IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTIES COURT
INSOLVENCY AND COMPANIES LIST

No. CR-2017-008690

[2018] EWHC 849 (Ch)

Rolls Building, Fetter Lane, London

Monday, 26th March 2018

Before:

ICC JUDGE JONES

IN THE MATTER OF **EMPOWERING WIND MFC LIMITED (in Liquidation)**

And

IN THE MATTER OF **THE INSOLVENCY ACT 1986**

B E T W E E N

(1) EARTH ENERGY INVESTMENTS LLP
(2) PAUL MILLINDER

Applicants

- and -

(1) ANTHONY HANNON (THE OFFICIAL RECEIVER)
(2) MIDDLESBROUGH FOOTBALL & ATHLETIC COMPANY (1986) LIMITED

Respondents

THE FIRST APPLICANT appeared In Person and in his capacity as Director of the Second Applicant Company.

THE FIRST RESPONDENT appeared In Person.

MR U. STAUNTON (instructed by Womble Bond Dickinson (UK) LLP) appeared on behalf of Second Respondent.

J U D G M E N T

ICC JUDGE JONES:

The Application

1 I have before me an Application issued on behalf of Earth Energy Investments LLP within the winding up proceedings of Empowering Wind MFC Limited (In Liquidation) ("the Company") under petition number 2017-8690. On 21 December 2017 the Application was adjourned part-heard until today. Earth Energy Investments LLP is the Company's parent and makes the Application as a creditor.

2 Mr Millinder is named in the title above as the Second Respondent. No draft order has been lodged to that effect but his joinder arises from page 32 of the transcript for the 21 December 2017 hearing. He has been joined in any event upon an application by the Respondents made today for costs against him as a non-party. That is yet to be considered.

3 The First Respondent is the Official Receiver, in this case Mr Hannon, the Liquidator of the Company. Joined to the proceedings as Second Respondent is Middlesbrough Football and Athletic Company (1986) Limited on the basis that the Application directly concerns them. Mr Hannon appears in person. Mr Staunton of counsel appears for the Second Respondent. Mr Millinder represents Earth Energy Investments LLP as its director.

4 Paragraph 1 of the Application is made expressly pursuant to r.14.11 of the Insolvency (England and Wales) Rules 2016 ("Rules"). It asks the court to reject the Second Respondent's proof of debt that was accepted by the Official Receiver for voting purposes and to exclude the Second Respondent from making any claim for payment in the liquidation under cl.3.4.2 of a lease and energy supply agreement. It is asserted that any such claim is false. The basis for this, in summary, is that no debt could have arisen because the Second Respondent refused to complete that agreement and caused Earth Energy Investments LLP substantial losses, resulting in the Company's insolvency. The proof is described as *"a false misrepresentation"* because the start date for the agreement would only have begun when a wind turbine was connected to the Northern Powergrid. That did not occur, it is said, because of the actions or failures of the Second Respondent.

5 The second paragraph of the Application asks the court to disclaim the energy supply agreement as an onerous contract. That is a matter which has not been pursued before me. The third paragraph asks for an assignment to Earth Energy Investments LLP of the

Company's causes of action for damages resulting from the Second Respondent's breaches of the lease and energy supply agreement. That too is no longer pursued.

6 The fourth paragraph of relief asks for the appointment of Mr Chris Parkman, an insolvency practitioner, as liquidator to replace Mr Hannon *"with the intention of the Applicant placing the Liquidator in funds so he can prosecute the claim"* against the Second Respondent.

Part-Heard

7 I considered the Application in detail with Mr Millinder during the hearing on 21 December 2017. There is a transcript of that hearing. I decided it was appropriate for the matter to be adjourned and for me not to give judgment. I wanted Mr Millinder to have time to consider his position, taking account of the fact that he did not have legal assistance at the hearing. Whilst the scope of those considerations was not limited for the purposes of today, I particularly wanted him to consider whether he would provide evidence to the Court of how he would be *"placing the liquidator in funds"* so that the claim could be prosecuted.

