Neutral Citation Number: [2022] EWHC 3015 (Ch)

Case No: CR-2022-BHM-000510

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PRPOERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES LIST (ChD)

In the Matter of MSOLD1 Limited (in administration)
And In the Matter of the Insolvency Act 1986

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street Birmingham B4 6DS

Date: 18 November 2022

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)
- -

Between :

Benjamin Neil Jones **Arvindar Jit Singh** **(in their capacity as Joint Administrators of MSOLD1 Limited)**	**Applicants**

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- -

Dawn McCambley (instructed by **Addleshaw Goddard**) for the **Applicants**
Ali Reza Sinai (instructed by **Primas Law**) for Maker&Son Ops Limited

Hearing date: 10 November 2022
- -

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.

.....

HHJ WORSTER

HHJ WORSTER :

The application

1. This is an application made by the administrators of MSOLD1 Limited ("the company"). The application notice is dated 19 October 2022, and seeks the following relief:

(a) The Applicants have permission to abridge time, pursuant to CPR r 3.1(2)(b), for delivering notice, pursuant to rule 3.57(2) IR, of their intention to apply to court under paragraph 79 of Schedule B1; and (b) pursuant to rule 3.57(3) IR of their intention to be appointed as joint liquidators of the Company.

(b) An order that the appointment of the Applicants as administrators of the Company shall cease to have effect from a specified time and date, pursuant to paragraph 79(1) of Schedule B1.

(c) An order that the Applicants shall be discharged from liability under paragraph 98(1) of Schedule B1, with effect from the date specified in paragraph (b) above.

(d) An order dispensing the following statutory requirements for the Applicants

i. The requirements of paragraph 49 of Schedule B1.

ii. The requirements of paragraph 51 of Schedule B1.

(e) An order that the suspension of the winding-up petition presented against the Company by DHL International (UK) Limited on 6 September 2022 ("Petition"), which was effective at 1.31pm on 3 October 2022 shall thereupon cease.

(f) The Petition shall take effect immediately thereafter.

(g) An order, pursuant to paragraph 79(4)(d) of Schedule B1, that the Company be compulsorily wound up by the court on the Petition and immediately upon the appointment of the Applicants ceasing to have effect (as set out in paragraph b above).

(h) A waiver of any procedural requirements that have not otherwise been complied with in the making of the winding up order on the Petition (referred to above in paragraph (g)), pursuant to rule 12.64 IR.

(i) An order that the Applicants shall immediately upon the Company being wound up by the court be appointed as joint liquidators of the Company, immediately following the Company being wound up, pursuant to section 140(1) IA86.

(j) Any act required or authorised under any enactment to be done by the liquidators is to be done by all or any one or more of them.

(k) The costs of and incidental to this Application be paid as an expense of the administration

(l) Further and/or such other relief as the Court shall consider appropriate.

2. The application is opposed. On 20 October 2022, an application notice was filed on behalf of (1) the company; and (2) Jack Mason ("Mr Mason") and sought the following orders:

1. *This case be transferred to the London Insolvency and Companies List.*

2. *The appointment of Arvindar Jit Singh and Benjamin Jones as joint administrators of Maker & Son Limited was (and remains) invalid.*

3. *That the appointment of Arvindar Jit Singh and Benjamin Jones as joint administrators of Maker & Son Limited be duly set aside.*

4. *If the appointment of Arvindar Jit Singh and Benjamin Jones as joint liquidators of Maker & Son Limited shall be deemed (and remains) invalid.*

5. *If any appointment of Arvindar Jit Singh and Benjamin Jones as joint liquidators of Maker & Son Limited be duly set aside.*

6. *For such further relief as the Court may decide is necessary*

3. The administrators' application was supported by the first witness statement of Benjamin Jones one of the joint administrators made on 19 October 2022, with a second short updating statement dated 23 October 2022. The application made by the company and Mr Mason (its sole Director) was supported by the Mr Mason's first witness statement made on 23 October 2022. Whilst that application is made in the name of the company and Mr Mason I note from the Notice of Acting filed by Primas Law, that they act for Maker&SonOps Limited ("Ops"). Mr Mason is also a Director of Ops. Nothing turns on that so far as a consideration of the merits is concerned.

4. The matter came before me on 24 October 2022. The administrators pursued their application on an expedited basis. Mr Sinai appeared for Ops, and prepared a Note setting out the concerns that his clients had about the making of the orders sought. He opposed the making of the orders sought by the administrators, and sought an adjournment of the application for 3 weeks so that Mr Mason could provide further information. I was taken through the evidence to that point, and heard some substantial argument. I concluded that the better course was to allow Mr Mason the opportunity to put forward further information before determining the matter, and adjourned the applications to 10 November 2022. A note of my judgment made by the administrator's solicitors is at [878].

