

Neutral citation number: [2012] EWHC 1262 (Ch)

Case No: 2277 of 2012

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9DJ

Thursday, 23<sup>rd</sup> February 2012

BEFORE:

**HIS HONOUR JUDGE HODGE QC**  
sitting as a Judge of the High Court

BETWEEN:

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**SECRETARY OF STATE FOR BUSINESS,  
INNOVATION AND SKILLS**

Applicant

- and -

**TOP CHOICE WHOLESALE LIMITED**

Respondent

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MISS LUCY WILSON-BARNES appeared on behalf of the Applicant (instructed by Howes  
Percival LLP, Manchester)

There was no attendance by the Respondent

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**Approved Judgment**

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(Official Shorthand Writers to the Court)

JUDGE HODGE QC:

1. This is the hearing, without notice to the company, of an application by the Secretary of State for Business Innovation and Skills for the appointment of a provisional liquidator in respect of Top Choice Wholesale Limited, application number 2277 of 2012. On this application, Miss Lucy Wilson-Barnes of counsel appears for the Secretary of State; and she has submitted a written skeleton argument dated 22<sup>nd</sup> February 2012. For reasons which will become apparent, no winding up petition has yet been presented to the Court.
2. The Secretary of State seeks permission to present such a petition under s.124A of the Insolvency Act 1986. He says that it would be in the public interest for Top Choice Wholesale Limited to be wound up by the Court. The draft petition, after providing the relevant formal details, states that on 12<sup>th</sup> January 2012 the Secretary of State authorised three individuals, Miss Debra Michelle Moon, Mr David Lennox Hope and Miss Karen Clarke, to investigate the affairs of the company pursuant to s.447 of the Companies Act 1985. The intended petition is the product of their investigations. The petition sets out details of the company's business, insofar as they are known to the investigators, at paragraphs 11 through to 17. Paragraphs 18 through to 21 relate to the roles and responsibilities of the company's directors and shareholders, past and present, and deal with the company's accounting records and the lack of any information about the remuneration and benefits received by the present director, Mr N Shah, and his predecessors, Mr Imerson and a Mr M Shah.
3. The grounds for winding up the company in the public interest are set out in paragraphs 24 and following of the petition. First, it is said that the investigator has been unable to contact the company or its current officers, apart from a brief phone call with the present sole director, Mr N Shah, on 12<sup>th</sup> January 2012. There has been, it is said, a failure to cooperate with the investigators in the performance of their investigatory powers. Full details are set out in the sub-paragraphs of paragraph 24.
4. In paragraph 25 it is said that there has been a filing of false accounts, a provision of false references, and trading in a manner which is contrary to the public interest. The only filed accounts, filed on or about 22<sup>nd</sup> August 2011, purport to be for the year-ending 30<sup>th</sup> September 2010. The Secretary of State's investigators have not found it possible to verify those accounts; and they are concerned that they are false, and were filed for the purpose of enabling the company to obtain credit. Reasons for that are given in paragraph 25.
5. At paragraph 26 it is said that the filing of the accounts, on or about 22<sup>nd</sup> August 2011, corresponded with increased credit checks on the company through Experian. 33 credit checks were made in the period 10<sup>th</sup> July to 10<sup>th</sup> October 2011, with a further 42 being made in the period from 10<sup>th</sup> October 2011 to 10<sup>th</sup> January 2012. That is a total of some 75 checks, out of a total of 80 made during the whole of the 12 month period from January 2011 to January 2012. Since 10<sup>th</sup> January 2012 there have been further credit checks carried out against the company. Of the companies which have requested a credit search through Experian, 21 declined to offer credit to the company, but offered instead to trade on cash payment terms, which the company refused to do. At least five companies did provide credit to the company, and supplied goods pursuant to such credit. It is said that the company placed orders

with these five suppliers, totalling £20,000 odd, for which no payment has been made. In relation to one supplier, a direct debit instruction was established, but all four attempts to take payments under that direct debit failed.

