OUTER HOUSE, COURT OF SESSION

[2018] CSOH 52

P1007/17 & P1008/18

OPINION OF LORD CLARK

in the cause

BLAIR CARNEGIE NIMMO, CA, administrator of DAWSON INTERNATIONAL PUBLIC LIMITED COMPANY, a limited liability company incorporated under the Companies Acts and having its registered office at Saltire Court, 20, Castle Terrace, Edinburgh

Noter

for Directions pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986

Noter: Howie QC; Shepherd & Wedderburn LLP
First Respondent: Thomson QC, Roxburgh; Office of the Advocate General
Second Respondent: Dodd; Lay Representative
Third Respondent: Delibegovic-Broome QC; Burness Paull LLP

30 May 2018

Introduction

[1] This is an application for directions by the noter, as the administrator of Dawson International PLC ("the Company"). He was originally appointed as joint administrator by the directors of the Company on 15 August 2012, along with another insolvency practitioner who later resigned. The respondents to the Note are the Environment Agency ("the first respondent"), Tweedside Independent Traders Ltd ("the second respondent"), and the Pension Protection Fund ("the third respondent").

[2] The noter is also the administrator of Dawson International Trading Limited ("DITL"). In that capacity, a Note seeking directions in essentially identical terms to the Note presented in respect of the Company was lodged by the noter in respect of DITL. The same respondents appeared in respect of that Note and submissions on the two Notes were heard together. It was agreed that the decisions reached in this Opinion, viewed as the lead case, apply in respect of both Notes.

[3] By interlocutor dated 20 December 2017, parties were allowed a debate on the issues of (i) whether the orders sought in the Note are a proper subject for directions by the court; and (ii) whether the first respondent can or could have a claim as a creditor of the Company. These matters are the subjects of the first plea-in-law for the first respondent, the first and second pleas-in-law for the second respondent, and the first and second pleas-in-law for the third respondent.

The parties' averments

The noter

[4] The basis for the application for directions was set out in the Note. By way of background, in the period between 1980 and 2000, the Company was the ultimate parent company in a group of companies. One of its subsidiaries was Dawson International (Holdings) Ltd, which owned the whole share capital of Pringle of Scotland Ltd (which later changed its name to Dawson (POS) Ltd, but is referred to here as "Pringle"). Pringle was a trading company, manufacturing knitwear products in mills at Hawick and elsewhere. It owned a factory situated within the Tweedside Trading Estate at Tweedmouth in Berwick-upon-Tweed ("the site"). In the course of its manufacturing activities at the site, Pringle made use of a solvent commonly used in connection with the dry cleaning of clothes,

tetrachloroethylene, in order to remove grease from wool being used in the factory. Over the years, a number of spillages of that substance occurred, and those resulted in tetrachloroethylene penetrating the ground at the site and thereafter migrating into the groundwater contained within the fell sandstone aquifer under Berwick-upon-Tweed, from which neighbouring landowners abstracted water in connection with their businesses.

[5] In 1992, Pringle was prosecuted in the Berwick-upon-Tweed magistrates court over a tetrachloroethylene spillage at the site and was convicted of an offence under section 85 of the Water Resources Act 1991. Following that conviction, Pringle took steps to combat the pollution of the groundwater (and, potentially, the River Tweed). In particular, it installed on the site, and thereafter operated, pumping equipment designed to ease the treatment and decontamination of the groundwater under the site which was flowing into the aquifer. A neighbouring landowner also instituted measures to seek to ensure the decontamination of the water abstracted by it from the aquifer. In May 1993, Pringle entered into agreements with the neighbouring landowner whereby it agreed to indemnify that landowner against such cost as the latter might incur in carrying out that decontamination work.

[6] Pringle entered into a Business Transfer Agreement on 16 December 1997 in terms of which the whole undertaking, property and assets of Pringle relating to the business then carried on by that company ("the Business") were sold to DITL, another subsidiary of Dawson International (Holdings) Ltd, with effect from the close of business on 3 January 1998. That sale included the heritable property relating to the Business. The whole liabilities of the Business were assumed by DITL and DITL undertook to indemnify Pringle against all liability of the Business irrespective of whether those liabilities were present, future, contingent or disputed. The works at the site were closed by Pringle in the latter part of the 1990s, though the precise date of the closure was said to be uncertain. The noter also

averred that, therefore, whether those works were part of the "Business" as defined in the Business Transfer Agreement was also uncertain.

[7] The Business Transfer Agreement required the heritable property of Pringle relating to the business carried on by it to be conveyed to DITL by Pringle. The site was not conveyed to DITL. The former business of Pringle was ultimately sold to commercial interests in Hong Kong. On 22 June 2001, Pringle entered into an agreement in its own name and its personal capacity to sell the site to another company. By virtue of clause 15 of the agreement for the sale of the site, Pringle was required to "retain all liability and responsibility for remediation of the Known Contamination". It also granted an indemnity in favour of the purchaser for any liability the latter might have imposed on it for the "Known Contamination". That expression was defined in the sale agreement as being the tetrachloroethylene contamination of the fell sandstone aquifer. In 2010, the purchaser company went into receivership and the site was sold to the second respondent, which is the present owner of the site.

[8] On 20 January 2012, Pringle was dissolved and thus ceased to have any legal existence. Following upon the appointment of the joint administrators to the Company and DITL on 15 August 2012, in the course of his investigation into the affairs of the group of companies, the noter discovered that in the period since 1998 remediation work had been carried on at the site, initially through the use of a soil vapour extraction system and latterly through the use of a pump and treat system employing two boreholes and pumps with associated equipment. There was some dubiety as to the legal basis upon which that may have been done, as the site had not, from mid-2001, been in the ownership of a company within the group of which the Company was the parent, although water abstraction and discharge licences relative to the said site had been held in the name of the Company.

During the period of the administration, a bare licence had been granted to allow the use of the pump and treat system by the noter in his capacity as administrator pending the outcome of this application for directions.

[9] The noter had invited claims to be lodged, along with proof of debts. By far the largest claim lodged with the noter was a claim at the instance of the third respondent in the sum of £10,366,153 in respect of the staff pension plan of the Company. The sum presently in the hands of the noter and available to pay administration expenses and creditors' claims was £3,296,529.18. As the process of administration had now been on foot for a period of over five years, the noter was anxious that the process should be brought to an end and a distribution made to those found to be true creditors of the Company. The noter had all but completed his conduct of the administration of the Company. In the normal course, he would now want to adjudicate and propose a distribution such as the third respondent now seeks to have made. The existence of the tetrachloroethylene contamination, however, had raised the possibility that the Company may have some form of liability to the first respondent, under the provisions of the Environmental Protection Act 1990 ("the 1990 Act") or the Water Resources Act 1991 ("the 1991 Act"), relative to either or both of the cost of remediating the contaminated land at the site and the cost of maintaining the pump and treatment regime at the site until some unspecified future date. The possibility of such a liability could preclude the making of any distribution in the administration for a considerable period of time. At worst, it might, if either cost was properly to be accounted an administration expense, and in consequence to rank ahead of ordinary unsecured creditors of the Company such as the third respondent, severely diminish the amount available for distribution to such creditors after the expenses of the administration process had been met.

[10] In view of the location of the site, it appeared to the noter that the existence and quantification of any liability which the Company may have would be a matter of English law. The status of any such liability as an administration expense or as a provable debt in the administration was, however, a matter of Scots law as the law governing the administration.