5. I deal with the events which give rise to these applications below, but the minute of Order [398] agreed between Ms McCambley and Mr Sinai following the hearing on 24 October 2022 is a useful starting point:

UPON a winding-up petition being presented against MSOLD 1 Ltd (company number 11208283 and previously known as Maker&Son) by DHL International (UK) Limited on 6 September 2022 ("Petition")

AND UPON Benjamin Jones and Arvindar Jit Singh being appointed as administrators (the "Applicants") over MSOLD 1 Ltd – in administration (company number 11208283 and previously known as Maker&Son) (the "Company") following the filing of a Notice of Appointment by Barclays Bank Plc on 3 October 2022, the holder of a qualifying floating

charge, pursuant to paragraph 14 of Schedule B1 ("Schedule B1") of the Insolvency Act 1986 (the "Act")

AND UPON the Petition being suspended, effective at 1.31pm on 3 October 2022, pursuant to paragraph 40(1)(b) of Schedule B1

AND UPON the following transactions purportedly taking place (the "Transactions") before the Applicants were appointed:

(a) the sale by the Company of its assets to Maker&Son Ops Limited ("M&S Ops"), as recorded in an asset purchase agreement dated 20 September 2022;

(b) the assignment of trade mark numbers 3187985 and 3639115 by the Company to Maker&Son Holdings Ltd on 16 September 2022;

(c) the grant of a debenture by the Company to Global Investment Management Holdings Inc. on 20 September 2022; and

(d) the grant of a debenture by the Company to Global Investment Management Holdings Inc. on 3 October 2022

AND UPON an application being issued by the Applicants for relief inter alia under paragraph 79 and 98 of Schedule B1 and section 140 of the Act, on 21 October 2022 (the "Application")

AND UPON M&S Ops filing a witness statement in the name of Jack Mason in opposition to the Application on 23 October 2022 (the "Mr Mason's Statement")

AND UPON the court having read the evidence on the court file

AND UPON the court hearing Dawn McCambley, Counsel for the Applicants, and Ali Sinai, Counsel on behalf of M&S Ops

IT IS ORDERED THAT

1. M&S Ops and/or Mr Mason do send the following documentation electronically to the solicitors acting for the Applicants, Addleshaw Goddard LLP (aziz.abdul@addleshawgoddard.com), by 12pm on 25 October 2022:

1.1. The assignments referred to in paragraph 25 of Mr Mason's Statement (the "Assignments") in unredacted form; and

1.2. A list of creditors of the Company, as is available.

2. M&S Ops do file and serve evidence in response to the Application by 4pm on 28 October 2022, including but not limited to the following:

2.1. Further details of the CVA proposal (including its proposed funding) for the Applicants to consider which would purportedly result in a dividend to creditors in the sum of 40p/50p in the £, referred to in paragraph 23 of Mr Mason's Statement.

2.2. Documentation and information sought by the Applicants in their email dated 4 October 2022 (timed 17:21).

2.3. The unredacted Assignments insofar as they have not been sent to Addleshaw Goddard LLP in accordance with paragraph 1 above.

2.4. Insofar as such evidence relates to the underlying agreements which gave rise to the Transactions, this must include the relevant metadata for each individual transaction document relied upon.

3. The Applicants do file and serve evidence in reply, if so advised, by 4pm on 7 November 2022.

4. The parties do file and simultaneously exchange skeleton arguments by 4pm on 9 November 2022.

5. The hearing of the Application be adjourned to 10 November 2022 at 10.30am. Time estimate: 1 day … .

6. Following that order, Mr Mason provided the administrators with a substantial amount of documentation relating to the assignments referred to in the order. Mr Mason then made a relatively short 2nd witness statement on 28 October 2022. Mr Jones filed his third witness statement in reply on 7 November 2022. In addition, the administrators filed a witness statement from Braden Richter of 7 November 2022. Mr Richter had been interested in the company and its business, and had some dealings with Mr Mason. He formed an adverse view of Mr Mason. On 9 November 2022 Mr Mason made a third witness statement. At paragraphs 12-14 he replies to Mr Richter's evidence, but the majority of the statement is a response to the criticisms of his second witness statement by Mr Jones. Ms McCambley characterised this as a "second bite at the cherry" and objected to its admission. I determined firstly that I would not take account of Mr Richter's evidence on this application. It was always likely to be contentious, and took me no further in relation to the issues I had to determine. Secondly, whilst late, and whilst containing some information which should properly have been in his second statement, I allowed Mr Mason's 3rd witness statement into evidence. That was a less than perfect outcome, for it left Ms McCambley without evidence in response. But given the potential consequences of the relief the administrators sought, it was the better course. Ms McCambley was able to deal with some of the matters Mr Mason raised on instructions.

7. There was insufficient time to give a judgment on 10 November 2022 and the matter was adjourned to today to allow for the attendance of Counsel.

The history

8. The company was incorporated on 15 February 2018, and retailed bespoke and ethically produced furniture. It has subsidiaries in the US, Australia, New Zealand and India. It employed 60-70 employees and traded principally from leased premises at Kemps Farm in Balcombe in West Sussex. It held valuable trade marks and owned associated intellectual property.