6. The company has provided suppliers with details of three entities providing trade references in the course of applying for credit from suppliers. The Secretary of State's investigators are concerned that the company has provided false trade references with the object of obtaining credit. Details are set out in paragraph 28.
7. During the period 6<sup>th</sup> September 2011 to 16<sup>th</sup> January 2012 the company has applied for credit, and has purchased goods valued at at least £20,000 odd, which have not been paid for. There has been a County Court judgment entered against the company for £477 in January of this year; and the company has received £45,700 into, and has paid almost £44,700 out of, its known bank accounts. Those bank accounts were still active as at 16<sup>th</sup> January 2012. That is notwithstanding that Mr N Shah, the present director, in his brief telephone conversation informed Miss Moon that the company was not then trading.
8. Experian credit searches were still being conducted as at 8<sup>th</sup> February 2012; and, according to information obtained by the company investigators, persons associated with the company were still attending the trading premises as at 18<sup>th</sup> January 2012. That is despite the fact that Mr Shah had told Miss Moon that the company had not been trading because of a burglary at the company's trading premises which had been reported to the police. On the basis of the date of the crime report, that burglary would appear to have been in about November of last year.
9. In addition to the concerns about the company's failure to cooperate with the investigation, the difficulties of contacting the company, the concerns about the company's accounts, and the provision of false references and the obtaining of credit, the Secretary of State is also concerned about the company's failure to maintain, preserve and/or to deliver up proper accounting records. That has meant that the investigators have been unable to establish the location and value of the company's assets -- which, according to the accounts for the period to 30<sup>th</sup> September 2010, amounted to a little over £80,000. They have also been unable to identify the payees and recipients of the monies passing through the company's bank accounts, and to establish whether those payments were *bona fide* payments for the benefit of the company, and various other matters, including the true financial position of the company. Those are the matters intended to be relied upon in the petition.
10. The petition is supported by evidence in the form of a very detailed witness statement from one of the three investigators, Miss Moon, dated 21<sup>st</sup> February 2012, together with an extensive exhibit, DMM1. The reasons the Secretary of State seeks the appointment of a provisional liquidator are set out in the other witness statement in support which is before the Court which is that of Mr Colin Peter Cronin, who is an Investigation Supervisor with Company Investigations, part of the Insolvency Service. His witness statement is dated 21<sup>st</sup> February 2012. He exhibits and verifies the petition; and, at paragraph 7 onwards, he explains why he considers it to be in the public interest that a provisional liquidator be appointed over the company pending the hearing of the petition. He also explains why he says it is appropriate for the application for that appointment to be made without notice to the company. He states (at paragraph 8) that he has carefully considered the matter and, in

particular, whether it is appropriate for the application to be made without notice to the company, and whether any alternative relief would be adequate.

11. At paragraph 9 he explains that, for the reasons set out in the petition and Miss Moon's witness statement, the Secretary of State believes that the company's business has been, and is being, carried on with a want of commercial probity, and in a manner which is inherently objectionable and detrimental to members of the public, and which is deliberately misleading to them. He also makes the points that the company cannot be contacted at its registered office address, which is also its trading premises; and that the investigator has been unable to make contact with the current or former officers of the company -- other than the formation agent -- otherwise than by way of the brief phone call on 12<sup>th</sup> January this year, to which I have already made reference.
12. He also makes the point that, as a result, the company's officers, both present and past, have not cooperated with the investigation, or delivered up any accounting records for the company. At paragraph 10 he states that he is of the view that the appointment of a provisional liquidator is required to protect members of the public from ongoing exposure to the company's objectionable business practices, by placing the company and its assets in responsible hands, and taking them out of the control of its sole director, as soon as possible, and by bringing the company's objectionable trading to an end. The appointment of a provisional liquidator, it is said, will also enable the company's affairs and trading to be investigated more fully, and its financial position, and creditors, to be established; and will provide a focal point of contact for the company's creditors, insofar as they have, like the investigator, been unable to make meaningful contact with the company. A provisional liquidator will also be able to take control of the company's records and assets. That is said to be a particular concern, given that the company appears to be continuing to trade by attempting to obtain goods on credit. The most recent Experian report, dated 8<sup>th</sup> February 2012, has recorded credit searches continuing to be made up to the date of that report. The report shows searches having been made on 18<sup>th</sup>, 24<sup>th</sup> and 30<sup>th</sup> January, and on 8<sup>th</sup> February this year. The fact that searches have continued to be made on 30<sup>th</sup> January and 8<sup>th</sup> February is of particular concern, given the presentation of a winding up petition against the company on 25<sup>th</sup> January this year. Mr Cronin also relates that funds received into the known bank accounts of the company are withdrawn, normally, within a week of receipt. He makes the point that the majority of the VAT repayment of some £9,800, received on 13<sup>th</sup> January, was paid out in two tranches, £4,500 later on the same day, and £4,000 on 16<sup>th</sup> January. The Secretary of State does not know whether there was a legitimate business purpose for those withdrawals. Mr Cronin therefore feels that there is a risk that, if a provisional liquidator is not appointed, further goods may be obtained by the company, and any current assets, including any cash at the bank held by the company, or received by the company hereafter, may be dissipated, so that they are not available to the company's creditors.
13. At paragraph 14 Mr Cronin says that he has carefully considered whether any alternative course of action would be appropriate; but in view of the fact that the company has been, and possibly still is, carrying on business by providing false information so as to obtain goods on credit, and failing to pay its creditors, and because there is no apparent means of effectively contacting the company's director to obtain undertakings, or enforce injunctive relief, he considers that the appointment of a provisional liquidator is necessary. He does not consider that alternative relief