8 I decided the additional time would be of advantage to him. He could obtain a transcript of the hearing and assess his position in the light of what had been said during it. I bore in mind in that context that there are matters Mr Millinder raises which I identified either as unnecessary for the purposes of the Application or inappropriate. However, the main purpose, I think it is fair to say, was to enable him to consider whether he wanted to present some form of package to the Court explaining how a liquidation with a new liquidator would be effective in the context of bringing proceedings against the Second Respondent. There seemed little point in replacing the Official Receiver if, for example, there would be no litigation because of lack of funds.

The Recusal Application

9 During the adjournment period the Court received a written request from Mr Millinder for me to recuse myself. An application was issued. It was listed for today. It is an application made on various grounds. It does appear to include a failure to understand or accept that this case is part-heard but, be that as it may, I need to go through those grounds at least in a little detail to explain my decision. My decision is that it is plainly groundless and there is no cause for me to recuse myself.

10 The first ground refers to the beginning of the transcript in which I stated that Mr Millinder was the applicant. That was certainly my understanding and it was an error on my part on the basis that his name does not appear as applicant within the Application. I would have thought it not unreasonable to appreciate that I made this error when reading from the attendance sheet. Certainly, nothing flows from that error. There is nothing within the transcript identified by Mr Millinder to even suggest that this might be cause for recusal.

11 Mr Millinder, however, makes the accusation that I said those words deliberately to make him liable in costs. In other words, that I had a pre-conceived plan to achieve that design. There is absolutely no foundation for that assertion.

12 Indeed, to emphasise that matters can be said in error, if one looks at the relevant passage in the transcript to which Mr Millinder took me, at page 31, to try and substantiate his allegation, that passage spoken by Mr Millinder starts with the very words: *"I am the applicant"*. I draw attention to that simply so that he might be able to recognise that people do make mistakes. That is, if it was a mistake. I do not recollect him drawing my attention at the same time to page 32 of the transcript but this records him not only repeating that the Application is his but also accepting he should be named in the title.

13 The second ground on which Mr Millinder relies is that this application should be heard by a High Court Judge. His basis for that is that there was and may still be a case before Mr Justice Arnold concerning the application by the Second Respondent to restrain presentation of a winding-up petition resulting from a statutory demand served upon it by, I assume, the Applicant and/or Mr Millinder. That case is not related to the matters in issue within the Application. The existence of that case on its own cannot support an application for recusal in order that the matter be heard by a High Court Judge.

14 Mr Millinder also relies upon the fact that on 21st November 2017 within those proceedings an enforcement officer sought to execute a warrant for an amount which excessively overstated the sum found to be due by a Judge. I presume this is in respect of an order for costs. Mr Millinder described this as, *"An unwarranted demand with menaces."* Again, I see no reason why that should cause the Application before me to be heard by a High Court Judge.

15 Mr Millinder appeared to be saying that one of the reasons was that such matter was already before the Court within the Application. That is simply not so. Indeed, it cannot be so because the events relied upon occurred (as he says) on 21st November, whereas this application was issued on 16th November. The event to which he refers had not occurred. Furthermore, I cannot see why Mr Millinder would want that matter to be heard in these proceedings. Plainly it would be inappropriate to do so.

16 I will ignore the additional accusations that have been made againstthe Chief Registrar, as he was then known, suggesting that he colluded with the Insolvency Service, by, as I understand it, attending a social gathering at which they were present. I have no idea whether or not those facts that occurred but I can see no basis for any such assertions even being relevant to this case, let alone to my recusal.

17 There is nothing before me that justifies this application being heard by a High Court Judge. It is to be recognised that the jurisdiction of the ICC Judges, as indeed, the Registrars, as we were previously known, is extremely wide in order to ensure that High Court Judges deal with other matters and that matters such as this come before them by way of appeal rather than at first instance. An advantage of that is, of course, that the route of appeal is from here to them rather than from them to the Court of Appeal. It is well established that this type of application of case should be heard by an ICC Judge and it is plainly right that it should be.