9. On 6 May 2022 Magenta Maker Limited ("Magenta") was granted a debenture over the company's business and assets. Magenta was then a minority shareholder, and provided loan facilities for the company. The debenture was registered on 9 May 2022. Barclays took an assignment of the debenture from Magenta on 30 September 2022 and gave notice of that assignment to the company on 3 October 2022, shortly before appointing the administrators.

10. There is an issue as to how much the company drew down and thus the indebtedness secured by this debenture. The administrators rely on information provided to them by the solicitors for Barclays Bank, who allege an indebtedness of some £4.9M. In his first witness statement at paragraph 15 Mr Mason says that he understands that there has been no drawdown. Whether or not the indebtedness is £4.9M, the evidence before me indicates that it is likely to be substantial. In a document prepared by the company dated 18 July 2022 [JM3 6096] the indebtedness to Magenta is put at just short of £3M. And at a meeting held on 12 October 2022 between Mr Mason and Mr Hatfield (the Chief Financial Officer of Inc and Co) on the one hand, and the administrators on the other, the note of the meeting is that Mr Mason and Mr Hatfield were saying that Magenta were owed about £3M. Mr Sinai did not suggest that Magenta were owed no money or that the debenture was invalid, but submitted that £4.9M was not the final figure.

11. At the hearing before me on 24 October 2022, there was also an issue as to the validity of the appointment of the administrators pursuant to this debenture. That was a matter expressly raised by the application of 20 October 2022. The point turned on the construction of a waiver given by Magenta on 4 August 2022, and Mr Sinai took me through the argument. At the hearing on 10 November 2022, Mr Sinai did not concede the issue, but helpfully invited the court to proceed on the basis that the administrators were validly appointed. I am content to do so. I did not determine the construction argument on 24 October 2022, but I formed a sufficient view of its merit to be satisfied that Mr Sinai's approach was a proper one for the Court to adopt. That approach clears away one of the major issues between the parties.

10. To return to the chronology; by mid 2022 the company was in some financial difficulty. The draft accounts for the year ended 28 February 2022 [718] showed an operating loss of £1.9M on a turnover over of £8.2m. That added to the historic trading losses. The balance sheet remained positive because of substantial sums for stock (£2M) and creditors (£10M). The notes to these draft accounts at 13 [729] indicate that the company was owed £4,469,521 by companies under common control.

11. The directors of the company considered offers for the company, and within the documents provided by Mr Mason is a comparison of the offers as at 18 July 2022. On 25 July 2022 the company filed a notice of intention to appoint administrators. The intention appears to have been to keep the company trading. For a notice of intention to be filed, there must have been a statutory declaration indicating that the company was unable to pay its debts or was likely to be unable to do so. DHL (a trade creditor) presented a petition to wind up the company based upon an unpaid debt of £79,151 on 2 August 2022, but withdrew it because the company had the benefit of an interim moratorium.

12. However, no administrator was appointed, and on 4 August 2022 the then shareholders of the company transferred their shares in the company to Maker&Son Holdings Limited ("Holdings"). Holdings is solely owned by Investment Holdings BVI Limited ("BVI") which as its name suggests, is a BVI company. Both Holdings and Ops appear to have been incorporated in August 2022. BVI is the majority shareholder of Inc and Co Group Limited ("Inc"), a Manchester based private equity firm. Mr Mason was appointed as the sole Director of Holdings on 3 August 2022 [325], the sole Director of Ops on 12 August 2022

[327] and the sole Director of the company on 31 August 2022 [321]. He is also a Director of Inc.

13. The notice of intention to appoint an administrator lapsed, and on 6 September 2022 DHL presented a second petition based upon the same debt. Barclays Bank (who were then owed some £35,000) was a supporting creditor. On 20 September 2022 the company filed an application to set aside the Petition on the basis that the debt was disputed, and in the alternative applied for a general validation order. Directions were given on 22 September 2022 and the application heard by HHJ Hodge KC on 30 September 2022 in Manchester. A copy of the note of the judgment made by Barclays is at [243]. Mr Jones first witness statement also exhibits a witness statement from Mr Mason of 21 September 2022 [237] made in support of that application, a cashflow forecast put forward by the company in support of its application for a validation order [239] and a copy of the hearing bundle index, which refers to two further witness statements and exhibit bundles from Mr Hatfield and a witness statement from a Mr Tomkins filed by the company.

14. HHJ Hodge KC dismissed the company's application. Firstly he concluded that there was no genuine dispute as to the petition debt. Secondly he refused the application for a validation order. The note of his judgment is unapproved, but it has been available to Mr Mason for some time now, and no issue is taken with its accuracy. It is the basis upon which the application for a validation order is made which is of relevance to the matters before me. HHJ Hodge KC considers whether the company is solvent, and makes reference to the notice of intention to appoint administrators and the fact that it must have been accompanied by a statutory declaration that the company is or is likely to become unable to pay its debts. He refers to Mr Hatfield's explanation for that and his evidence that "the company continues to trade". The note continues in this way [246]:

> *At paragraph 30 Mr Hatfield asserts the company will continue to pay its creditors as and when they fall due. The companies accounts show a solvent balance sheet position but do not contain any reference to the debt asserted by the supporting creditor in the sum of a little over £500,000. Mr Tomkins also relies upon a cash flow forecast. The cash flow forecast is dependent upon monthly injections of £250,000 for wages funding. The source of those payments is not explained and the effect on the company's cash flow and its resulting creditor ledger is not spoken to by Mr Hatfield*.