would adequately protect the public.

14. He acknowledges (in paragraph 15) that the appointment of a provisional liquidator is likely to bring the company's trading to an end; but, nevertheless, he considers that it is appropriate to make the application without notice to the company. That is because of the concern that the company has deliberately used false accounts and references to obtain credit. Mr Cronin considers that, if notice were to be given to the company of the petition, and of this application for the appointment of a provisional liquidator, there is a risk that further goods might be obtained on credit, and monies or goods held or received by the company might be dissipated.
15. I am satisfied on the evidence presently before the Court, which inevitably is entirely one-sided, that there is a good *prima facie* case that, on the eventual hearing of this winding up petition on public interest grounds, the company will be wound up, if it has not already been wound up by then. I am also satisfied that it is appropriate that, pending the hearing of this public interest winding up petition, the management of the company should be taken out of the hands of its directors. I am satisfied that there is a *prima facie* case, on the evidence, that the company, whether or not originally established, or acquired from formation agents, for that purpose, has been obtaining credit by the use of false accounts and false references.
16. I am satisfied that it is appropriate, even without notice to the company, that the conduct of its affairs should be taken out of the hands of its sole director, who has declined to cooperate with the company investigation, and should be placed in the hands of the Official Receiver. I am satisfied that it is appropriate to do so even though no notice of the application has been given to the company. Indeed, given the lack of cooperation of the company, and its sole director, with the investigators, I am not sure that it would, in fact, be practicable to give such notice, or that the giving of such notice would make any difference in terms of enabling the company to come before the Court to make any appropriate representations. Effectively, the company and its sole director have brought a without notice application upon themselves by the attitude they have displayed in response to the investigation.
17. As I have indicated, no winding up petition has yet been presented by the Secretary of State. That is because when his solicitors sought to present a petition to the Manchester District Registry, the Court declined to issue the petition because of the existence of a pending winding petition in the Birmingham District Registry. The Secretary of State does not have a copy of that petition; but he has placed before the Court the advertisement in the Gazette, which was effected on 15<sup>th</sup> February. It would appear that the petition was presented on 25<sup>th</sup> January by Dracon Trading Limited, t/as Bright Star Fireworks, with an address in Melmerby. The petition, according to the advertisement, and according to what the Secretary of State's solicitors have been told is endorsed on the petition, is returnable in the Birmingham District Registry on 28<sup>th</sup> March.
18. The petition would appear to be that of a trade creditor. The existence of this petition increases the Court's concerns in relation to the ongoing conduct of the company's affairs, and also in relation to the need for the appointment of a provisional liquidator, in two respects. First, because, although the petition was presented on 25<sup>th</sup> January, as previously stated two credit searches have been effected since then, on 30<sup>th</sup> January and 8<sup>th</sup> February. Secondly, the petitioning creditor, Dracon Trading Limited, t/as Bright Star Fireworks, is not one of the

creditors whose existence has been thrown up during the course of the company investigation. At paragraph 112 of her witness statement, Miss Moon states that, from the limited information available to her, she is aware of a number of creditors, totalling just over £20,000; but they do not include the petitioning creditor. That reinforces the need for an impartial third party to take control of the company's affairs, so as to identify the full extent of its actual, or potential, financial exposure to creditors.