18 The next ground on which the recusal request has been made is an allegation that I failed to pre-read all the documents. The transcript should reveal that I had been able to pre-read. There is, in fact, no requirement upon any judge to pre-read all of the papers. Reading time is given, so far as the court can, to try and reduce the time required at the hearing. It is not intended that the judge should know the case inside out and ensure that he can refer to and identify each document. The purpose of the hearing is to ensure that those representing the parties identify to the court the documents relied upon and their material parts. Insofar as those material parts need to be looked at because the judge has not seen them, the parties should refer the judge to them.

19 In any event, the basis upon which this ground for recusal is presented is to be found at paragraph 3.9(4):

> "Irrespective of whether Mr Registrar Jones read the advice or not, the evidence presented before him in the case and the position made clear herein are the primary reasons for failure of the project and resulting in Middlesbrough FC being the sole cause of the insolvency and therefore, putting other matters to one side for the moment, the claimant considers the fact that Middlesbrough FC are being allowed by Mr Hannon to frustrate the company's insolvency in this way after being the sole cause of it and after causing very substantial losses to the claimant that the position presents a conflict of interest in common law, whereas Middlesbrough FC causes the loss and that loss greatly exceeds the proof of debts that are false anyway. The claimant is aware that the rule of set-off would apply in any case and furthermore."

20 It is obvious that this passage can form no basis for recusal. Insofar as it is considered relevant to the merits of the Company's underlying claim that I may not have read an advice, then the point that flows is that the merits are not the matter of importance for this decision. As will appear later, the Applicant(s) have not overcome the hurdle of demonstrating that the Company will proceed with the litigation proposed if a new liquidator is appointed even assuming the claim has sufficient merit to make it reasonably arguable.

21 I add for completeness only, that it may well be that the advice referred to was placed on C-e file as a confidential document by Mr Millinder. If so, it is not before the court in any event. Privilege has or may not have been waived, whereas if a Judge reads a document, as Mr Millinder appears to ask, it is to be treated as a document read in open court.

22 The fourth ground follows on from the merits issue. Mr Millinder contends for recusal on the basis that I failed to appreciate the obvious merits of the case that the Company has against the Second Respondent. That is not a ground for recusal. No decision was reached at the 21 December hearing (except to adjourn part-heard). Should a decision have been reached to which that challenge could be made, it would be a ground for appeal. It would not be a ground for recusal.

23 The fifth matter goes to the question whether I was right, in the context of the adjournment, to ask for a proposal to demonstrate that the intended, future litigation would and could be proceeded with by the Company; in other words, that there is a package presented to the court indicating that funds are available and that they would be used accordingly.

24 It is difficult to see why that should be a cause for complaint, let alone recusal, when paragraph 4 of the Application Notice itself is premised on the basis that that there will be evidence of such funding. Plainly there is no ground for recusal. Even if complaint might be justified, it would be a ground of appeal not a ground for recusal.

25 Mr Millinder then proceeds with allegations of bias and collusion which he really should not make. I will not repeat them here and will not trouble with them in any form of detail. It is quite plain there is no foundation for them and that they should not have been made.

26 It is my decision that it was right for me to continue to hear the part-heard Application and is right for me to deliver this judgment. I will do so. The application is totally without merit.

Paragraph 1 of the Application – Rule 14.11

27 Before looking at the facts of the matter, it is convenient to deal at this stage with an issue of construction concerning Rule 14.11. It arises in the context of paragraph 1 of the Application and the fact that there has been no decision by the Official Receiver as Liquidator to admit or reject any proof of debt for a dividend. Mr Millinder contends that Rule 14.11 applies in any event. He considers it to be a free-standing right to ask the Court to exclude the Second Respondent's proof without a decision having been made by the First Respondent.

28 Alternatively, he contends that it applies to two decisions which have been made. Namely, when the Official Receiver on two occasions marked a proof of debt from the Second Respondent "objected to" for a vote upon whether he should requisition a meeting of creditors to decide upon his removal and replacement (see paragraph 13 of his 1st Report dated 15 December 2017).