From that evidence it is apparent that the application for a validation order was put to the court on the basis that the company continued to trade, and would pay its debts as they fell due.

15. Mr Mason's evidence in the present applications is fundamentally inconsistent with that. His evidence is that prior to the application for the validation order being made and heard, the company had entered into the following transactions:

(1) On 31 August 2022 the company assigned its trade marks to Holdings [329]. The transaction was registered at the IP Office on 16 September 2022.

(2) On 3 September 2022 the company passed a resolution changing its name to MSOLD1 Limited; a resolution registered at Companies House on 4 October 2022.

(3) On 20 September 2022 the company entered into:

(i) an agreement to sell its business and assets to Ops [99] for £100,000 to be paid in cash upon completion.

(ii) a debenture in favour of Global Investment Management Holdings Inc ("GIMH"), a Delaware corporation, creating a fixed and floating charge over the company. The charge was registered on 3 October 2022

(iii) a chattels mortgage in favour of GIMH, again registered on 3 October 2022

(iv) licences to Ops to occupy the premises at Kemps Farm.

(4) The remaining employees of the company were subsequently "TUPE'd" to Ops.

In other words, by the time the matter came before HHJ Hodge KC, the company had changed its name and transferred its business and assets to another company. There was no prospect of the company continuing to trade or paying its creditors as they fell due. The cash flow forecast can have had no basis in fact. If what Mr Mason now says is true, he cannot have failed to understand that the entire basis of an application for a validation order was false.

16. In his first witness statement Mr Mason makes reference to the Validation Order at paragraphs 27-32. Firstly he says that the Judge did not deal with validation order element of the application. That is not correct. Secondly he says that prior to the sale of the assets to Ops an independent valuation was undertaken and third party offers made for the assets at between £100,000 and £150,000. The purchase price was, he says, reasonable. I was shown the valuation from July 2022 in the course of argument. The administrators had not exhibited it because they contended it was commercially sensitive. Given that it is now rather out of date I doubt that, but the point here is that the valuation was for sums far in excess of the £100,000 to £150,000 figure. The valuations were on a variety of bases, but were in six figures, and even on a "distressed sale" for the UK and Australian operation were over £500,000). It may be that no offers were made which matched the valuation, but the "independent valuation" referred to by Mr Mason is well above the price paid; a point not apparent from his evidence. In his 3rd witness statement Mr Mason says that these values declined after July and that (at paragraph 8.24) in any event he would now agree to an independent valuation and to pay the difference.

17. At paragraph 30 Mr Mason evidence is that the trademarks and IP were purchased by Holdings in return for the August 2022 payroll. There is some evidence to support the fact that the payroll came out of a bank account operated by Ops. The administrators now accept that was the position. I note that the transfer of 31 August 2022 (which on the face of it pre-dates the presentation of the Petition) does not identify the consideration. A similar line is taken with the Asset sale to Holdings, said to be for £100,000. This too is said to have been paid for by funding the payroll.

18. Mr Mason's final point on this aspect is that he intends to apply for validation orders in respect of those transfers.

19. To return to the chronology. On 30 September 2022 Barclays Bank took an assignment of Magenta's debenture. At 11.50 on Monday 3 October 2022 a process server served the notice of assignment and a demand letter on the company at the Kemps Farm premises [699]. The event of default was the presentation of the second DHL petition on 6 September 2022.

The administrators were appointed at 1.31pm and attended the Kemps Farm site. The validity of their appointment was challenged, and they were told that the business and its assets had been sold to Ops and provided with copies of the agreements I refer to at 15 above.

20. Mr Jones sets out a recent analysis of the documents and their metadata now provided which record the transactions of 20 September 2022. The PDF's of the chattel mortgage, the GIMH debenture and the licences to occupy were created at 13.17 and 12.22 respectively on 3 October 2022, and the copy of the Board minute approving the sale to Ops (signed by Mr Mason) was created on 27 October 2022. The administrators suggest that this indicates that these documents had been backdated. Mr Mason's case is that these were the copies printed out for the administrators, and that the transactions bear their real dates. There is some support for that in the fact that there is a PDF for a debenture in favour of GIMH created on 20 September 2022, unsigned Word versions of the chattels mortgage and the sale to Ops created on 19 September 2022, and a PDF of the draft assignment of the IP created on 31 August 2022. Mr Sinai referred to the evidence as "neutral". That is not a bad summary. However there remains a real issue as to the bona fides of these transactions, which were only registered on 3 October 2022. One further curiosity is that an authorised person acting for the company also registered the satisfaction of Magenta's debenture at around the same time. Ms McCambley submits that this must have been Mr Mason for he was the only director of the company. If not he, then given that he was the sole Director of the company, I infer that he authorised that step.

