Neutral Citation Number: [2016] EWHC 2522 (Ch)

Case No: 10089 OF 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/10/2016

Before :

MR. REGISTRAR BRIGGS

Between :

(1) DARRYL PRESTON **(2) CRE8ATSEA LIMITED (IN LIQUIDATION)**	**Applicants**
- and -	
(1) MR ELLIOT GREEN (LIQUIDATOR OF CRE8ATSEA LIMITED) **(2) VODAFONE LIMITED** **(3) COMMISSIONERS FOR HM REVENUE AND CUSTOMS**	**Respondents**

MR PRESTON IN PERSON (ACTING WITH A MCKENZIE FRIEND)
EVIE BARDEN (instructed by **FREETHS LLP**) for **ELLIOT GREEN**
JOSEPH CURL (instructed by **DLA PIPER LLP**) for **VODAFONE LIMITED**
MARK MULLEN (instructed by **THE SOLICITORS' OFFICE OF HMRC**) for the **COMMISSIONERS FOR HMRC**

Hearing date: 5 October 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. REGISTRAR BRIGGS

Mr Registrar Briggs:

Introduction

1. The first Applicant, Mr Preston, was a director of Cre8atsea Limited (the "Company") and claims to be a contributory and creditor of the Company. The Company was incorporated on 28 August 2002, and operated health salons and spas. It also sold services and products to the maritime industry. The Company underwent several name changes. It was wound up by the Court on 11 March 2013 at a final hearing of the petition which was presented on 18 November 2011 by the third Respondent ("HMRC"). Mr. Preston's application is for rescission of the winding up order.

Events leading to the winding up of the Company

2. The petition was presented by the third Respondent HMRC, in respect of assessments for corporation tax. The presentation of the petition spurred the Company into action and it filed late returns for HMRC to consider. In the meantime, on 3rd January 2012, HMRC issued an assessment for VAT in the sum of £1,303,098.47. At an adjourned hearing of the petition in July 2012, HMRC confirmed a nil assessment in respect of corporation tax and as the petition was not based on the VAT assessment did not wish to prosecute the petition. The second Respondent, Vodafone Limited ("Vodafone") was represented and sought substitution on a debt of £27,734.42. The court ordered an adjournment, substitution, amendment of the petition and re-verification.

3. At the next adjourned hearing, a month later, the Company disputed the Vodafone debt. American Express Services Europe Limited provided notice that it wished to support the petition as the Company owed £61,895.73. An adjournment was granted. The hearing of the petition came back to court on 24th September 2012 but on the morning of the hearing Vodafone was served with a witness statement from Mr Preston contending that the wrong entity had been billed and a company called Harding Brothers Limited should have been invoiced instead. It was later discovered that Harding Brothers Limited was a former name of the Company.

4. On 29th January 2013 the petition was listed for a hearing on 11th March 2013 with a time estimate of one hour. Although the order does not record attendance by the Company, the undisputed evidence from Mr Way of Vodafone is that the Company was

represented by counsel, and the dispute as to the debt was withdrawn. Mr Way has provided a note of the judgment. Registrar Barber said

> "I have before me what is now an undisputed petition following the substitution of the petitioner for HMRC, effective on 23rd July 2012, some 8 months ago. The company indicated that it would be disputing the petition on the basis of some substantial ground: that the petitioner was seeking payment from the wrong entity.....Following the petitioner's filing of evidence in response to the position, the company went singularly quiet, perhaps because the petitioner's evidence of change of name demonstrated beyond doubt that the petitioner had the right legal entity.....Mr Clark of counsel (very recently instructed) seeks an adjournment to allow time to pay. He seeks 42 days. Notwithstanding being allowed 20 minutes to take instructions as to the manner [the debt] is to be paid, Mr Clark is unable to assist on the fine detail, simply confirming his client's intentions to raise the sums within a period of 6 weeks."

5. The application for a further adjournment was successfully resisted, and an order winding up the Company made on the undisputed debt. Mr Preston was not present at the final hearing.