[11] In correspondence, which had gone on for some years, the first respondent had not asserted that it presently had a claim in the administration, but only that further investigations to allow the question of the existence of a claim to be considered would require to be undertaken. Depending upon the outcome of those investigations, and any steps which may thereafter be taken towards the designation of the site as "contaminated land", a claim against the Company may become competent to the first respondent. The first respondent had also expressed the view that, under the relevant English environmental legislation, it was incumbent upon the noter to keep the pump and treat system in place for what appears to be a period of indefinite duration, irrespective of its cost, and that if the noter should fail to do so, he would incur liability for the remediation costs both *qua* administrator and personally. Reference was made to a letter from the first respondent to the noter dated 21 September 2017, as being the most recent iteration of the first respondent's position. The noter had been advised by specialist environmental consultants, *inter alia*, that the pump and treat system was no longer having any appreciable beneficial effect and would therefore be as well closed down.

[12] In these circumstances, the noter found himself faced with an immediate and real problem as to how (if at all) he could bring about a conclusion to the administration and distribute the assets ingathered by him to the creditors of the Company in accordance with their respective rights as provided for in the Insolvency (Scotland) Rules, 1986. The first

respondent seeks to reserve its position as to whether it has a claim in the administration, as to the value of that claim and as to whether or not it ranks as an administration expense. In its letter of 21 September 2017, the first respondent declined even to discuss these issues until such time as the site may be designated as "contaminated land" and a "special site", if, indeed, it ever comes to be so. In its letter the first respondent envisaged that this process could take "several years". The first respondent further contended that since there was a potential for liability of the Company under part 2A of the 1990 Act

> "it would be inappropriate for the Administrator to distribute the companies' assets whilst this remains a real prospect since that would result in the companies not having sufficient funds to discharge any such liability".

That contention appeared to the noter to imply that the potential cost of the environmental remedial work discussed by the first respondent would be an administration expense ranking ahead of ordinary creditors.

[13] The noter was concerned that, in the event that he keeps the pump and treat system operational on an indefinite basis and does not make a distribution, as the first respondent argues he should do, the amount ultimately available for distribution will be reduced through fees payable to him and to advisers, irrespective of the merits of the arguments advanced by the first respondent and the third respondent, thereby prejudicing the interests of the body of creditors as a whole. He was in addition concerned that there may be substantial delay in the resolution of the administration if he is obliged to treat "a far-off claim" from the first respondent as an administration expense and could not in the meantime value that claim. On the other hand, he did not conceive that he was entitled to prejudice the first respondent if it is to prove to be a major creditor of the administration entitled under the Insolvency Rules to participate in the ultimate distribution of the Company's assets. The noter was accordingly placed under the necessity of seeking

directions from the court as to the course he should follow in relation to the conclusion of the administration.

The directions sought

[14] Pursuant to paragraph 63 of Schedule B1 to the Insolvency Act, 1986 and the correlative rules of court, the noter requested the court to direct:

> "(i) whether either or both of the noter and the Company is an "appropriate person" for the purposes of (a) the Environmental Protection Act, 1990 or (b) the Water Resources Act, 1991 so as to come under a liability to the first respondent in relation to the costs of remediation of that plot of land at Tweedside Industrial Estate, Tweedmouth, Berwick-upon-Tweed owned until 2001 by Dawson International (POS) Ltd and sometime the site of a "Pringle of Scotland" factory ("the Plot") and the costs of countering and treating the groundwater under the plot or the aquifer thereunder;
>
> (ii) whether, consistently with his compliance with such duties as may rest upon him under the said statutes of 1990 and 1991 on the one hand and the Scots law anent insolvent administrations on the other, the noter can – or, alternatively, is obliged to – permanently switch off the pump and treat system presently operating on the Plot and thereafter proceed as accords towards the conclusion of the administration of the Company;
>
> (iii) whether, in the event that the Company or the noter is under a liability to the first respondent under either or both of the said statutes of 1990 and 1991 as an "appropriate person" relative to the costs mentioned in direction (i) above, that liability is properly to be treated by the noter as an administration expense or as a debt for which the first respondent could have proved as an ordinary unsecured creditor or, alternatively, might yet prove as such a creditor, in the administration;
>
> (iv) whether, in the event that any such liability as is mentioned in direction (i) above is properly to be treated as an administration expense, the noter may - or, alternatively, is obliged to – require the first respondent and all others claiming to be creditors of the Company in respect of expenses of the administration of the Company to submit claims to the noter for the full value of the sums claimed by them to be such expenses accompanied by such evidence as they may have of the Company's indebtedness to them in those sums and of the status of that debt as an administration expense by the date falling 28 days after the date of intimation by the noter of his call to such alleged creditors to furnish him with such claims and evidence in support thereof."

The first respondent's averments

[15] In its answers to the Note, the first respondent explained the statutory procedure required to be gone through before the first respondent could become the regulator of land under Part 2A of the 1990 Act. The regime under Part 2A was a regime of last resort. The first respondent would not generally take steps to commence that procedure if a voluntary solution could be achieved. It had been the noter's initial position that he did not wish the site to enter the Part 2A regime. In those circumstances, the first respondent had encouraged the noter and the current owner of the site to enter into a voluntary arrangement which would see remediation of the site continue. By letter dated 20 March 2015, the noter had advised the first respondent that he was still seeking to reach a commercial agreement with the site owner. On becoming aware that a voluntary arrangement could not be reached, the first respondent commenced the process to become the regulator of the site under Part 2A of the 1990 Act.

[16] Paragraph 63 of Schedule B1 to the 1986 Act entitled the noter to seek directions in connection with his functions as administrator. Those functions included the making of a distribution. It was accepted that the noter was entitled to seek directions regarding that function. However, the noter was not entitled to seek a ruling from the Scottish courts on the existence and quantification of the liabilities which the Company may have under the provisions of English environmental law, that matter being for determination by the English courts. The liability of any party under the 1990 Act could not be determined until two conditions were met. First, the site would require to be declared contaminated under Part 2A of the 1990 Act by the local authority in whose area it is located. Secondly, the site would require to be designated a "special site" pursuant to section 78C of the 1990 Act. On about 28 July 2016, the first respondent had begun discussions with Northumberland

County Council about inspecting the site for the purpose of determining whether it should be declared as contaminated land and a special site for the purposes of the Act. Those investigations were underway and due to conclude at the end of March 2018. The first respondent anticipated that it would compile its inspection report and report back to the council by the end of April 2018. Thereafter the council would decide whether the land was contaminated land under Part 2A. If it concluded that the land was contaminated land, the council would seek the first respondent's view on whether the site should be a special site. The council would thereafter form its own view on that matter. It was only if the council determined that the site was a special site that the first respondent would become the Part 2A regulator of the site and be in a position to take any action in respect of the site. By letter dated 31 March 2017 the first respondent had provided the noter with its provisional views on the liability of the Company and DITL. However, the first respondent was not in a position to provide any estimate of that liability at this stage.

[17] The directions sought were not orders which the noter was entitled to seek under the relevant provision. In particular the noter was not entitled to seek a direction from the Scottish courts on whether the Company was an "appropriate person". That was not a matter which related to the noter's functions. Nor was the noter entitled to seek a direction from the court as to "the costs of countering and treating the groundwater under the plot or the aquifer thereunder". That was also not a matter related to the noter's functions. Further, the noter had not provided the court with the information it would require to determine that question.

[18] Accordingly, the prayer of the Note should be refused.

The second respondent's averments

[19] The orders sought by the noter included matters governed by English law which were outwith the jurisdiction of the Court of Session. These included the issue of whether the Company was an "appropriate person" under the 1990 Act and whether the noter could permanently switch off the pump and treat system.

[20] Without having sight of the original business transfer agreement, it was unclear to the second respondent which of the Dawson group of companies retained liability for the "Known Contamination", save to say that the second respondent believed, that as parent company with ultimate control, the Company retained liability. The accounts of Pringle for 1998 indicated that there was a sale of trade assets and liabilities to DITL and that Pringle would become dormant from 3 January 1998. The accounts which followed that date showed Pringle to be dormant. However, in contradiction of the transfer of liabilities and the dormant status of Pringle, in 2001, the site was transferred to the purchaser company and Pringle gave indemnities to that company. The indemnity by the dormant company was worthless. The second respondent believed that the Company sought to close the works, in preparation for selling the valuable Pringle brand and intellectual property, while dispensing with the loss-making business, closing the Berwick factory and divesting itself of the site. The second respondent also believed it to be more likely that the conveyance to DITL did not take place due to the Company's wishes that the potential (very substantial) environmental liability should not affect DITL's other operations.