21. It is apparent that in the period following the appointment of the administrators, the company failed to cooperate with the administrators. In his submissions to me at the hearing on 24 October 2022 Mr Sinai said that they had "got off on the wrong foot". Ms McCambley took me through the exchanges. The administrators made a written request of Mr Mason for information relating to the company. It was detailed, but much of the material should have been available to Mr Mason. He was its sole Director, and had a duty to cooperate. His initial response by email on 4 October 2022 at 16.46 [360] says that he is taking legal advice and will respond within 21 days. The email included this:

> *I can confirm that the company does not have any assets, any staff or any electronic systems.*

Mr Mason signs the email as Group Chief Executive Officer of Inc and Co.

22. On 12 October 2022 there was a telephone meeting between Mr Jones and members of his staff, and Mr Mason and Mr Hatfield. The administrators note of the meeting is at [705]. Mr Mason was not particularly cooperative; indeed he is rather dismissive of the administrators. Mr Sinai recognised that (what he described as these) "macho comments" did not help. The note includes an explanation of the intentions of Mr Mason and Mr Hatfield in relation to the creditors. It also included Mr Mason saying that he would like to work with the administrators to formulate a plan. Mr Jones comments a little later that without any basic information, commenting on any proposal would be "challenging". In essence that remains a substantial part the administrators' position.

23. Ops proceeded to make contact with customers of the company with a view to honouring the orders they had placed with the company for furniture. The order would have been accompanied by a deposit or part payment. I was taken to an email sent out to 500 or

more of the company's customers dated 20 October 2022 [JM3 26]. The arrangement proposed gave the customer thee options. A "NOW" order with 10% off, continuing with the current order, or taking a credit note with 10% added. The customer's agreement involved them assigning their debt from the company to Ops. There are some examples of the assignment in the papers. For example at [753] the customer has assigned the debt of £1239 to Ops. The terms of the assignment were not explored in submissions, but they include this:

> *By [Ops] agreeing to honour this debt you agree not to take any legal action against [Ops] …*

Honouring the orders placed by customers of the company is a positive aspect of Ops' case. It is also to the potential benefit of Ops, who currently trade this business. Maintaining customer goodwill and the reputation of the business is also an important factor in that continued trading. Moreover, the assignment of the debt gives Ops more creditor "voting power" in the decisions to be made in relation to the company.

24. The intention of Mr Mason is that there be a CVA of the company's debts. In his first witness statement he says this:

> *23. It was and remains the intention of the company to propose a CVA to all creditors offering a dividend of between 40-50p/£*

He then takes issue with the Barclays debt, the apparent indebtedness to HMRC of c£2M which he says will be set off against the sums HMRC owe to the company in respect of VAT and R&D credit, and that a debt of £492,734 owed to Bartolini Homes SRL has been assigned to Ops. He then continues:

> *25. The majority, by value of the creditors of the Company have assigned their claims totalling £12,293,953 as creditors of the company to [Ops]. We are in discussion to take additional assignments of £5 million next week. Copies of the assignments are available to the court for inspection …*
>
> *26. This would represent a better return for creditors if the administration continues and better than could be achieved in any liquidation.*

25. Mr Mason has produced a document entitled "MSOLD1 LTD … Creditors Assignments and Creditors List as at 24th October 2022" [754]-[805]. The total creditors figure is said to be £21,832,938. The list is of assistance, but there are some gaps in the information relating to these assignments, and some serious questions still to be answered. In particular there are a number of claims from related companies:

Maker and Son PTY Ltd (the Australian subsidiary)	£2,123,408.56
Ops	£2,785,073.86
Holdings	£2,785,073.86
GIMH	£4,184,415.86
Maker and Son LLC (the US subsidiary)	£5,517,577.45

A total of over £15M.

26. Of note is the fact that:

(i) no figures are given for the Magenta/Barclays loan or for HMRC;

(ii) the Ops and Holdings debts are the same to the penny;

(iii) the debts owed to the US and Australian company are said to be £7.6M. This contrasts with the position as set out in the company's accounts to February 2021, where it is the connected companies who owe the company some £4.4M: a swing of some £12M in a relatively short time. Mr Mason says that this information was extracted from Xero (an electronic system where the company's financial details are held). His understanding is that the company initially funded the set-up costs of these two companies but that over time they became "net contributors" and as a result were owed money by the company.

There needs to be some further investigation of the position.

27. The potential for a CVA is a central theme of the opposition to the administrators' application. It is said that the administration should continue so that a CVA can be further investigated, that the administrators have already decided against a CVA and have the interests of Barclays Bank at heart, rather than the interests of the creditors as a whole, and that if there is to be a liquidation, the court should appoint someone who will have a more open mind about a CVA.