29 Neither contention is correct. Rule 14.11 applies to appeals of decisions admitting or rejecting proofs for dividend:

a) Rule 14.11 appears within Chapter 2 of Part 14 of the Rules which applies to creditors' claims in administration, winding-up and bankruptcy. Part 14 addresses and is solely concerned with distributions by way of dividend. Chapter 1 is an application and

definition provision. Chapter 2 deals with proving debts for dividends, the decision and appeal process and other connected matters such as the ranking of debts, valuation of security, interest and mutual dealings/set off. Chapter 3 follows with Rules concerning the distribution. This scheme in itself undermines Mr Millinder's argument.

b) The arguments' lack of merit is all the more apparent from the scheme of Rules 14.2 – 14/11. They deal with: (i) the proving of a debt for dividend (14.3); (ii) the requirements for the proof (14.4); (iii) inspection of the proof (14.6); (iv) admission or rejection of the proof (14.7); followed by (v) the appeal against a decision on proof (14.8); (vi) the officeholder not being liable for costs on the appeal (14.9); (vii) the ability to withdraw or vary the proof within the context of the appeal at any time (14.10); and then within Rule 14.11 the powers of the court on the hearing of the appeal. Rule 14.11 does not stand alone and confer a right without an appeal from a decision admitting or rejecting a proof for a dividend.

30 There has been in this case no decision admitting or rejecting a proof submitted for dividend. In fact, the problem here is that the Company has no funds and there will be no dividend. As a result, therefore, there is and can be no appeal and Rule 14.11 cannot be applied as paragraph 1 of the Application requests.

Different Rules

31 It may have been more appropriate for Mr Millinder to have considered appealing the decisions referred to in paragraph 13 of the Official Receiver's 1st Report dated 15 December 2017. But, he has not and he has not relied upon Chapter 1 of Part 15 of the Rules which would then have applied. An appeal against those decisions must be made no later than 21 days after the decision date (see Rule 14.35).

32 There are further arguments from Mr Millinder under paragraph 1 of the Application to address. There is also paragraph 4. All arguments arise from the case that the Second Respondent is not a creditor and that the Company and indeed the Applicants have substantial claims in damages against it. I will next summarise the facts relied upon, insofar as it necessary to do so. I will not decide any facts in dispute unless I expressly state otherwise.

Facts Relied Upon

33 The Second Respondent claims to be a creditor of the company. There is an invoice, raised on 25th June 2015, for about a quarter of a million pounds, an email identifying the sum due as just over £541,000 and a proof of debt in the sum of some £4.1 million. Mr Millinder does not accept that the first two documents are not proofs of debt. In fact, that does not matter for the purposes of the Application. However, he alleges as part of his arguments that the Official Receiver has committed fraud by non-disclosure of the first two proofs. There is absolutely no basis for alleging fraud against the Official Receiver and he should not do so.

34 Moving back to the relevant matter, namely the claim by the Second Respondent, Mr Millinder asserts that it knows there is no debt and he wants the proof to be determined to establish that fact. Mr Millinder often concentrated upon this point during his argument and alleged fraud against the Second Respondent too.

35 In outline: The basis on which he says there can be no debt is that the contract to which the claim refers was a conditional one. The conditions were not met and, therefore, there can be no claim. The pre-conditions involved establishing a grid connection and the commissioning of a wind turbine, neither of which were achieved. He says that it was the Second Respondent who refused to provide the connection to the grid and therefore caused the turbine not to be connected. The claim is that it was Second Respondent who *"killed the project"*, to use his terminology. In other words, instead of Second Respondent having a claim, the Company has a claim in damages against it for a very substantial amount.

36 This argument can be found in more detail within a letter from Prospect Law of 18th August, 2017. Paragraphs 10 to 15 set out the background in far more detail than I have just described. I read as follows:

> "Our client undertook to install a wind turbine on MFC land adjacent to MFC's stadium. EW MFC was the special purpose vehicle by which our client was to deliver the project. The intention of the parties was for EW MFC to take a lease of and occupy land adjacent to MFC's stadium. On this land EW MFC would build and commission a wind turbine which would then be connected to MFC's infrastructure and to the National Grid. The wind turbine would generate free electricity for the stadium and also attract income in the form of a government subsidy paid for the generation of

electricity by this renewable source and in respect of the export of electricity to the grid. The project was funded by EW MFC using third party funding. A key part of the project's viability was the availability of a government renewal energy subsidy known as the feed-in tariff. The tariff was available up to 31st December, 2015. The project was scheduled to complete by 15th December, 2015. At that point it would be accredited and gain a vested right to receive the then feed-in tariff rate for a period of twenty years following accreditation. The wind turbine itself would have enjoyed a minimum working life of thirty years, so further benefit would accrue to the parties for a further ten years following the cessation of the feed-in tariff payments.