[21] The basis upon which remediation work continued after the Pringle business had been sold and Pringle became dormant was that the Company recognised the responsibility for the original pollution. The Company had constant access to the site and the remediation

equipment remained in the ownership of either the Company or DITL. The second respondent had not given a bare licence to the administrator.

[22] The process of administration had now been on foot for a period of upwards of five years. The noter has had ample opportunity to settle this matter since discussions with the current owners of the former factory site commenced in 2013, and had the noter done so the administration could have been closed long ago. The second respondent had always been, and would remain, open to a commercial agreement in order that the land could be remediated and the administration closed. In respect of ownership, the second respondent understood that the Company was not the owner of the site at the time of the original contamination, save to say that the Company was the ultimate parent company and *de facto* owner of the site and in charge of overall operations. Since the sale of the site to the purchaser company either the Company or DITL had continued to occupy the water treatment plant and premises. It was wrong of the noter to say that he found himself faced with an immediate and real problem about how he could bring about a conclusion to the administration. Since commercial discussions began in 2013, the noter had always had a very real alternative: to quickly settle this matter and close the administration by negotiating a realistic figure with the second respondent, avoid unnecessary court action and the accrual of ongoing administration costs, facilitate the prompt end of the administration, ensure that the remediation program continued without liability, prevent further loss to the public purse and prevent any future claims in the administration from third-party landowners, by concluding an all-encompassing commercial agreement with the second respondent.

[23] The prayer of the note should be refused. The directions sought by the noter which did not relate to his functions as administrator should not be given.

The third respondent's averments

[24] The third respondent generally accepted the averments made by the noter. The third respondent's claim in the administration of the Company was in the sum of £10,366,153 and in the administration of DITL was in the sum of £96,269,399.

[25] The first respondent had no standing in these proceedings. The Company had been in administration for the past five years and the first respondent had not lodged a claim as creditor with the noter or claiming to be entitled in respect of expenses of the administration. The first respondent had also not specified on what legal basis the noter might be personally liable for any remediation costs. The first respondent's conduct had already prejudiced the interests of the presently known creditors in that the limited resources available to the noter had been utilised to deal with the first respondent's general statements, in a situation which the first respondent had not made a claim in the administration at all, whether for a contingent or any other type of debt, and did not require an adjudication of any such claim. Any further engagement by the noter with the first respondent would be unfair to the presently known creditors.

[26] The site in question had never been declared contaminated under Part 2A of the 1990 Act and had never been designated a special site pursuant to section 78C of the 1990 Act. Even if such designations were now made, any liability flowing from them would not constitute a debt which could be relevantly claimed (either by the first respondent or any other party) in the Company's administration. Accordingly, the noter was obliged to utilise the assets available to him in the administration for the benefit of the present creditors only. That obligation extended to no longer funding the operation of the pump and treat system on the site. The same considerations applied to any suggestion by the first respondent that the Water Resources Act 1991 might be relevant in this case. There had been no Works

Notice served on the Company in terms of the 1991 Act either before or after the date of administration, nor had any anti-pollution works been carried out by the first respondent under the 1991 Act.

[27] No creditor or potential creditor had a right in insolvency proceedings to seek to preserve its position as long as it wished, at the expense of all the other creditors. Such an approach undermined the operation of the statutory insolvency regime. Further, *esto* the Company and the noter were obliged to utilise the assets available to the Company for the purpose of any environmental remedial works in relation to the site (which was denied), such sums would not properly constitute expenses of the administration. They were not an expense that would arise from any act or decision taken by the noter during the administration, but would arise out of events which occurred before the administration.

Submissions

Submissions for the noter

[28] The submissions for the noter can be summarised as follows. The objection of the first respondent to the hearing of the case in Scotland was misplaced. The 1986 Act had remitted to the jurisdiction of the Court of Session the determination of any application for directions which may be sought by the administrator under paragraph 63 of Schedule B1 of the 1986 Act. That remit was unqualified by any reference to the substantive law, under which Scottish rules of private international law may be considered to govern the merits of any problem which may give rise to the need to seek directions. In view of the frequency with which commercial relationships crossing the English border were encountered in Scotland, the probability that such issues might arise and give occasion to administrators to seek directions of the court would have been readily foreseeable by Parliament when it

legislated on Schedule B1. Yet no restriction was placed on the ability of the court to pronounce directions even though the merits of the problem which gave rise to the need for directions were governed by the domestic provisions of a foreign law. The indication was therefore that the court in Scotland was expected to be able to give directions to an administrator whether or not a law other than that of Scotland was involved in the problem which gave rise to the need for directions.

[29] Insolvency petitions are no different from other proceedings in this regard and it was clearly envisaged that foreign law issues could be determined upon in such petitions, including those seeking directions *(Liquidator of Bank of Credit and Commerce International, SA, noter* 2007 SLT 1129). The mere fact that the case may involve some element of English law was not therefore a basis for arguing that the case should not be disposed of in Scotland through the mechanism of a petition for directions.

[30] In any event, there was no apparent need for the court to embark on a consideration of any evidence of English law. The legal presumption that English law is the same as that of Scotland was undisplaced. That being so, the question of the ability of the court to entertain issues of foreign law in the context of a petition for directions was irrelevant to the disposal of the cause.

[31] In relation to the title and interest of the first respondent, the noter accepted that he had, of course, called the first respondent, but the first respondent was still required to qualify a title and interest to participate in these proceedings, as that matter has been challenged by another respondent (the third respondent). Further, the *tempus inspiciendum* for the existence of a title and interest was the point at which the Company fell into administration, as it was in relation to creditors *(Bloom* v *Pensions Regulator* [2012] 1 BCLC 248 (para 23 *et seq*). On the face of the averments of the first respondent and its

correspondence, the first respondent was not at that date a present creditor of the Company, indeed, it might never become one. The court in England had in the past declined to permit persons in that position to present arguments in opposition to a petition for directions (*Re Olympia and York Canary Wharf Holdings Limited* [1993] BCC 866) and it was not obvious why the position *quoad* title and interest should be any different in Scotland. It was not for the noter to make out a case that the companies were not "appropriate persons"; rather, it was for the first respondent to make out the case on this matter.

[32] The further challenge by the first respondent was assumed to relate only to the first direction sought. It was that the direction does not fall within the scope of paragraph 63. That paragraph allowed the administrator to seek directions from the court "in connection with his functions". To decide if a direction sought was a proper direction to grant one had therefore to enquire as to the functions of the administrator and then ask whether the direction had a connection with those functions.

[33] The functions of an administrator involved the management of the property, business and assets of the company, the rescue, if that be possible, of the business or some part thereof, the ingathering of the company's assets to the extent that such rescue was not possible and the distribution of the assets to those whom the administrator found to be entitled to participate in such a distribution, in proportion to their respective entitlements. In the instant case, the administrator had to manage the affairs of the companies placed under his charge over a sustained period. That had involved him in dealing with allegations of potential environmental liability which were potentially of material relevance to the ability to distribute assets of the Company for years to come.

[34] The terms of paragraph 63 should be read widely. The object of the paragraph was to allow administrators to be able to bring before the court in summary fashion as many

kinds of problem as possible. The words of the statute were therefore widely drawn. All that was needed was that the subject of the direction in view should be "in connection with" a function of the administrator. That meant that it must have something to do with an administrator's function. That rather limited requirement was clearly met, given the history of this case, by the first direction. It was about whether or not there was a liability to the first respondent for certain costs, which affected the ability of the administrator to make a distribution and end the administration. The "appropriate person" question had something to do with the functions of the administrator.