Standing to make an application to rescind the winding up order

6. Rule 7.47 of the Insolvency Rule 1986 (Rules) provides the court with jurisdiction to order rescission of a winding up order:

> "Every court having jurisdiction under the [Insolvency Act 1986 to wind up companies] may review, rescind or vary any order made by it in the exercise of that jurisdiction....."

7. Rule 7.47(4) provides that an application is to be made within 5 business days of the winding up order. The Practice Direction on Insolvency Proceedings (2014) elaborates:

> "11.7.2. The application should normally be made within five business days after the date on which the order was made (rule 7.47(4)) failing which it should include an application to extend time. Notice of any such application must be given to the petitioning creditor, any supporting or opposing creditor and the Official Receiver.

11.7.3 Applications will only be entertained if made (a) by a creditor, or (b) by a contributory, or (c) by the company jointly with a creditor or with a contributory. The application must be supported by a witness statement which should include details of assets and liabilities and (where appropriate) reasons for any failure to apply within five business days".

8. At the hearing of the application Mr Preston accepted he was not a contributory of the Company. He claimed to be a creditor. The basis of his claim is set out in his first witness statement dated 20 May 2015 where he states that the Company owes him £3,643 "which is made up of unpaid out of pocket expenses which were incurred in relation to costs incurred in the course of my work and duties undertaken for the company." No further elaboration is provided in any of his witness statements.

9. At the hearing of the application a small clip of documents was handed to the court. I was informed the documents were sent to the Respondents the day before the hearing. The clip comprises two invoices. The first is dated 1st November 2010 and is for "reimbursement of emergency consumables for vessels". The sum sought on the face of the invoice is £808. The invoice notes that the consumables were paid in cash. The supporting sales proforma shows that only approximately £580 was invoiced. The accounts of the Company for the year ending 31 December 2010 do not disclose this related party transaction. The purchase of goods on behalf of the Company does not relate to "duties undertaken for the company". The invoice mentions no duties undertaken.

10. The expenditure could possibly fall within the category of 'out of pocket expenses' although the phrase is usually used when an employee has to spend money for their sustenance during the course of a working day. No explanation has been given as to why the Company did not repay the debt between October 2010 and the presentation of the petition. Mr Preston is not mentioned on the supporting invoice from the seller of the consumables. The buyer's address is stated as being 67 Bond Street London, which is not an address occupied by Mr Preston. There is no evidence that the Company did not pay for the goods direct, or evidence that even if Mr Preston did pay for the goods on behalf of the Company, he had not been repaid. Miss Barden, acting for the liquidator, informs the court that there is nothing in the Company books and records that supports the claim of the debt.

11. The second invoice relates to storage of "stock & assets" for the period 2011 and 2012. No particulars are provided as to what stock or assets were in storage. The invoice is dated 1st December 2012 after the Company assets were said to have been sold. There is no evidence that Mr Preston paid for the storage if stock and assets were stored. In any event it is not easy to describe the payment for storage of unspecified goods in an unspecified location over what appears to be a two-year period as "unpaid out of pocket expenses which were incurred in relation to costs incurred in the course of my work and duties undertaken for the company."

12. Mr Preston was asked in court to provide an explanation as to why the invoices were not provided to the Official Receiver, the liquidator or the Respondents to the application until the day before the hearing. Mr McGuinness informed the court that the documents formed part of the exhibit to Mr Preston's first witness statement. The invoices before the court in the newly provided clip, are numbered from page 170 giving support to the argument that they at one time formed part of the exhibit. Mr Curl on behalf of Vodafone, however demonstrates a serious flaw in the contention. In paragraph 6 of Mr Preston's first witness statement he referred to page 170 of the exhibit as being an extract from Companies House. In fact, page 170 of the exhibit is an email dated 16 May 2013. The invoice now tendered as a genuine document is also numbered page 170 of the exhibit. There is no evidence from Mr Preston on this issue.

13. In making decisions about the credibility of evidence set out in an affidavit on an application for summary judgment, Bingham LJ (as he was) said in *Bhogal v Punjab National Bank, Basna v Punjab National Bank* [1988] 2 All ER 296 at 303

> "But the correctness of factual assertions such as these cannot be decided on an application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence."