As a result of the project, MFC would benefit from free electricity and reduced bills and the subsidy tariff receipts would go to EW MFC and provide a return on investment for both EW MFC and the funder. The benefit to EW MFC would have been considerable - in excess of £9 million. This fact and the fact that MFC's claim pursuant to its proof of debt is disputed in full shall explain why Mr Millinder has been so assiduous in pursuing the matter of EW MFC's claims and defences and why it is not acceptable that the appropriate action is not taken by the Official Receiver who remains the office holder in this instance."

37 Within his witness statement of 15th November, 2007 Mr Millinder also explains that:

"Middlesbrough Football Club has no legal position from which to have raised any invoice for the supply of energy in the specific circumstances of which each party was acutely aware. The start date is the date from which the conditions precedent in cl.2 are satisfied. There was no start date because Middlesbrough Football Club refused to complete the agreement so that Northern Powergrid could establish the grid connection for the wind turbine. Without a grid connection the turbine cannot operate even with the best endeavours of the tenant. Without a connection the turbine cannot supply energy to the stadium. The claimant asserts that this same grid connection went to the heart of the project and from February 2015 when Middlesbrough Football Club refused to do so the operative provision of force majeure applied to the delay caused by the landlord that is proven to be beyond reasonable control of the tenant.

Clause 2.1 of the energy supply agreement required that the tenant gain full satisfaction of the connection agreement. The claimant explains that the connection agreement

encompassed the Northern Powergrid connection offer, the connection deed dated 7th November, 2013, the Northern Powergrid, Middlesbrough Football Club asset sale agreement and the Ofgem feed-in tariff preliminary accreditation for the wind turbine generating station and that those documents are clearly inextricably linked and that one cannot operate without the other. Hence the tenant could not get full satisfaction of the connection agreement due to actions of the landlord."

Paragraph 1 Relief – Further Arguments

38 I have already decided that the Application cannot rely upon Rule 14.11. I deal here with the other arguments of Mr Millinder.

39 Mr Millinder's starting position is that there is no debt owed to the Second Respondent by the Company. He also wants to allege dishonesty and fraudulent misrepresentation on the part of the Second Respondent. I have sought to explain to him that these are in any event unnecessary allegations to make, at least for these purposes and at this stage. There is no need for him to raise the bar by making such serious assertions. Mr Millinder has continued his allegations but I will nevertheless take this matter on the basis that he need not do so and that all I need to be concerned with (to the extent that I need address the merits) are the existence and potential prospects of the contractual (possibly tortious) claims which may arise from the facts appearing within the letter and witness statement.

40 Mr Millinder also asserts the proof of debt was lodged fraudulently because the Second Respondent knows it has no claim. I have previously explained to him that I need not decide whether the proof of debt was lodged with an improper motive. To the extent that merits are relevant, he need not establish motive. It is sufficient for him to address (to the extent it is relevant or necessary) whether the debt exists or the Company has a claim, not the motive behind lodging the proof.

41 His underlying argument that a decision needs to be made upon the existence of both the debt proved for and the Company's claims raises a practical point. What is particularly relevant to the Application and needs to be borne in mind taking into account, as I have mentioned, paragraph 4 of the Application, is that the Company has no funds.

42 Ignoring the existence of the Company's possible claim in damages for the moment, this means in pragmatic terms that there is no point in time and costs being spent determining

the Second Respondent's proof of debt. Nothing adverse will result from this proof. There is no need for anyone to investigate the proof and Mr Millinder's contention that the court must do so because it is fraudulent is misconceived. There will be no distribution. The Company will be dissolved without the Second Respondent receiving a payment in any event.