[35] The points made on behalf of the first respondent regarding jurisdiction were misplaced. Section 21 of the Civil Jurisdiction and Judgements Act 1982 makes provision about jurisdiction. The general jurisdiction dealt with in Schedule 8 to the Act is not apposite when specific grounds of jurisdiction are founded upon. Parliament had passed the 1986 Act and the Enterprise Act 2002 and had provided the circumstances in which an administrator may seek directions.

[36] The question of "appropriate person" was central to the question of whether there is liability. If the first respondent asserts a claim to be here based on that concept that must fall within the meaning of "functions". The issue was really all about who are the creditors of the Company. The cases supported the view that this matter could be looked at in an application for directions. Many questions have been dealt with by applications for directions.

[37] As to the first direction, the question of liability is central to the administrator's functions. If the first respondent is right about being a creditor, the administrator should be dealing with this as a matter within his functions. As to the second direction, if the companies are not "appropriate persons" then the obligations of the administrator are

affected; money can be spent on other creditors. This was surely a matter about his functions.

[38] So far as the objection by the second respondent was concerned, that not all parties had been called, there was no proper foundation for that contention.

Submissions for the first respondent

[39] The submissions for the first respondent can be summarised as follows. At the hearing which took place on 20 December 2017, the first respondent had sought time to adjust its pleadings in advance of any debate. The first respondent was particularly keen to set out in its pleadings the fact that it did consider itself to be a creditor of both the Company and DITL, together with a supporting narrative of the grounds on which the first respondent had that status. The court, however, declined to allow any such period of adjustment, in short, on the view that the first respondent could give notice of its position in its Note of Argument. It had to be appreciated, therefore, that in its Note of Argument the first respondent not only set out a summary of its legal arguments as to the two issues which were to be debated but also, necessarily, provided details of its claim as a creditor of the two companies.

[40] The first respondent's position was that, from 1998 onwards, the Company and DITL assumed responsibility for the site. They had knowledge of the contamination. They also had the means for remediating the site. There were reasonable steps which they could have taken to remediate the site, which they did not take. In those circumstances they "knowingly permitted" the continued contamination of the groundwater under the site. In consequence, they were "appropriate persons" in terms of Part 2A of the 1990 Act and "responsible persons" in terms of the 1991 Act.

[41] In addition, there had been a reduction in the effectiveness of the pump and treat system being operated for the purposes of remediating the site since the noter was appointed as administrator of the two companies. A failure to operate the pump and treat system appropriately would result in further contamination of the groundwater. There were assets in the administrations of both of the companies which would allow the noter to maintain and operate the pump and treat system. In those circumstances, the first respondent considered that it would be unreasonable for the noter not to do so. The first respondent considered that the costs of remediating any further contamination of the groundwater which arose in those circumstances would be payable as expenses of the administration.

[42] The first respondent did not accept, for the reasons averred, that it had caused delays in terms of how it had approached the issues at the site. When the administrations of the companies commenced, the noter's solicitors advised the first respondent that the noter did not wish the site to enter the regime under Part 2A of the 1990 Act. Despite not receiving formal intimation until February 2017, the first respondent reached the conclusion during the course of 2016 that a voluntary agreement might not be forthcoming. On reaching that conclusion, the first respondent took steps to commence the procedure to become the regulator of the site. That procedure was ongoing.

[43] It was important to understand that this is a debate. The position being advanced by the first respondent had to be taken *pro veritate* for the purposes of the argument. As to the letter of 21 September 2017, that had to be viewed in its proper context. It was apparent that for a number of years both before and after the appointment of the administrator steps had been taken to deal with contamination. The noter did not wish to enter the contaminated land regime hence the parties sought to resolve the situation by consent. The first

respondent had commenced the necessary steps which might result in liability. The letter did indeed set out six conditions which would require to be met in order for the first respondent to be liable. The context was that the parties were trying to reach agreement. It was not a letter asserting a claim in the administration. Moreover, it was written by a geologist on behalf of the first respondent. In effect, the first respondent was trying, by the letter, to persuade the noter not to come to court. However, the Note was then presented. In its answers to the Note, the first respondent had set out what it was then able to plead. Detailed advice was subsequently received from English counsel as to the environmental law position. The purpose of the advice was to see whether the first respondent could conclude that the two companies were "appropriate persons". The advice allowed that position to be maintained. The proper approach in this debate was to apply the test of relevancy. The first respondent offered to prove that the two companies were "appropriate persons" and "responsible persons" under the legislation in question. The two companies fell within such designations because together they had responsibility for the site. Apportionment of liability may follow.

[44] It was accepted that mere enactment of legislation is not enough to trigger a liability. However, the third respondent's submission overlooked the first respondent's position as now averred. The first respondent did not rely on the mere enactment of legislation but upon compliance with the necessary condition contained in the legislation for liability to result.

[45] It could not be correct that the first respondent was entitled to lodge a claim only if all of the procedures had been completed before the insolvency event. If that was correct, "appropriate persons" could avoid liability by going into insolvency prior to conclusion of the statutory procedure. The policy of the law was that all creditors must be entitled to

participate in the distribution. There was nothing in the case law which supported the view that in the present case the first respondent could not have a claim as a creditor.

[46] Reference was made to *Liquidator of the Ben Line Steamers Ltd* 2011 SLT 535 and *In re Nortel GmbH* [2014] AC 209 on the matter of contingent liability. In the latter case, in considering the question of whether a statutory obligation came within that category Lord Neuberger had explained the relevant legal principles. These principles were equally applicable to the position of a contingent claim in Scots law.

[47] In this case there were two separate claims. The first was a claim in respect of contamination which was caused or knowingly permitted prior to the date when the companies entered administration. The second was a claim in respect of contamination which may have been caused or knowingly permitted after the date when the companies entered administration. It was accepted that the second category could not be a contingent claim as it arose after the date of insolvency. However, the first was a contingent claim.

[48] There was also an alternative analysis of the first respondent's first claim, namely, that it might also be regarded as being an unascertained claim, that is, a claim which had as its source circumstances, events and relationships which pre-date the insolvency, but which have not, at the date of insolvency, been quantified (*Miller* v *McIntosh* (1884) 11 R 729; *Powdrill* v *Murrayhead Ltd* 1997 SLT 1223; *Asphaltic Limestone Concrete Company Limited* v *Glasgow Corporation* 1907 SC 463; and *Donnelly* v *Royal Bank of Scotland plc* 2016 SLT (Sh Ct) 307. The primary position for the first respondent was that the debt was contingent and the alternative was that it was unascertained. On either basis, however, the important point was that the proposition advanced by the third respondent, that any liability would not form a debt which could relevantly be claimed, was plainly wrong in law.

[49] On the question of expenses in the administration, it was accepted that a claim against the companies or the noter under the 1990 Act or the 1991 Act as an administration expense would involve consideration of the particular statutory provisions and the conduct of the parties in question. These were not matters to be dealt with in this debate. For present purposes, it sufficed to say that it could not be said that the first respondent was bound to fail in making good such claims in due course.

[50] In relation to the first respondent's locus to lodge answers, the first respondent was named in the schedule to the Note. The directions sought related to the claim which the first respondent may have against the Company or against the administrator. In those circumstances, the first respondent plainly had an interest in the directions sought. It would be bizarre were it otherwise; the third respondent's argument to the contrary appeared to contemplate that it is open to the noter to seek orders which directly affect the position of the first respondent without the first respondent itself being entitled to be heard in opposition to the grant of those orders. It was manifestly the case that the first respondent had the necessary title and interest to oppose the grant of the prayer within the Note. To say that the first respondent has no locus to oppose the application because it is not a creditor presupposed the answer to the very question that the court was being asked to determine. Put another way, the court could not conclude that the first respondent had no locus without first determining all matters in dispute between the first respondent and the administrator.