14. In *Standard Chartered Bank v Yaacoub* [1990] CA Transcript 699 Lloyd LJ, said:

> "It is sometimes said that in an application under Ord 14 the court is bound to accept the assertion of a defendant on affidavit unless it is self-contradictory or inconsistent with other parts of the defendant's own evidence, and that the court cannot reject an assertion on the simple ground that it is inherently

> incredible.....In the present case I ask myself whether it is credible that an oral agreement was made in mid-January of 1985 as alleged by Mr Naidoo in his third affidavit. I have come to the conclusion that it is not."

15. The issue of weighing the credibility of evidence set out in an affidavit or witness statement arose again in *National Westminster Bank Plc v Daniel* [1994] 1 All ER 156, where the Court of Appeal agreed with the dicta of Bingham and Lloyd LJ. Glidewell LJ giving the judgment of the court noted that in *Standard Chartered Bank v Yaacoub* "Lloyd LJ posed the test: is what the defendant says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence." This approach is not confined to applications for summary judgment or striking out. It has been adopted by the courts in many different situations where there is no oral evidence, and in an insolvency context: see for example *Portsmouth v Alldays Franchising Limited* [2005] BPIR 1394

16. In my judgment the description of the debt in Mr Preston's witness statement does not match the invoices which are intended to support the debt. The inconsistencies have not been explained; there is a failure to provide adequate supporting documentation for the invoices, a failure to explain why the alleged debt was not paid while the Company traded, a failure to explain why the Official Receiver or liquidator had not seen the invoices until late in the day and a failure to reconcile the exhibit pagination.

17. The evidential inconsistencies, failures to properly explain or elaborate upon his contention that the Company owes him a debt, lead me to conclude, on the balance of probabilities, that the assertion of his status as a creditor of the Company cannot be relied upon.

18. As a result of this finding Mr Preston does not have standing to make the application and the application must fail. In deference to arguments made by the parties during the course of the one day hearing, and in case I am wrong in reaching the conclusion that Mr Preston is not a creditor, I shall go on to consider the other issues raised.

The application to extend time beyond 5 business days

19. Any delay in making an application for rescission is serious. The reason for the short time limit has been explained in several authorities but most succinctly by Hart J in *Oakwood Storage Services Ltd* [2003] EWHC 2807 (Ch) (28):

> "The fact is that the time-limit in r.7.47(4) is put there for the very good reason that a winding-up order affects more persons than simply the petitioning creditor and the company itself. It has long been the case for that reason, the court is extremely guarded in the exercise of its jurisdiction to review or rescind a winding-up order and has always insisted on very strict time-limits for the making of such an application."

20. In a similarly succinct manner Lightman J in *Leicester v Stevenson* [2003] 2 BCLC 97 explained what an applicant had to do and how the court should exercise the jurisdiction on an application where the period of extension is substantial (paragraph 14):

> "any extension of time must be justified and strictly justified if the extension is to cover any substantial period. It is a jurisdiction to be very cautiously exercised."

21. Every case has to be dealt with on its own facts but Mr Curl and Mr Mullen submit that the court would be breaking new ground if it extended time in this case. The extension of time application in *Leicester v Stevenson* was for three years and rejected. In *Re Mid East Trading Limited* [1997] 2 BCLC 230, fourteen months was too long; seven months was too long in *Wilson v The Specter Partnership* [2007] BPIR 649; and Mr Philip Marshall QC (sitting as a deputy High Court judge) found four months too long in *Re Metrocab Ltd* [2010] 2 BCLC 604.