43 Furthermore, there is no money to enable any detailed analysis of that proof of debt or of the Company's claim by a liquidator. That is not in dispute insofar as the Company's financial position is concerned but I refer to the first report of Mr Hannon in this regard. He makes plain:

> "There are no assets in the case to be distributed. Therefore, it will be both premature and pointless to undertake any work in relation to the payment of a dividend and as office holder I report to the court that at no time have I made any adjudication challengeable under rule 14.8."

The point I emphasise here is the lack of assets.

44 Mr Millinder's response is that there is a duty upon the liquidator to determine the proof once it has been lodged whether dividends may be payable or not. I reject that. It is plainly not the law. There is no requirement to determine a proof for the purposes of dividends in the absence of any realisations to pay them. Nor is there any duty in the absence of funding needed to do so. That could be solved by an interested party providing the funding but there is no evidence of that, not even as a possibility.

45 Mr Millinder's arguments changed tack during the hearing. He relied upon the fact that the Official Receiver decided not to call a meeting pursuant to his requisition because he is a minority creditor and his proof does not exceed the binding threshold if the Second Respondent's proof is counted for voting purposes. Mr Millinder says the proof should not have been admitted for voting purposes and should not have been marked "Objected to".

46 Mr Staunton, who appears on behalf of the Second Respondent, submits that this argument is not open to the Applicant(s) in any event. The Application is made with express reference to and reliance upon Rule 14.11. It would not be right for Mr Millinder to be able to change his case and now challenge different decisions. Furthermore, he could only do so under the

Rules by an appeal. Mr Staunton observes that not only is there no appeal but any attempt to appeal now will be out of time.

47 It will be apparent that I need not reach a decision because Mr Millinder has not appealed and his case before me has not been presented as an appeal. There is also no application to appeal out of time. Even if there was, the absence of Company funds and therefore a future dividend would make the granting of permission pointless. In addition, there is no evidence that the Applicant(s) can fund an appeal.

48 In many ways, however, none of this need matter. As previously explained, if all that matters is that the Second Applicant has submitted a proof for a debt which is does not truly have, nothing adverse will result. There will be no distribution. There is no need for anyone to investigate the proof and Mr Millinder's contention that the Court must do so because it is fraudulent is misconceived. If, however, what matters is that the Company should bring proceedings against the Second Respondent, this can be addressed within the context of paragraph 4 of the Application.

Paragraph 4 of the Application

49 Underlying the Application is the argument that what is needed is a method of ensuring that the Company's dispute with and claims against the Second Respondent, as identified by Mr Millinder, will proceed; for example, by the appointment of a new liquidator. That argument is made in the context of asserting, which is correct, that the Official Receiver in his capacity as liquidator is not currently intending to proceed with such litigation. One reason for that is, of course, that the Official Receiver has no funds.

50 Mr Staunton emphasises that the process (whether in the context of an appeal against a decision upon proof or litigation brought by the Company) will involve considerable cost. It will also involve significant, potential cost liabilities and possibly the need to comply with an order for security for costs. He is plainly correct. Absence of funds would justify a view, as submitted by Mr Staunton, that this Application should be dismissed without further consideration.

51 The absence of funds is therefore an underlying problem which must be addressed by the Applicant(s). I tried to make that clear to Mr Millinder at the previous hearing and it was, as I have mentioned, one of the reasons for the adjournment. There is the fundamental

problem that funding is obviously required for litigation and that applies as much to litigation brought by the Company as it would to anyone seeking to appeal a decision upon the proof. There is no point in considering hypothetical litigation, in other words litigation which is not going to be brought because it cannot be financed. The Court needs evidence that the intended litigation can be pursued. As I have mentioned more than once, Mr Millinder in fact recognises this because the Application states that the liquidator will be placed in funds. If that assertion is to be made, there must be evidence before the court to substantiate it unless it is self-evident. It is not self-evident and he has not presented evidence.