[51] In relation to the appropriateness of the directions sought, in terms of paragraph 63 of Schedule B1 to the 1986 Act an administrator was entitled to seek directions from the court in respect of his functions as administrator. The orders sought by the noter did not relate solely to the manner in which the noter should exercise his functions. Three points

could be made. First, the right to seek directions from the court is the counterpart of the administrator's position as an officer of the court. Where the legislation already provided a procedure for dealing with an issue, that procedure should be followed. It would not be appropriate to seek directions instead of following the procedure, unless all interested parties consented to that proposal. Accordingly, as the legislation provides a method for adjudicating on creditors' claims, it was not appropriate to seek directions on that matter. Secondly, the provision cannot have been intended to provide the court dealing with the insolvency with jurisdiction to deal with disputes which would not otherwise have come within its jurisdiction. Such an interpretation would be in conflict with the provisions of Article 1(2)(b) of EC Regulation 44/2001 (the "Brussels I Regulation"). The European Court of Justice considered the identical wording in the Brussels Convention in the case of *Gourdain* v *Nadler* [1979] ECR 733. In that case, the court determined that, in order for proceedings to be excluded from the scope of the Convention, they require to "derive directly" from the bankruptcy or winding up and be "closely connected" with the proceedings for the insolvency. The European Court of Justice had since confirmed that this approach applies equally to the Brussels I Regulation (*Seagon* v *Deko Marty Belgium NV* (C–339/07) [2009] BCC 347. Against that background, where a dispute between an administrator and a third party did not relate to the proper interpretation of the insolvency law governing the administration, paragraph 63 did not provide the court with jurisdiction to determine the issue. Thirdly, an administrator is in any event not entitled to bring every issue which faces him to the court.

[52] It was accepted that the third and fourth directions were matters in respect of which the noter was entitled to seek directions. However, both of those directions would require the hearing of evidence. Neither was covered by the current debate. In respect of the first

two directions, these did not relate to the noter's functions. The noter was quite clear that the purpose of seeking these directions was that the noter wishes to make a distribution to creditors. That was the function in respect of which the noter was seeking directions. Where, as here, an administration commenced prior to 30 May 2014, the power to make a distribution is governed by section 52(3) of the Bankruptcy (Scotland) Act 1985 as applied to administrations by Rule 4.68 and 2.41 of the Rules. In terms of those provisions, when determining what funds are available to make a dividend, an administrator must take into account "future contingencies". The noter's functions do not involve adjudication or valuation of claims unless or until a claim is lodged. No claim has been lodged by the first respondent at this stage. When a claim is submitted by the first respondent, the noter will require to adjudicate on that claim. Any appeal from the adjudication would lie with this court. In dealing with such an appeal, the normal practice of this court would be to issue letters of request to the English court so that the underlying dispute could be determined in its more natural forum. It would not be appropriate for the court to enter into an analysis of the first respondent's claim until that claim had been adjudicated upon.

[53] The position was similar in respect of the second direction sought. The noter asks whether he is entitled to, or required to, turn off the pump and treat system at the site. It was assumed that the reason that the noter asks this question is that he is concerned that the costs of operating the pump and treat system may be expenses in the administration. The 1990 Act makes clear that there will be circumstances where an insolvency practitioner will be personally liable for the costs of remediating a site. Whether the noter's proposed actions would make him so liable depends on the application of English law to the full facts of the case. Jurisdiction for dealing with any disputes in this regard lies with the English courts. If the noter has concerns regarding the consequences of turning off the pump and treat system,

it is for him, if he wishes to do so, to take advice from those qualified in English law on whether that action would result in him incurring personal liability under the 1990 Act or the 1991 Act. It would presumably also be open to him to raise declaratory proceedings in England if that was felt necessary. However, what he could not do, was to ask the Scottish court to give him permission to turn off the pump and treat system. That was particularly so where his application provided no details of the continuing pollution on the site or the statutory provisions which he is concerned he could be contravening. Both as a matter of pleading, and as a matter of substance, the direction sought was inappropriate: the noter seeks a direction in respect of which he has not provided to the court the material which would be necessary for the court properly to adjudicate upon the issues raised by the direction and in respect of which, in any event, the substantive issues fall to be determined, not by the court having jurisdiction in relation to insolvency matters but, rather, by the (English) court having jurisdiction to deal with the contaminated land regime. This court did not have jurisdiction to deal with the underlying dispute as to liability between the parties.

Submissions for the second respondent

[54] An application on behalf of the second respondent to be represented by a lay representative was granted. In summary, the second respondent made the following points. The second respondent effectively adopted and followed what had been said on behalf of the first respondent. However, the second respondent could offer another perspective and could present an alternative option to resolve matters. Reference was made to the background facts and to the allegedly poor practices, spillages and other unlawful activities at the Pringle site. The history was summarised. Reference was made to how the companies

had operated and how their businesses and assets had been transferred. A detailed chronological account of events was given.

[55] The jurisdiction of the court did not extend to significant matters which were supplementary to the insolvency, and which were the subject of English law, affecting land outwith the court's usual territorial jurisdiction. These matters were not proper subjects for directions by this court. As to the question of whether the first respondent can or could have a claim in the administration, the first respondent will have a claim but will need time to be allowed to complete its investigations and quantify that claim. Therefore, the making of a request for directions from any court in respect of these matters was inappropriate.

[56] The noter had not provided the court with the full facts available to him. The question of whether the noter and/or the Company was an appropriate person under the 1990 Act or the 1991 Act was a significant matter supplementary to the actual insolvency process and was one for English law. Contamination, caused by the Company's actions and omissions, occurred over an extended period of time and now, over twenty years later, and for the foreseeable future, was having serious consequences. The land is situated in England and was subject to English legislation which is enforced by the first respondent, based in England, before courts in England. Furthermore all of the respondents were domiciled in England. Any decisions pertaining to the contaminated land should be deferred to the English courts and should proceed at a more appropriate juncture.

[57] In any event, the request for directions was premature. Given that the first respondent has recently commenced investigations at the site to ascertain the extent of the current contamination and assist in determining any future liability, the second respondent believed it would not be proper for any court to issue directions while investigations were ongoing. The status of the noter and the companies could only be determined following the

conclusions of the current investigations. The requests for directions were not a proper subject for any court at this time.

[58] The two companies previously accepted liability for remediating the site and, since 2012, the administrator assumed liability for the remediation. The second respondent believed that the noter's liability had only increased during that period. That period, in excess of five years, was significant in the history of the contamination being present on the ground. Arguably, the orders were now being sought only because the first respondent had commenced formal investigations and this was an attempt to pre-empt the outcome of these investigations.

[59] In relation to the fourth order sought, it was wholly unreasonable at this stage for the noter to request the court's consent to place a 28 day deadline for claims to be quantified. The first respondent will certainly have a claim in the administration. It is yet to be clarified whether such a claim will be limited to the costs of continued remediation of the site, or whether it might extend to putting the existing remediation equipment back into good order and undertaking increased remediation, required in light of any spread of contamination which has resulted from the lack of proper maintenance during the administration. These were expenses in the administration.

[60] The first respondent was not only a creditor but had sufficient interest in this matter to be involved in the proceedings. The court had a right to hear a more rounded picture of the insolvency in the context of the supplementary matters than that which the noter and the third respondent would portray. The first respondent was the public body with statutory responsibility for the protection of the environment in England and as such had a sufficient interest to remain involved as a respondent in this case. Moreover, the contamination of land and the aquifer underlying Berwick-upon-Tweed was also a matter of public interest

and the first respondent has a role to act in the public interest. Reference was made to *Axa General Insurance Ltd and others* v *Lord Advocate* [2012] SC (UKSC) 122.