22. A contested oral hearing for permission to appeal in *Metrocab Limited* was heard by Lord Justice Jacob [2010] EWCA 1572. In my judgment he made the following helpful observation:

> "That leaves me simply with the original application, based as it is on the suggestion that the judge exercised his discretion wrongly as regards extending time. I cannot begin to think that he exercised his discretion wrongly. The period provided in the Rules is very, very short: seven days. The purpose of the Rules is essentially to deal with some mistake that has been made in the winding up or something that can be put right very quickly such as a sudden influx of cash. The purpose of the Rules is not to allow those behind the company to spend a lot of time trying to raise funds and the like and then come back much, much later, which is what happened here. The rule provides for seven days only because it is vital that once a winding-up order has been made, people know where they stand

> and can act on it. This is a very, very short period. I know of no other rule that is so short. Periods for appeal are three weeks, six weeks, and so on and so forth. They are not tight as this. The three and-a-half month and four-month periods involved here is simply way too long. I cannot see any realistic prospect of the Court of Appeal interfering with the judgment below.

23. Mr Preston accepted he knew of the winding up order on 11 March 2013. Direct access counsel had been instructed by the Company and worked on and off through-out the proceedings. Counsel was instructed in relation to another application to rescind in respect of a related company by June 2014. The application to rescind this winding up order was not made until 20 May 2015.

24. In *Metrocab Limited* at first instance the Deputy Judge considered the principles to be applied to the exercise of discretion to extend time. The Deputy Judge adopted the reasoning in *Sayers v Clarke Walker* [2002] EWCA 645 which concerned applications for permission to appeal out of time. In that case Lord Justice Brooke said that if a case was complex the check list in CPR r 3.9, concerning relief from sanctions, should be applied. The Deputy Judge considered the reasoning provided by Lord Justice Brooke:

> "The rationale is that, given the Applicant has not complied with a time limit in the court rules, if the court is unwilling to grant him relief from his failure to comply through an extension of time, the consequence would be that the order of the lower court would stand and he could not appeal it. Even though this was not a sanction expressly "imposed" by the rule, the consequence would be exactly the same as if it had been: "and it would be far better for courts to follow the check-list contained in CPR r 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."

25. Applying that rationale to insolvency proceedings the Deputy Judge said (paragraph 15):

> "In my judgment this analysis is equally applicable in the context of an application for an extension of time such as that made by the Applicants in this case. Although the application is made under the Insolvency Rules, r 7.51 of those rules applies the practice and procedure of the High Court (except so far as inconsistent with the

provisions of the Insolvency Rules). If the Applicants are unsuccessful in obtaining an extension of time the consequence will be that the winding-up orders will stand. The consequence will accordingly be the same as if r 7.47 of the 1986 Rules imposed a sanction for not making an application within the seven day period provided for.

26. Mr Curl for Vodafone submits that the reasoning of the Deputy Judge is that all relief from sanction applications must satisfy CPR 3.9. The inability to make a rescission application as a result of being out of time is similar to having a sanction imposed. Relief is required. Mr Curl argues that there may be good reasons why the CPR may not apply to an application to extend time to make a rescission application. Mr Mullen and Miss Barden submit that the CPR should be applied by analogy as in reality the Mr Preston is seeking relief from sanction.

27. The argument against the reasoning provided by the Deputy Judge in *Metrocab Limited* is as follows: (i) there is no sanction within the CPR meaning, namely a penalty for disobeying an order or rule; (ii) the wording of CPR 3.9 does not lend itself to the rescission of a winding up order context (namely, for litigation to be conducted efficiently and at a proportionate cost); it is simply an indulgence to extend time and the court knows that its discretion should be exercised with great caution; (iii) CPR 3.9 requires the courts to consider all the circumstances of the case, but there is no need to consider all the circumstances, just the relevant circumstances relating to the time lapse from 5 days after the making of the winding up order; (iv) unlike many applications to extend time where sanction is imposed, the purpose of rescission is not to have a second bite of the cherry in argument terms, but to rectify an obvious mistake; (v) a winding up is a class remedy, and the class, as well as those administrating the winding up, are entitled to the certainty of a court order; (vi) the five-day limitation period is peculiar to winding-up orders for that reason: see the commentary in *Insolvency Legislation Annotations and Commentary* 5th Edition (Jordans) and judgment of Lord Justice Jacob in *Metrocab* (supra); and (vii) in any event the courts have provided clear and uncontroversial guidance to both rescissions and applications to extend time in the context of rescission: to add the application of CPR 3.9 on top of the established guidance is unnecessary and may lead to confusion.