28. In the Order of 24 October 2022 at paragraph 2.1, I directed that Mr Mason provide further information about the proposed CVA and its funding. In his 2nd witness statement of 28 October 2022 he deals with the matter at paragraphs 7-12. Firstly he refers to discussions with Paul Stanley, a licenced Insolvency Practitioner with Begbies, He says this:

7. … In principle, he considers that a CVA would provide the best return to creditors based upon a total payment of £5M payable over a 5 years period in the following manner: £100,000 upfront. Going forward the funds will be paid from Ops supported by Holdings. This is different from what had been planned. After consultations with PS it became apparent that a commitment to pay a set p/£ could be a major problem in the event additional creditors are discovered.

8. This will be funded by either free cash generated by the operations of Ops, a new share issue in Ops (which would be designed to bring the CVA to an early conclusion) or by support provided by Ops parent company Holdings.

He says that in the limited time it has not been possible to prepare a full proposal, but that a CVA should not be dismissed as an option, and that to demonstrate good faith he will arrange for the sum of £100,000 to be deposited with Ops' solicitors.

29. The administrators contacted Mr Stanley on 1 November 2022. His reply is at [1049]. He said that he had been contacted the previous week and had spoken to Scott Dylan (of Inc) and a solicitor by Zoom. The purpose of the call was to understand the situation, which he said, "appeared at first sight bizarre", to explore the options and in particular whether a CVA might be a more appropriate route to exit an administration than a compulsory winding up.

He said that he had seen very few documents and had not seen valuations or the contract for the sale of the assets. He said this:

> *It is true that CVA was discussed as an option and that I advised that the only persons who could propose a CVA would be either the administrators or a subsequently appointed liquidator. I have not seen any forecasts, funding proposals, or any proof of funds nor have I canvassed the views of creditors. Consequently this option is only theoretical at this stage.*

It may be a small point, but the impression given by Mr Mason's use of the phrase "in principle" at paragraph 7 of his 2nd witness statement paints a rather more positive picture than the description of a CVA as being a "theoretical" option. Mr Stanley goes on to say that if the £100,000 was deposited he would be prepared to discuss the CVA option with the administrators and look at accepting the appointment as supervisor subject to a number of matters. I understand that he has now indicated that he would be prepared to act as liquidator and would explore a CVA if appointed.

30. Proof of funding is an important issue. The essence of the proposal is that the CVA will be funded from Ops and Holdings. No further information is provided. Mr Jones' response at paragraph 39 of his 3rd witness statement points out that neither Ops nor Holdings have filed any accounts at Companies House (given their recent incorporation), and that even if Inc were involved, it appears to have limited funds. Its abridged accounts for the period to 30 June 2021 (filed on 22 June 2022) show net assets of £162,953. The proposal that there would be free cash generated by Ops is to be seen in the context of the substantial trading losses the company's business made in previous years.

31. Another obvious difficulty with a CVA is the position of HMRC; see Mr Jones at paragraph 40 of his 2nd witness statement. A CVA would not vary the rights of a preferential creditor without their consent. An interim proof of debt has been lodged by HMRC in the sum of over £2.2M, of which £1,732,679 is preferential. Mr Mason's position in his evidence is that any liability would be met by setting off R and D credits and VAT refunds. Mr Jones understands that R and D credits for the company have already been received to February 2021, and that a company is only eligible for them if at the time of the claim it is a going concern, which is no longer the case here. He also refers to the VAT position and to an "actual" (as opposed to assessed) claim of £543,911. Mr Mason responds in his 3rd witness statement at paragraph 8.32 by saying that the HMRC position is not clear, and makes the point that so far there have been no discussions with HMRC and no one has presented them with the possibility of a dividend.

32. To return to question of cooperation. Reading the note of the meeting of 12 October 2022 and Mr Mason's emails to the administrators prior to the issue of this application tends to support the administrators case (put by Ms McCambley at paragraph 33 of her skeleton for the hearing on 24 October 2022) that the administrators have been prevented from progressing the administration as a direct result of the transactions referred to at paragraph 15 above, a lack of verifiable information about those transactions, and the failure of the company's Director to provide them with information and documentation relating to the company's business. Mr Mason would have understood the duties of a company Director. He refers to the fact that he is CEO of 19 companies, and he appears to have some considerable

knowledge of company rescues. The evidence is that he did not cooperate before the administrators made their application.

33. Since the Order made on 24 October 2022 Mr Mason has been prepared to provide the administrators with considerable amounts of information. His position is that he is cooperating as best he can. The administrators say that there are still gaps in the information that has been provided. Some of the information they seek (whilst relevant) is not essential at this point. For example, Mr Mason's address and documents for the purposes of money laundering purposes. They have his address in Barcelona from the details he gives at Companies House. There has been some disclosure of the metadata of the various transactions I refer to. However, and importantly, the administrators still do not have access to the books and records of the company. These, it is now said, are held electronically on Xero. Mr Sinai informed the court that Mr Mason understood that Xero were to give access to the administrators, albeit he said that this may have only been on 6 November 2022. The administrators position was that they still had no access. This is key information. The fact that the administrators could still not access it at the date of the hearing before me on 10 November 2022, is a matter of concern.