[61] If the noter wished the court to give directions which impact on significant environmental matters he should accept that the first respondent has a place in this litigation. Further, the noter had not cast his net widely enough – neighbouring landowners should also have been the subject of service of the note. It was unrealistic to suppose that the first respondent should investigate and designate every contaminated site in case insolvency was to follow. The third respondent's position was incorrect in a number of respects. The reason for the first respondent' claim not commencing sooner was, as the second respondent understood, that discussions had been taking place with the administrator. The second respondent accepted the first respondent's contention that the claim was contingent because the contamination had already occurred prior to administration. There was therefore an existing obligation. The right to enforcement already existed prior to insolvency. Voluntary remediation measures had been taken. The companies were vulnerable to action. The polluter should pay. Had the contamination not been treated voluntarily it would have been subject to the statutory procedures. There had always been some legal obligation on the companies. The first respondent must remain in these proceedings.

[62] It was open to the administrator to reach a commercial agreement to resolve matters. That remained the position. The matters which were the subject of the application for directions were for the English courts. It wasn't for this court to provide immunity to the administrator in respect of these difficult decisions. The first and second directions were not appropriate subjects for this court. The third and fourth directions were proper subjects for

directions but are premature until the outcome of the first respondent's investigations. A commercial agreement would be the preferable outcome.

Submissions for the third respondent

[63] The submissions for the third respondent can be summarised as follows. The first respondent was not a creditor who had, or could have, a valid claim in the Company's administration. The relevant time to assess the first respondent's position was the date when the companies went into administration, and at that date the first respondent did not have any present, future, or contingent claim against the companies. Any amount that the first respondent may wish to claim in the future against the companies, following the completion of its current investigations, could not qualify as "expenses" in the administration, being amounts which would arise out of events that occurred before the administration.

[64] The court should bear in mind that the two companies were in administration and had been for more than five years. The context was therefore one of insolvency. The first respondent had not lodged a claim in the administrations, so one had to try to guess the nature of the claim it may seek to establish. The only possibility was a contingent claim. Reference was made to the cases of *Liquidator of Ben Line Steamers*, *In re Nortel Gmbh*, *Joint Liquidators of Scottish Coal Co Ltd* v *Scottish Environment Protection Agency* 2014 SC 372, *in re Celtic Extraction Limited* 2001 CH 475, and *Re Olympia and York Canary Wharf Holdings Limited*.

[65] A disbursement, in order to qualify as an expense in administration, would need to arise from actual decisions taken by or on behalf of the administrator or during the administration. That was not the case here. An expense of the administration must

reasonably have been intended by the legislature ultimately to be ranked ahead of other debts. The costs of the pump and treat system could not be such an expense.

[66] The first respondent had no standing in these proceedings as it was not a person who has or could have a relevant claim in the Company's administration. In relation to its claim to be a contingent creditor, three points were relevant. First, whatever type of arrangements existed on the ground just before the administration, those were, in the first respondent's own admission, purely voluntary. A party relying on a voluntary obligation carried the risk of its counterparty's insolvency. Secondly, neither the Company nor DITL had any contingent obligation in relation to the first respondent at the date they entered administration. There was no existing legal obligation, nor was there any relationship with legal effect. In fact, even now, five years later, there was no such obligation. Thirdly, for the past five years the first respondent had simply continued acting as if the companies were still solvent. They were not. The shortfall to the creditors was significant and the existing creditors were being prejudiced by the delay in distributions.

[67] Matters could not be kept going on an open-ended basis. This was so contrary to the conduct of the administration that directions were sought. The first respondent was merely seeking to preserve its position. That could take several years. No relevant designations under the 1990 Act or the 1991 Act were made prior to administration. It was wrong that a creditor could effectively just reserve its position at the expense of other creditors. The first respondent required to pursue a statutory procedure in order to ascertain whether it could potentially be a creditor. Any liability depended on that statutory procedure, which had yet to be gone through. There were various steps which required to be taken, all as narrated in the pleadings. These included that it had to be determined that the land was contaminated

and then whether it was a special site. Only then would the first respondent be the regulator.

[68] The letter of 21 September 2017 set out the many conditions to be met before the first respondent had a regulatory function. Reference was also made to the letter of 31 March 2017 which gave provisional views as to the Company's liability. It narrated that it was impossible to reach conclusions about liability at that stage. There was no real prospect of liability prior to administration, as was required, nor was there now. It was completely unrealistic to discuss potential liability when the first respondent was not a Part 2A regulator. It appeared that the first respondent was still not in a position to make any substantial decisions as to potential liability of the Company. An unascertained debt of the type referred to by the first respondent simply did not exist as a relevant category of debt. A debt is contingent if it depends on events which may or may not happen. There had to be an existing legal relationship even if the outcome of the relationship was unclear. A contingent debt is quite different from a mere *spes*. Some sort of obligation is required. In the present case the first respondent just had some hope of an obligation but was not actually a contingent creditor. The two companies had not committed to anything. It was necessary to find a real prospect of liability. The first respondent was effectively saying that the monies of the Company should be spent on the environment. That was the wrong approach. The monies should go to creditors.

[69] Paragraph 3.3 of the first respondent's note of argument now asserted that the companies were "appropriate persons". This was completely contrary to the letter of 21 September 2017. The court should scrutinise the statements made in paragraph 3.3 of the note of argument very carefully. The letter of 21 September 2017 was the main reason why parties were in court. The contention in the note of argument was awkwardly at odds with

the first respondent's position in the letter. Moreover, the two companies were treated together by the first respondent, but the real question was which one was said to be liable, based on what knowledge and at what point in time.

[70] If the court was with the third respondent, and held that the companies owed no contingent obligations to the first respondent, the noter could no longer properly charge any costs of running the pump and treat system as administration expenses. The operation of the pump and treat system was something that arose from events which occurred prior to the administration and was done, before the administrations, on a voluntary basis.

[71] Thus, the first respondent was not and could not be a creditor in the Company's administration. As at the date when the Company went into administration, the two conditions the first respondent refers to (declaration of the land as contaminated and its designation as a special site) were not met. There was therefore no need for the court to engage in the discussion on whether the noter or the companies are "appropriate persons" for the purposes of the 1990 Act or the 1991 Act. Alternatively, as the two conditions were not met at the date of the Company going into administration, the court might consider it appropriate to direct the noter instead to administer matters on the basis that, on the proper analysis of the insolvency law, the Company and the noter have no liability to the first respondent.

[72] In relation to the second direction sought, the court was entitled to direct the noter to switch off, permanently, the pump and treat system. In relation to the fourth direction sought, the noter should be directed to require all parties claiming to be creditors to submit claims to the noter by a particular date. The noter was entitled to seek guidance or directions on the points raised. As the first respondent was not a contingent creditor under

either the 1990 Act or the 1991 Act, the court was invited to characterise the first and third directions as not necessary.

Decision and reasons

[73] The parties addressed as the first or primary issue the question of whether the first respondent can or could have a claim in the administration. They then turned to the issue of the appropriateness of the directions sought. I shall therefore follow that structure. Before doing so, I should indicate that the point raised by the second respondent, that not all parties had been called, is not, in my view, well-founded. The Note was served on the key relevant parties, who lodged answers, and no other persons claiming an interest did so.

Is the first respondent a person who can or could have a claim as a creditor of the Company?

[74] An important development in the procedural history in the present case was that the first respondent set out, in its note of argument and the appendix to it, certain factual propositions upon which it now relies. In particular, the first respondent stated that, from 1998 onwards, the Company and DITL assumed responsibility for the site. They had knowledge of the contamination and also had the means for remediating the site. There were reasonable steps which they could have taken to remediate the site which they did not take. In those circumstances they "knowingly permitted" the continued contamination of the groundwater under the site. In consequence, they were "appropriate persons" in terms of Part 2A of the 1990 Act and "responsible persons" in terms of the 1991 Act. Senior counsel for the first respondent explained how it came to be that these "averments" were included in the note of argument and not the pleadings. No point was taken by the noter or

the other respondents that it was not open to the first respondent, in light of the observations made by the judge at the earlier hearing, to do this. Accordingly, I proceed on the basis that these averments form part of the first respondent's case.