28. The Insolvency Rules expressly provide that that the "CPR....apply to proceedings under the Act or Rules with any necessary modifications, except so far as inconsistent with these Rules.": r.7.51A(2). It is clear from a reading of this rule that the CPR does not apply to all extensions of time provided by the Insolvency Act 1986 or Rules. In my judgment the CPR does apply to this application but perhaps for different or perhaps additional reasons to that given by the Deputy Judge in *Metrocab Limited.* I applied CPR 3.9 to an application to extend time for the filing of an appeal against a decision made by liquidators of a company to admit a proof of debt in *McCarthy v Tann* [2016] EWHC 542 (Ch). The reasoning was that an appeal against a rejection of proof is a challenge to a decision made by an office holder and involves litigation. The application to extend time for bringing an application to challenge was the first step initiating litigation. In *Re Lehman Bros International (Europe) (in administration)* [2014] BPIR 1259, David Richards J (as he was then) said:

> "In considering an application to extend time in the context of litigation brought under the Insolvency Act 1986 and governed by the Insolvency Rules the approach set out in the current version of the CPR....applies by reason of r.7.51A(2)....In this respect insolvency litigation is no different from any other type of litigation. This approach is, however, less obviously applicable to applications to extend time outside the context of litigation. The whole thrust of Sir Rupert Jackson's review and the approach of the courts to extensions of time and relief from sanctions is driven by the important public interest in avoiding unnecessary delays in litigation and the need, therefore, to emphasise the importance of complying with time limits set out in rules, practice directions and orders. I am not aware of any similar review having been conducted into the conduct of insolvencies. In any event, the two matters specified in CPR 3.9 are by their terms applicable only to litigation."

29. In my judgment the CPR would not apply to a time limit for an office holder to file a report: it is clearly not litigation. It does not initiate a challenge. It may be that not every court proceeding will initiate a challenge but there is no need to decide that today. The application to extend time to rescind a winding up order is made within existing winding up proceedings, and if the application does not initiate a first step, it continues what is already in existence. The application of CPR 3 is not inconsistent with the Rules.

30. As CPR 3.9 applies the three stage test provided by the Court of Appeal in *Denton & Ors v TH White Limited* [2014] EWCA Civ 906 gives guidance and requires consideration:

> "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"

31. In respect of the first stage, the application was made more than two years after the winding up order. The researches of counsel have demonstrated that there is no reported decision where an extension has been given for such a large amount of time. Mr Mullen described the delay as "simply inordinate". Mr Curl said that the delay was not only "inexcusable" but "extreme". I agree with these descriptions. I have no doubt that the delay is serious and significant. It is serious because of the time period and significant as there is potential prejudice to creditors. It is also significant as other parties have been or will be affected by the delay: liquidator has been in office for more than two years; the official receiver and the liquidator have incurred costs; and creditors have submitted proof of debt. The Miss Barden for the liquidator informs the court that he is investigating the events surrounding the Company sale of assets in 2011 and Mr Preston has not yet co-operated.

32. As a result of the delay being serious and significant I move onto consider the reasons for the delay. Mr Preston's account of the reasons for the delay are:

    32.1. he was ill and not fit for work for a period of 9 months;

    32.2. as a litigant in person he was unaware of the strict time limit;

    32.3. he was corresponding with HMRC as to the VAT assessments and did not appreciate that HMRC would appoint a liquidator.

33. The reasons for delay are not good reasons for delay. As regards his ill health it has not been questioned that Mr Preston was signed off sick for a period of time, however there is

no explanation for the delay occurring from the period 11th March 2013. Even if he were not well, there is no medical evidence to demonstrate that Mr Preston was unfit to file and serve an application. In any event, I have noted above that the Company was represented by solicitors and counsel at the date of the making of the winding up order. I infer that Mr Preston, as its director, had the benefit of legal advice at the time the order was made, yet did not make an application to rescind or instruct others to make the application. This is unexplained.