19. Section 124A (2) makes it clear that a company cannot be wound up on public interest grounds if it is already being wound up by the Court. It is because of the existence of the petition pending in the Birmingham District Registry that the Secretary of State's petition has not yet been issued. It is for that reason that an application is also made for an order giving the Secretary of State permission to present his winding up petition. I am told that there is no reported authority on the Court's approach to a situation such as the present. However, Miss Wilson-Barnes has reminded me that this situation has arisen on at least one previous occasion in this Court. That arose in connection with a petition presented on 25<sup>th</sup> March 2008 in the Manchester District Registry in respect of CTN Security Services Limited and a petition which it was hoped to present to the Court in respect of another, related, company, CTN Retail Security Services Limited.
20. The matter came before me on an application for the appointment of a provisional liquidator. The Secretary of State had not been able to issue the public interest petition because there was pending a creditor's winding up petition. According to Miss Wilson-Barnes's note of my extemporaneous, and unreported, judgment, she submitted to me that a creditor's petition should not prevent the presentation of a public interest petition because s.124A (2) prevented the making of a winding up order on public interest grounds only when a company was already being wound up by the Court. She submitted that, unless and until a winding up order was made on another petition, then the company was not already being wound up by the Court. She acknowledged the provision in s.129 (2) of the Insolvency Act, that, subject to immaterial exceptions, the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up; but she submitted that that only has the effect of retrospectively backdating the operation of a winding up order. It did not mean that the company was in the course of being wound up before an order was made, so as to engage the operation of s.124A (2).
21. Miss Wilson-Barnes has noted that my judgment records that I accepted the correctness of that submission. I am recorded as having said that there was no statutory basis preventing a petition from being presented in respect of a company by the Secretary of State on public interest grounds, notwithstanding the existence of another petition to wind up presented by a creditor.
22. I accepted Miss Wilson-Barnes's submission that a creditor's petition was fundamentally different from a public interest petition. I held that, in the latter case the relevant class interest was that of the public, whereas, in the former, it was that of the company's creditors. I took the view that the problem of having two winding up petitions by creditors pending was not analogous to the situation where there was one creditor's petition and a concurrent public interest winding up petition. I acknowledge that in the case of a creditor's petition, a party could be substituted as petitioning creditor if the petitioner were paid off, whereas there was no corresponding ability on the part of the Secretary of State to be substituted as

petitioner on a creditor's petition. I also acknowledged that a creditor's petition might be dismissed if the petitioner were paid off, or if the petitioning creditor failed to comply with the provisions of the Insolvency Rules with regard to winding up petitions. I therefore accepted that the existence of a creditor's petition could not be relied upon to ensure that the company was in fact wound up. I acknowledged that if a winding up order were to be made on the creditor's petition, then the continuation of the public interest winding up petition would be unnecessary. But I nevertheless held that that should not disentitle the Secretary of State from presenting his own petition on public interest grounds; and I therefore proceeded to permit the presentation of the winding up petition by the Secretary of State, notwithstanding the existence of a pending creditor's petition; and I proceeded to appoint provisional liquidators.

23. I see no reason to depart from my earlier decision. Given that this is a situation that has occurred now in this Court a second time, it may be appropriate for a transcript of my judgment to be obtained, and then to be given more general publicity, so that the point does not need to be argued out on a future occasion; but that is essentially a matter for the Secretary of State.
24. I am satisfied that I do have the jurisdiction both to permit this public interest petition to be presented and, on the footing that the petition will be presented by the Secretary of State, to make an order appointing the Official Receiver as provisional liquidator in relation to Top Choice Wholesale Limited. For the reasons I have given, I am satisfied that that is the appropriate course, notwithstanding the effect that will have on the company, and the fact that no notice has been given to that entity.
25. So, I will make orders in the terms of the draft submitted, the first simply giving permission to present a winding up petition, and the other appointing one of the Official Receivers to be provisional liquidator of the company until after the conclusion of the hearing of the petition. I have made one minor amendment, without opposition from either the Secretary of State or the Official Receiver, which is to limit the power of the Official Receiver to sell the company's property in the ordinary course of its business to perishable property. Subject to that amendment, I am content with the terms of Miss Wilson-Barnes's draft. So, I will make an order in the terms of each of the two drafts.