52 To avoid this, Mr Millinder returns to the arguments concerning the need to stop a fraudulent misrepresentation by the lodging of the proof. He says the court ought to insist that the proof is dealt with irrespective of funding because it is not only false but involves a fraudulent misrepresentation. I have dealt with this when addressing paragraph 1 and the reasoning equally applies to paragraph 4. The relief sought will not be granted if there is no purpose to be achieved. The relief should not be granted if there is no funding available.

53 Mr Millinder also argues that no evidence of any funding or ability to bring the claim is required because the claim is self-obvious. It is clear the Company has a good claim against the Second Respondent.

54 However, the fact that Mr Millinder says there is a fraudulent misrepresentation and/or a good claim does not establish the position. The Court cannot proceed, as Mr Millinder wants it to, on the basis that because he says that there is clear evidence that is the position. The Court must proceed on the basis that there will be litigation and those against whom he makes the allegation will have the opportunity to be heard. Only at a trial within such litigation could the Court possibly reach a decision on the merits. It is obvious from the facts previously referred to that this would involve very large costs on the part of the Company. If there are no funds, there will be no litigation and there is no purpose to be served by the Court deciding whether to grant the relief sought. If all that is to happen in this liquidation is that there will be a final report made to creditors stating that there has been no adjudication of proofs or ability to pursue litigation because of a lack of funds and therefore the Company will be dissolved, there is no point in considering the appointment of a new liquidator. There are not even the funds available for the further investigations which will inevitably be required.

55 In those circumstances, it was stressed to him that the problem of the absence of funds is the matter he needed to consider and address. It had appeared to me towards the end of the last hearing that Mr Millinder had appreciated that. He then, however, responded that the solution is to replace the Official Receiver and that should be done in any event. That cannot be right if the purpose of the replacement of the Official Receiver is to have litigation started when that litigation cannot start without any funding. After all, paragraph 4 of the Application acknowledges this. It asserts that the liquidator will be placed in funds and evidence for that is required by the Court. A package needs to be shown to the Court to demonstrate how the intended claim will be pursued.

56 Mr Millinder then argued that is not the case because he will not put the package together whilst the Official Receiver is the liquidator. The reason he gave is that he does not trust the Official Receiver. Even assuming there was any basis for such lack of trust, and I have not found any but I will assume for the moment that there is, the replacement office holder will need to be placed in funds or other agreements will need to be reached to ensure that the Company can bring and pursue the litigation. The Court is entitled to require the Applicant(s) to provide evidence to show that litigation will be commenced and continued. If there is no such evidence, the Court will not grant relief.

57 It will be seen from the transcript of 21 December 2017 that when this was explained, a number of other, unsustainable matters were raised by Mr Millinder, including the observation that there may well be a criminal misconduct route that could be brought. Again, I have found absolutely no basis for that but, clearly, that does not affect the need for evidence of funding.

58 I had expected Mr Millinder to return for the purposes of today with a proposed package to evidence that the intended litigation could be brought. I had emphasised that if he did, that would not necessarily mean I would grant him the relief sought because I had not yet heard from Mr Staunton on behalf of the Company with regard to what he would say in opposition. I would not like it to be thought from my judgment to date that I would have reached a decision without hearing from Mr Staunton. However, Mr Millinder has returned having decided that he will not inform the court of any funding that is available; if indeed there is any. He has decided that he will not produce any evidence of funding. I can only

proceed in those circumstances where he has made that deliberate decision on the basis that there is no evidence before me to show that the funding exists.

59 The position can therefore be concluded in respect of paragraph 4 of the Application as follows. I am not able or expected to decide the case on the merits between the Company and the Second Respondent upon the Application. It is obvious that any such decision can only be made at trial in litigation which has been commenced by the Company through its liquidator should that be the correct course. Second, I can, of course, grant relief to enable that claim to be investigated and/or commenced and that relief can include the removal of the Official Receiver should that be appropriate. Third, it cannot be appropriate when the Company has no funds and the litigation will not ensue. Fourth, there need to be proposals concerning funding for the Application to be effective. Otherwise the litigation is hypothetical and the relief sought will be refused. Fifth, Mr Millinder has not provided the evidence of funding proposals required. In those circumstances the Application cannot be taken further and is dismissed.

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****This transcript has been approved by the Judge****