34. Consequently whilst it can be seen that there has been a greater level of cooperation since the involvement of the court, there is still a question mark over the willingness of Mr Mason to give the administrators what they need. Mr Sinai points to the fact that some of what is sought is not relevant, and repeats the point that the actions of the administrators when they attended the company's premises on 3 October 2022 meant that things got off on the wrong foot. Mr Mason also suggests that the Bank has its own agenda and is involved in other claims in which he is involved. So the lack of trust has a context.

The relevant law

35. There is broad agreement here, so I can deal with this aspect relatively briefly. Under section 127 of the of the Insolvency Act 1986, in a winding up by the court, any disposition of the company's property made after the commencement of the winding up is void unless the court otherwise orders. Consequently the transfers made out of the company after 6 September 2022 would be vulnerable.

36. By section 40(1)(b) of the Act a petition for winding up is suspended while the company is in administration following an appointment under paragraph 14 of Schedule B1. The effect is that the petition has no legal effect during the period of suspension but is revived upon the company ceasing to be in administration; see HHJ Purle QC in *Harlow v Creative Staging Limited* [2014] EWHC 2787 (Ch) at [8].

37. A company ceases to be in administration when the appointment of an administrator ceases to have effect in accordance with Schedule B1 of the 1986 Act; see Schedule B1 paragraph 1(2)(c).

38. Paragraph 79 of Schedule B1 provides that:

(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.

(2) The administrator of a company shall make an application under this paragraph if—

(a) he thinks the purpose of administration cannot be achieved in relation to the company,

(b) he thinks the company should not have entered administration, or

(c) the company's creditors decide that he must make an application under this paragraph.

(4) On an application under this paragraph the court may—

(a) adjourn the hearing conditionally or unconditionally;

(b) dismiss the application;

(c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).

39. The Court has power under paragraph 79(4)(d) to make a compulsory winding up order on a suspended petition. In *Re J Smiths Haulage* [2007[BCC 135 HHJ Norris QC (as he then was) said this at [6]:

> *For my part I have no doubt that if in order to terminate an administration an administrator makes an application under para 79(1) of Schedule B1 that his appointment shall cease to have effect from a specified time then the court has power under paragraph 79(4)(b) likewise to make an order on the suspended petition: either dismissing it or making a compulsory winding-up order, depending on the course taken by the administration and the necessity for distributions or investigations.*

40. The decision was followed by HHJ Purle QC in *Harlow*. At [53] he says this:

> *In all the circumstances it does seem to me that this court ought to recognise that Parliament must have intended to keep the petition in being for a reason and one of the reasons is so that an order might be made on the suspended petition, taking advantage of the doctrine of relation back, despite any objections of the petitioner.*

41. The desire to preserve the consequences of section 127 may be a proper reason for an administrator to seek a winding up order on a suspended petition rather than to present a new petition. The court must exercise its power on such a winding up for the benefit of the creditors as a whole; see HHJ Purle QC in *Harlow* at [28].

Discussion

42. Firstly Mr Mason's evidence. I noted in the judgment I gave on 24 October 2022 that the way the company's application for a validation order was put to the Court in Manchester was a matter of considerable concern. It was not dealt with at all in Mr Mason's 2nd witness statement. In his 3rd he said this at paragraph 8.30

> *I would apologise to the court for the errors in the application for a validation order. This was done without the benefit of legal advice and was subsidiary (i.e. an after thought tacked on) to the primary application to set-aside the winding up petition. Our intention was to provide funds to pay the employees and an acceptable return to the creditors without the need for liquidation. We never had any malign intentions or meant to deliberately mislead the Court.*

An apology is welcome, but I cannot accept the way Mr Mason now characterises the matter. The company was represented by Counsel. More importantly, this was not an "error". The application for a validation order was supported by evidence, and in particular a cash flow forecast. It was said that the company continued to trade. If Mr Mason is right, and the various transactions I refer to at paragraph 15 above had taken place on the dates given, there was no way it could trade. It had changed its name, transferred its assets, and made arrangements for Ops to take over its premises and staff. The alternative is that, as at 30 September 2022, some of these transactions had not yet been put into effect (the Trade Marks had been transferred by that point). That is what the administrators suspect; but Mr Mason denies it.

43. I am bound to take the fact that the application for a validation order was made on a false basis into account when considering the weight I can give to Mr Mason's evidence on other matters.

44. Secondly, the fact that the assets and business of the company were transferred away from it to companies in the control of or connected to Mr Mason, at a time when the company was insolvent is, of itself, a matter which gives rise to concern. It leaves the secured creditors with nothing to enforce against, and the preferential creditor with little or no prospect of recovery. It may mean that the company's customers get the furniture they ordered. But the company's business and assets are now in the hands of others. Indeed since their transfer to Holdings, the trade marks have been transferred on to BVI.

45. Thirdly, whilst the idea of a CVA and the provision of a dividend may be superficially attractive, it is apparent that in this case there has been little investigation of the feasibility of such an arrangement, whether before the transfers of the company's business or assets, or since. In particular, there is no evidence to support the contention that there would be a dividend of 40-50p/£. There are no forecasts or funding proposals, and no proof of funds. Mr Mason's evidence that the dividend to creditors will be funded from free cash within Ops is simply a statement to that effect. There is nothing to demonstrate that it is achievable. There is no evidence of an investor prepared to put forward some substantial capital sum, either to invest in the business and make it more profitable, or to contribute to the dividend to the company's creditors.