[75] It is undoubtedly correct that the averments appear, in at least some respects, to sit uneasily with the terms of the correspondence referred to by the parties (in particular the letter dated 21 September 2017). That point was taken up by the third respondent and by the court. An explanation of how matters had developed was given by senior counsel for the first respondent. On the basis of that explanation I am satisfied that whatever disparities appear between the first respondent's position in pre-litigation correspondence (which I understand was not the subject of legal advice) and the position now put forward (which was the subject of advice from English counsel), I require to have regard to the matters which the first respondent now offers to prove. I accept the submission for the first respondent that at this debate the only way in which I can characterise those averments as irrelevant is if they are demonstrably untrue or if they would not suffice as a basis for establishing a claim as a creditor. There was no suggestion of the averments being demonstrably untrue.

[76] The first respondent's position is therefore that, subject to the site being designated by the local authority as contaminated land and as a special site, the first respondent has a right under the 1990 Act to have the contamination remedied. I was not addressed in full detail on the relevant provisions, or any contingencies which arise, in respect of any potential liability of the noter or the companies under the Water Resources Act 1991. However, the relevant provision of the 1991 Act appears to be section 161, in terms of which a Works Notice can be served by the first respondent on a "responsible person". In its letter dated 21 September 2017, the first respondent noted that Part 2A of the 1990 Act addressed

issues of potential harm to human health and pollution of controlled waters. It went on to state:

> "Unlike Part 2A, where we currently do not have any powers to act, there are no barriers preventing us from starting to regulate under the Water Resources Act 1991."

The letter further stated that the issuing of a Works Notice under the 1991 Act could not be done until investigations were completed, which it was anticipated would be by the end of March 2018. It would therefore appear that, taking the first respondent's averments *pro veritate*, the only contingency which exists in respect of potential liability under the 1991 Act is the requirement for a Works Notice to be issued.

[77] Having regard to the principles set forth by Lord Drummond Young in *Liquidator of Ben Line Steamers Limited, Noter* and by Lord Neuberger in *In re Nortel Gmbh*, it is in my view clear that the first respondent, on its averments, is a contingent creditor. Lord Neuberger said, in respect of an obligation under statute, that:

> "However, the mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it falls within rule 13.12(1)(b) . It would be dangerous to try and suggest a universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least normally, in order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b) , it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)."

While these observations were made in relation to a specific rule within the insolvency rules applicable in England, it was common ground between the parties that the principles

identified should be applied in deciding whether in the present case the first respondent had a contingent claim in the administration.

[78] Applying these principles, and taking the first respondent's averments *pro veritate*, the companies had taken "some step or combination of steps": they had assumed control of knowingly contaminated subjects, failed to take reasonable measures to remediate the contamination at the site and thus knowingly permitted the continued contamination. As noted above, under the 1990 Act, the first respondent can, if and when the land is designated as contaminated and as a special site, serve a notice requiring remediation. Under the 1991 Act, the first respondent can issue a Works Notice. The steps taken by the companies therefore had "some legal effect" and put them under "some legal duty or into some legal relationship" which resulted in them being "vulnerable to the specific liability in question". I do not consider that, in relation to the 1990 Act, there can be no legal duty owed to, or legal relationship with, the first respondent until the conditions for enforcement are met. The first respondent is identified in the statute as the person responsible for enforcement and that is, in my opinion, sufficient for the existence of a duty or a relationship. Moreover, under the 1991 Act the first respondent is able to serve the notice. There is plainly a real prospect of liability being incurred. The steps which the companies had taken were sufficient to commit them to a contingent liability. It is consistent with the regime under the legislation to conclude that these steps gave rise to an obligation from which a contingent liability arose. Otherwise, a company could knowingly cause contamination and any liability could be avoided by entering into insolvency prior to enforcement becoming possible. To use the words of Lord Drummond Young in *Liquidator of Ben Line Steamers Limited, Noter* (at 543C-D), there existed, prior to the administration, as a result of what the companies had done or failed to do (according to the first respondent's averments) an obligation whose

enforceability is dependent on the occurrence of future events (the designations of the site as contaminated land and as a special site and the issuing of the relevant notices) which may or may not occur. Therefore, there is a contingent liability.

[79] In the present case, the acts giving rise to the potential claim pre-dated the administration, but they did not create a present indebtedness at that point, because, for the purposes of the 1990 Act, the two contingencies required to be satisfied before the first respondent could become the regulator, with enforcement powers, and take remedial action, and for the purposes of the 1991 Act a Works Notice required to be served. I therefore do not consider that the alternative formulation put forward by the first respondent (of a present but unascertained debt) is an appropriate characterisation of the position. However, as noted above, the failures by the companies, on the first respondent's averments, created, prior to administration, what can in my view be characterised as a duty or legal relationship which gave rise to a contingent liability. Thus, the points made in *Bloom* v *Pensions Regulator* and *Re Olympia & York Canary Wharf Holdings Ltd* about the requirement for the contingent liability to exist prior to the insolvency event are met.

[80] I do not consider that the decision in *Re Mineral Resources Ltd* is of any material assistance. In that case the point about whether the first respondent could prove that it was an ordinary creditor was *obiter*. The case turned on its own facts and it would be wrong to understand the effect of the judgement as being that the first respondent could not have a claim in proceedings such as the present, which have as their basis the 1990 Act and the 1991 Act. Similarly, I do not find anything of assistance in the case of *In re Celtic Extraction Ltd*, in which the court rejected the idea that the costs of continuing a licence should be regarded as administration expenses. In relation to the question of expenses in the administration, it does not appear to me that this is covered by the issues identified to be dealt with at the

debate. The question of whether the first respondent can or could have a claim as a creditor relates to the position prior to administration.

[81] I therefore conclude that the first respondent is a person who can or could have a claim as a creditor of the Company. Accordingly, I reject the contentions advanced by the third respondent as to the locus or standing, or title and interest, of the first respondent to appear in these proceedings. In consequence, I also reject the suggestion by the third respondent that I should hold at this stage that the first and third directions are unnecessary and that I should proceed to give the second and fourth directions.

Are the orders sought in the Note a proper subject for directions by the court?

General

[82] Paragraph 63 of Schedule B1 to the Insolvency Act 1986 provides that:

> "The administrator of a company may apply to the court for directions in connection with his functions."

The first respondent argued that the right to seek directions cannot have been intended to provide the court, dealing with the insolvency, jurisdiction to deal with disputes which would not otherwise have come within its jurisdiction. It was submitted, in reliance upon *Gourdain* v *Nadler* that it is only proceedings which derive directly from and are closely connected with the insolvency proceedings which fall outwith the scope of the ordinary rules as to jurisdiction. The first respondent argued that, where a dispute between an administrator and a third party does not relate to the proper interpretation of the insolvency law governing the administration, paragraph 63 does not provide the court with jurisdiction to determine the issue.

[83] In relation to jurisdiction within the United Kingdom, section 21 of the Civil Jurisdiction and Judgments Act 1982 provides that Schedule 8 (which sets out the general circumstances in which a person may be sued in a Scottish court) does not affect:

> "(a) the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds…"

The meaning of section 21 was considered in *Thoars' Judicial Factor* v *Ramlort Ltd* 1998 SC 887, which was an application for reduction of a trust deed based upon it being a gratuitous alienation. The defender was domiciled in England. Section 21 of the Civil Jurisdiction and Judgments Act 1982 was said by the court to be "…concerned with situations in which jurisdiction is conferred on a court in a defined way in relation to a defined matter" and section 34 of the Bankruptcy (Scotland) Act 1985 was held not to be such a provision. Schedule 4 of the 1982 Act deals with the allocation of jurisdiction within the United Kingdom, but Schedule 5, paragraph 1, excludes from Schedule 4 proceedings relating to a company where jurisdiction is conferred on the court having winding up jurisdiction under the 1986 Act.

