could render the entire argument about s. 1028 otiose. That BB2 chose to take this question last and to elide it with Question 1(c) says much about the lack of faith which it (rightly) had in this line of argument.

151. BB2 says that, given that the exercise of construction is designed to elicit the objective common intention of the parties and not to ignore it and given that, as was common ground before the arbitrator, the parties must be taken to have entered into the Agreement with knowledge of the statutory provisions contained in Part 31 of the 2006 Act, it makes no sense to construe clause 20.2(g) so that an Event of Default arises immediately upon the striking off occurring.

152. It submits that the only interpretation that makes sense is the one proposed by BB2, i.e. that an Event of Default only occurs after a reasonable period of time has elapsed without an application for restoration having been made, because it accommodates the statute. It submits that it is difficult to see why the parties would have intended BAE to become entitled to take the very draconian step of terminating the Agreement immediately upon BB2 being struck off the register. Provided that BB2 is restored to the register within a reasonable period of time, the striking off itself causes no prejudice to BAE, particularly in circumstances where completion of the transaction is not due to take place for a number of years.

153. One of the striking things about the way this argument was advanced was that it was put forward without any reference to the authorities, either those referable to construction or those dealing specifically with implication of terms. On the former point BB2 were faced with authority which made their argument practically impossible. For example *Arnold v Britton* [2015] AC 1619:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" …. And it does so by focussing on the meaning of the relevant words, …, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

154. The clause is clearly worded. It states what the trigger for the Event of Default is: "*being struck off the Register of Companies or being dissolved or ceasing for any reason to retain its corporate existence*". This could hardly be clearer. It plainly does not refer to a failure to apply for restoration within a reasonable time. There is nothing in the relevant context which could justify such a reading.

155. Even had the reading been somehow within the ambit of possibility, it would have met with difficulty in circumstances where there was a clear distinction made in cl. 20.1 between Events of Default, which entitled BAE to terminate immediately, and certain other events which entitle BAE to terminate if not remedied within a specified period (see cl. 20.1(d), (e), (f), and (h)).

156. That being the case, BB2's construction could only succeed if it were permissible to imply a term to the effect for which it contended. But any such argument walks so squarely into eminent negative authority that the proposition was never even expressly put.

157. To take just one example, in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 482, Bingham MR put it this way:

> "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong … it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred."

158. Nor is the result, as BB2 contended, draconian. Section 1000 of the Companies Act 2006 sets out the circumstances in which the registrar may exercise the power to strike off a company. It involves: (1) sending two notices to the company; (2) if no response

is received, publishing a notice in the Gazette; (3) if no response is received, sending a further notice to the company and publishing it in the Gazette; (4) giving the company a further two months to respond and only then, if despite all of the above, no response has been received, striking the company off.

159. Further, the entire process will only be commenced if the company fails to comply with its statutory obligations (e.g. to file accounts). It is therefore something of a challenge for a company to be struck off. It is not draconian for a party to contract for the right to terminate a contract with a company which is in such a state of disarray.

Conclusion

160. For the reasons which I have given BB2's appeal fails and the decision of the Arbitrator is upheld.