46. I also question how a CVA could be enforced. It may be possible to fashion some sort of scheme, but there is nothing left in the company, and any arrangement would depend upon the cooperation of Ops, Holdings, BVI and possibly Inc.

47. The first matter to consider is whether the administration should cease. The administrators say it should. Mr Sinai submits that it should not; that it is still in its early days, and it should continue so that the possibility of a CVA can be further investigated. Ms McCambley's submission is that this can be done just as well in the course of a liquidation. Given that there is nothing now left in this company, and in the absence of a well-developed proposal for a CVA which might benefit from keeping the company in administration, I have concluded that the administration should cease. That course is further justified by the fact that this is a case for making a winding up order (see below). The relief sought in the administrators' application notice at (c) and (d) would follow from that decision. It is also the case that upon the administration ceasing, the suspension of the DHL petition comes to an end.

48. The second and related issue is whether an order for winding up should be made on the DHL Petition. DHL consent to that course, as do Barclays (who were the supporting creditor). Mr Sinai makes the point that the petition has not been advertised. But I see no real benefit from advertisement now. The parties who would object to a winding up (Mr Mason, Ops and Holdings in particular) have had the opportunity to argue the matter. As I have said, there is nothing left in the company other than debt, and so a winding up order is the appropriate order to make. As I understand it, it is said that the company should be kept alive to host some form of CVA. That can be done in a liquidation.

49. The underlying reasons for a winding up order on the DHL petition at this stage are (i) to take advantage of the retrospective effect of section 127, and (ii) to give the liquidators the additional powers of investigation that go with that office. The underlying reason for Ops objection to that course, is that the sale of the business and assets are avoided, with the potential consequences for its business and the customers of that business, old and new; that is former customers of the company and the new customers who have ordered and/or paid money since September 2022. If those transactions are set aside, Mr Mason's intention is to apply for a validation order. That would be a matter to be determined on the evidence available to the court on any such application, but it provides no reason not to proceed with the petition. Indeed I regard the recovery (or the potential for the recovery) of the company's assets as being a matter which plainly benefits the creditors as a whole. Leaving the business and assets of the company in the hands of others, leaves those others with all the cards in any subsequent arrangements for the use of the company's assets, whether in a CVA or otherwise, when by operation of section 127, they should be in the hands of the company.

50. The alternative put forward is the possibility of an unfunded and undeveloped scheme for a CVA by the companies which took the benefit of the company's business and assets whilst leaving much of the company's debt behind. I have not been persuaded by the evidence Mr Mason has put before the court, that there is sufficient merit in that alternative course to outweigh the more tangible benefits which follow from an order winding up the company. Ops and the other beneficiaries of these transactions would have known that the company was insolvent. The fact that an application for a validation order was made to the court in Manchester indicates that those in control of the company well understood the effect of section 127 on the presentation of DHL's petition. There is no good reason why they should not be subject to the effect of that provision.

51. Mr Sinai makes the point that the administrators have powers of investigations under sections 235 and 236. They do, but a liquidator has greater powers (section 238, 239, 411 and 412). Given the lack of willing cooperation from Mr Mason and Ops, those powers may well be required.

52. Consequently I grant the orders sought at paragraphs (f), (g) and (h) of the administrators' application.

53. Finally there is the issue of who should be appointed as liquidators. The administrators' case is that it would save time and costs if they were appointed because of the work they have already done and the fact that they have an understanding of the matter. The essential point made in opposition to that application is that the administrators have a closed mind on the question of a CVA and will consider the interests of the Bank ahead of the other creditors.

54. I am conscious that the relationship between the administrators and Mr Mason is not one characterised by trust. Mr Mason may feel that the administrators acted precipitously when they attended the company's premises on 3 October 2022, and that the Bank has its own agenda so far as he is concerned. But I have not detected any inappropriate conduct on the part of the administrators in the conduct of this matter. Their requests for information may be seen as over-detailed. But given the transfers of the company's assets, the absence of cooperation from the company's Director, and without access to the books and records of the company, it is not surprising that they have pushed for more. In his 3rd witness statement at paragraph 32, Mr Jones gave some evidence about the funding of the company's payroll which was wrong. When that became apparent he immediately withdrew that evidence, and I accept that there were genuine reasons for the mistake he made. As liquidators, Mr Jones and Mr Singh will owe duties, and are bound to consider the interests of the creditors according to the well understood principles which apply. Mr Jones' evidence is to the effect that he will consider a CVA on its merits. At this stage (and on the material he has) it is hardly surprising that he sees difficulties with what is suggested.

55. Whilst the administration is only weeks old, these administrators have a head start in terms of their understanding of the position, and time and cost should be saved by their appointment. Consequently I make the orders sought at paragraphs (i) and (j) of the administrators application. I will hear Counsel on any other matters which arise.