34. In addition, there is a curiosity about Mr Preston's ability to make an application to rescind the winding up order in respect of Beta Retail Limited (another company in which Mr Preston was a director) and not the Company. The application to rescind in relation to Beta Retail was made in July 2014. Accordingly, Mr Preston, acting in person or with the assistance of direct access counsel, knew by at least July 2014 that there was a strict time limit to adhere to. In any event there is nothing in the CPR, the Rules or Insolvency Practice Direction that permits the court to deal with litigants in person any differently from any other party. No extra time can be afforded to Mr Preston as a result of his status as a litigant in person.

35. Mr Preston thought that time should be extended as he was in correspondence with HMRC. If this is the reason for delay it is not a good reason. Even if he were fully engaged with the correspondence an application to rescind could have been made.

36. Taking into account all the circumstances of the case, this is not an application that should succeed. It is relevant to have regard to the following factors:

    36.1. The winding up order was regular;

    36.2. The petition debt was accepted at the hearing of the winding up;

    36.3. An adjournment was sought at the final hearing because the Company could not pay its admitted debts as they fell due;

    36.4. American Express is a creditor of a large sum and its interests in the winding up proceedings need to be protected;

36.5. HMRC have a large claim and its interests have to be protected through the sanctity of a properly made winding up order;

36.6. The Company remains insolvent and has not traded for many years;

36.7. If there is doubt about the proofs that have been or will be lodged, the liquidator will be well placed to challenge them: as Mr Preston accepted; and

36.8. Lastly the application to extend time has not been 'strictly justified'.

37. I shall deal with the substantive grounds for rescission in brief.

Grounds for rescission

38. The onus is on Mr Preston to satisfy the court that this is an appropriate case in which to exercise the discretion to rescind. It will only be an appropriate case where the circumstances can be described as exceptional, and the circumstances relied upon should include a material difference from those that were before the court at the final hearing when the winding up order was made.

39. Mr Preston submits that an order of rescission is required to correct an obvious injustice. In his first witness statement he claims that no money is owing to Vodafone or HMRC

> "I should stress that by the time the [winding-up] order was made the company was no longer and had personally paid all of its known liabilities in full....I am not aware of any other creditors aside from the disputed amount with HMRC..." (sic).

40. In his second witness statement Mr Preston claims that any nomination of Mr Green as liquidator by HMRC was done on a false premise and that as a result all liquidation costs should be borne not by Company but by HMRC. In his third witness statement (which is just shy of 150 pages and was drafted with the assistance of counsel) he details his concerns regarding the investigations undertaken by HMRC. In his fourth witness statement (dealing with an application to adjourn the hearing of the application for rescission - which was refused) he says that documents held by the liquidator will assist with the rescission application and that he is at a disadvantage without them.

41. The evidence is that the Company is insolvent owing several millions of pounds. There is more than one creditor and in any event there is no evidence that the petitioning creditor has been paid. There is no evidence that the Company or any third party has readily available funds to pay the petitioning creditor, let alone the other creditors. In oral submissions made by Mr. McGuinness on behalf of Mr Preston, Mr Preston accepted that he had no knowledge of what if any documents held by the liquidator could be relevant to the application for rescission. I refused an application to adjourn for the purpose of further disclosure for reasons given in an extempore judgment. Those reasons included the fact that the liquidator had offered Mr Preston the opportunity to inspect and take copies of the Company's books and records but that offer was not taken up.

42. Mr McGuinness claimed that this is an exceptional case where an order rescinding the winding up order should be made as:

    42.1. The Company was placed in a difficult position as a result of the investigations undertaken by HMRC into its tax affairs;

    42.2. Mr Preston had a period of illness following the winding up of the Company. This contributed to a delay in making the application for rescission;

    42.3. There was an appeal in relation to the debt claimed by HMRC in respect of VAT;

    42.4. The conduct of an HMRC inspector was wrongful (and HMRC should not have asked for the appointment of a liquidator).