[84] In my view, paragraph 63 of Schedule B1 to the 1986 Act confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds. Applying the principle in *Thoars' Judicial Factor* v *Ramlort Ltd*, the 1986 Act confers jurisdiction upon this court in a defined way in relation to a defined matter.

[85] The issue raised by the first respondent is really about the scope and effect of the jurisdiction conferred by paragraph 63. I do not consider the first respondent's submission on this point to be well-founded. It seeks to put a gloss on the language of the statutory provision: paragraph 63 is not restricted to matters concerning "the proper interpretation of the insolvency law governing the administration", as was submitted. I do not consider that

such a restriction follows from the decisions of the CJEU founded upon by the first respondent. Reading paragraph 63 in the context of the decisions referred to, the question is whether the directions complained of derive directly from the administration and are closely connected with it. In my opinion, this does not differ in any material way from the meaning of the expression "in connection with his functions" actually used in paragraph 63.

[86] It is of course true that the administrator could simply have taken legal advice on the question of the characterisation of the Company as an "appropriate person" or a "responsible person" for the purposes of potential liability of the Company under the 1990 Act and the 1991 Act, and on related matters, and applied that in adjudicating upon the question of indebtedness, if and when a claim comes to be made by the first respondent. But there is nothing in the terms of paragraph 63 which results in the procedure it provides not being available where the adjudication procedure can be used. In *Brown's Trustee* [2010] SLT (Sh Ct) 45), the learned sheriff was not saying that anything that could be the subject of the adjudication procedure should not be the subject of directions; rather, he observed that where the statute laid down certain procedures for applications to the court to determine matters (as in section 31(6) and section 49(6) of the 1985 Act, now repealed) it would be difficult to envisage a petition for directions in respect of those matters being appropriate.

[87] I accept that an administrator is not entitled to bring every issue which he faces before the court for directions. In *Re T & D Industries plc* [2000] 1 WLR 646, Lord Neuberger commented that commercial and administrative decisions are for the administrator, and the court is not there to act as a sort of "bomb shelter" for him. Commercial and administrative matters can be distinguished from the factual and legal matters raised by the noter in relation to the directions sought. Questions of the kind raised, which affect the treatment of claims or potential claims, can be suitable issues for directions.

[88] In order to apply the test in paragraph 63, it is necessary firstly to identify which functions of the administrator each direction is said to be in connection with and secondly to consider whether there is indeed the required connection.

The first direction

[89] The first direction is in the following terms:

> "(i) whether either or both of the noter and the Company is an "appropriate person" for the purposes of (a) the Environmental Protection Act, 1990 or (b) the Water Resources Act, 1991 so as to come under a liability to the first respondent in relation to the costs of remediation of that plot of land at Tweedside Industrial Estate, Tweedmouth, Berwick-upon-Tweed owned until 2001 by Dawson International (POS) Ltd and sometime the site of a "Pringle of Scotland" factory ("the Plot") and the costs of countering and treating the groundwater under the plot or the aquifer thereunder;"

[90] This first direction is said by the noter to relate to the function of the administrator in distributing the assets of the Company. Distribution is expressly stated in paragraph 65 of Schedule B1 to be a function of the administrator. Whether or not there is a liability to the first respondent for certain costs will affect the ability of the administrator to make a distribution and to conclude the administration. The existence of any such liability hinges upon the key matters raised in the first direction, in particular the characterisation of the noter or the Company as an "appropriate person". (The first direction does not refer to the expression "responsible person" used in the 1991 Act, but I infer that this is intended to be included.)

[91] As I have held above, any liability on the part of the Company to the first respondent is a contingent liability. The contingencies have not yet been met. The first direction does not seek to establish a present liability. Rather, the court is at this stage being asked simply to give directions on a central condition of the existence of any potential liability. It is about

the nature and basis of a potential creditor's claim, or, perhaps more aptly, whether that claim can be disregarded because a fundamental condition for its existence is not met. The direction is specifically focused on the characterisation of the noter and the Company under the 1990 Act and the 1991 Act. This is of course the very point upon which the first respondent bases its right to participate in these proceedings: it offers to prove that the Company is an "appropriate person" under the 1990 Act and a "responsible person" under the 1991 Act. The first respondent has accordingly founded, for its title and interest in these proceedings, upon the very matters upon which the noter seeks the first direction. The first respondent's position on these matters is not admitted by the noter and it therefore follows that it is for the first respondent to establish them. The main issue upon which the direction is sought is therefore already in play. The first direction does not in terms seek a direction on the quantification of the first respondent's claim and it remains to be seen whether actual figures will be put forward or be the subject of dispute. In relation to the point made by the third respondent about the liability of the individual companies, the first respondent offers to prove that they are both responsible and the question of apportionment may arise, which can be dealt with in due course.

[92] It is clear, as noted above, that one of the functions of the administrator is to distribute assets to creditors. Another function is to manage and indeed complete the process of the administration. An issue which is the foundation for a potential claim by a creditor can properly be regarded as a matter arising "in connection with" these functions. It is connected in the obvious sense that aspects of carrying out or fulfilling these functions depend upon the answer to the question. I therefore see no real difficulty in concluding that the first direction falls within the terms of paragraph 63.

The second direction

[93] The second direction is in the following terms:

> "(ii) whether, consistently with his compliance with such duties as may rest upon him under the said statutes of 1990 and 1991 on the one hand and the Scots law anent insolvent administrations on the other, the noter can – or, alternatively, is obliged to – permanently switch off the pump and treat system presently operating on the Plot and thereafter proceed as accords towards the conclusion of the administration of the Company;"

[94] The precise nature of the matters to be considered in respect of this direction are not fully specified. However, it is plain that the duties, if any, under the 1990 Act and the 1991 Act form a critical feature for the purposes of this direction and hence that it is to an extent dependent upon the first direction. As the noter put it, if the companies are not "appropriate persons" (or "responsible persons") then the obligations of the administrator are affected and money can be distributed to the creditors. Again, I do not view this as a commercial or administrative issue. It is a matter which arises in connection with the functions of the administrator, for the same reasons as given earlier. Accordingly, it is a suitable issue for directions.

[95] As senior counsel for the noter observed, there are no averments to the effect that English law on the matters raised in the directions sought differs from Scots law. However, even if English law is to be applied, I see no difficulty in doing so in the conventional manner.

[96] In reaching these views, I have had regard to the lengthy history of how matters have developed and to the fact that the only real obstacles to a distribution of assets and the completion of this long-running administration are the matters raised in the directions. I appreciate that the first respondent's policy is generally to try to proceed on the basis of voluntary agreement (as it made clear in its letter dated 21 September 2017). The first

respondent's position is that it was not until February 2017 that it became clear that no voluntary agreement would be reached, but its investigations had been under way before then and it was said they should be completed by March 2018. In these circumstances, it seems to me that further delay in the completion of the administration can and should be avoided. The directions sought should have that effect. I appreciate that the enforcement duties of the first respondent are subject to the constraint of public funding being available to allow it to carry out the necessary investigations and analysis, but significant progress should by now have been made. In any event, this constraint does not provide a sound basis for delaying the completion of the administration and looking after the interests of the general body of creditors.

[97] Accordingly, I consider that the first and second directions sought by the noter are appropriate subjects for directions.

Conclusions

[98] For these reasons, I shall repel the first plea-in-law for the first respondent and the first and second pleas-in-law for the second and third respondents. I shall also fix a by-order hearing to determine further procedure. In the meantime, I reserve all questions of expenses.