43. I find that none of these reasons are convincing and would not permit the winding up order to be rescinded. The fact that the Company had to spend time dealing with its tax affairs is not an exceptional circumstance. Every trading entity is answerable for tax. I have already dealt with the delay in making the application above.

44. In relation to the petition debt HMRC acted appropriately when returns were filed late. The evidence of HMRC is that the late returns applied a carry back of losses sufficient to extinguish the petition debt and at the hearing of the petition HMRC sought dismissal of the petition.

45. The VAT debt arose as the Company contended that it had purchased goods from the related company Beta Retail Limited, on which VAT was charged, and then sold the

goods to companies outside of the European Union. Those subsequent sales did not attract VAT. The Company reclaimed its input tax – the VAT it paid on the purchases – and did not have to account for any output tax on the alleged sales, none having been charged. The Company's reclaim was paid by HMRC but as mentioned above, in June 2011, the Company was asked to provide evidence of the transactions. The evidence was, according to Mr Ravat of HMRC, poor, lacked detail and unconvincing. As a result, an assessment in the sum of £1,273,135, together with interest, was raised in January 2012 for the periods December 2010 to April 2011. A further sum of £224,144.95 is also claimed for the period to June 2011. This sum is based on the Company's own VAT return.

46. By reason of section 73(9) of Value Added Tax Act 1994, unless the assessment is reduced, or withdrawn a statutory debt arises. Mr Ravat has reviewed the correspondence passing between the Company and the case officer. He states that there is "no reference whatsoever in any of the correspondence" for a review or an appeal. In any event Mr Mullen on behalf of HMRC powerfully argues that even if there was such a request for a review or an appeal, the Company appears to have done nothing to pursue either in the year prior to the winding up order. Mr Mullen correctly submits that the debt remains due and owing. In any event, as Mr Mullen points out, Section 84 of VATA 1994 provides that the tax must generally be paid before an appeal can be entertained. The tax remains due and payable.

47. In my judgment that is the end of that particular argument. However it is worthy of note that in *Leicester v Stevenson* [2003] 2 BCLC 97 the court considered a submission that the petition debt was not owed by the company that had been wound up. Mr Justice Lightman said:

> "I told [the Applicant] that this is not an appropriate occasion to investigate in the detail which he wished the question whether or not the debt is indeed due to [the Applicant] rather than Lidel. It seems to be that the court when making the winding-up order reached the totally correct view that there was a proper debt, and that on the face of it, and it was accepted by the company, the debt was due....and this was a proper case for a winding-up order."

48. Following this rationale even if the evidence of HMRC can in some way be undermined (it has not been undermined), the statutory debt of HMRC unravelled (it has not been unravelled), and the petition debt of Vodafone swept under the carpet, this is not the appropriate forum to consider in detail the nature of the debt due on the petition. The Company did not dispute the debt at the hearing of the petition and the winding-up order was properly made.

49. Following the same rationale, it is not the appropriate forum to consider or make any findings in relation to the conduct of Mr Nunn (the case officer of HMRC dealing with the Company and its assessments). In my judgment the conduct of Mr Nunn, that has been questioned by Mr Preston, has no bearing on an application to rescind.

50. Mr McGuinness informed the court during his submissions that the assets of the Company had been sold in July 2011, and by the time the Company had been wound up it was not trading. Mr Preston was keen to have the winding up order rescinded so he could use it as a vehicle to re-commence trade. If this was a submission, it has only to be expressed for it to be seen that no exceptional circumstances can arise from it.

Conclusion

51. In my judgment Mr Preston has no standing to make this application. It is not an appropriate case to extend time. Time extensions to make an application for rescission should be exceptional and for very short periods. The delay in making this application is woefully long and has not been adequately explained. Exceptional circumstances would have to be demonstrated to the satisfaction of the court. No such circumstances have been demonstrated.

52. In my judgment as there is no evidence that the petition debt has been paid or will be paid on rescission, the Company is insolvent, the Official Receiver and liquidator's remuneration and fees have not been paid and the liquidator is undertaking investigations into the conduct of Mr Preston as director of the Company, the application to rescind fails.

53. Order Accordingly.