Case No: **19098 of 2009**

Neutral Citation Number: [2015] EWHC 221 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF CORPORATE JET REALISATIONS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
No. 7 The Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date:12 February 2015

Before:
MR. REGISTRAR BRIGGS

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Between:

ELLIOT GREEN — **Applicant**

- and -

(1) DAVID CHRISTIAN CHUBB
(2) MICHAEL JOHN ANDREW JERVIS — **Respondents**

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- -

Mr. Paul Burton (instructed by **Freeth Cartwright LLP**) for the **Applicant**
Mr. Adam Al-Attar (instructed by **Hogan Lovells**) for the **Respondents**
Hearing dates: 17 December 2014

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JUDGMENT

Mr Registrar Briggs:

Introduction

1. Corporate Jet Realisations Limited (the "Company") was incorporated on 29 August 2001 and became a holding company for 6 trading subsidiaries, all of which carried on business in the private jet charter industry. Upon a creditor's

petition the Company was wound up by the court on 25 November 2009. Mr. Green was appointed as its liquidator on 1 March 2010. The insolvent liquidation of the Company succeeded the appointment of David Chubb and Michael Jervis as joint administrative receivers (the "Joint Receivers") on 26 September 2007. The Joint Receivers vacated office on 5 March 2013.

2. By an application dated 27 June 2013 (the "Application") Mr. Green (in his capacity as liquidator of the Company) asks for immediate delivery up of 'all books and records and other documents of the Company and all documents, files and other information which came into existence as a result of the Respondents position as Joint Receivers". Perhaps more controversially the Application also asks that the Respondents deliver up of the 'management buyout sales reports prepared by PricewaterhouseCooper LLP ("PwC") ……', and details and documents relating to 'all work undertaken by PwC prior to entering receivership.' The Application is made pursuant to Sections 234, 235 and/or 236 of the Insolvency Act 1986.

The factual background

3. The Company was a holding company for 6 trading subsidiaries. It was dependent upon lending from the start. The lending came chiefly (if not exclusively) from the Governor and Company of the Bank of Scotland (the "Bank") which provided overdraft and loan facilities. By a debenture dated 28 November 2002 the Bank obtained a debenture securing its loans and, as I understand it, also obtained specific security by way of aircraft mortgages. On 4 April 2007, PwC was engaged by the Bank to investigate the financial position of the Company and its subsidiaries and to report back on the options

open to the Bank and the Company. During the course of the independent business review PwC established that the Company was balance sheet insolvent with net current liabilities of £111m and a negative net monthly cash flow of about £110,000. The Bank instructed PwC to realise its property interests in the Company in order to pay down the liabilities owed. According to the evidence provided by Mr Chubb (the first Respondent) the existing management team made an offer to purchase the business of Company during the course of a marketing campaign.

4. By a letter dated 14 August 2007 the Bank appointed PwC to advise it in relation to the proposals for a management buyout ("MBO"). The letter of engagement was sent to the Company. The Bank required the Company to pay PwC's fees in accordance with the Bank's rights against the Company under the finance documents. Whether or not the Company actually paid the sums due to PwC is not clear; it may be that the Bank paid PwC adding the costs to its security. It was agreed that the advice provided by PwC to the Bank would be confidential as between those parties.

5. The Bank appointed the Joint Receivers on 26 September 2007 and on the same day they effected a sale of the business and assets to a company incorporated by the MBO team. It is uncontested that the sale documentation identifies that the value obtained for the Company related to the shares of the subsidiaries. The consideration for four of the subsidiaries was £1-00 each save. One subsidiary (Fly Euromanx) obtained a sale price of £50,000. The price for Fly Euromanx however was deferred but it was eventually realised. As regards the last subsidiary the shares in 328 SSG, were the subject of an

option to purchase. That option was exercised in 2011 for a price of £5,000,000. The sale to the MBO did not include 5 aircraft owned by the Company. The Joint Receivers instructed agents to assist in valuing, leasing and disposing of the aircraft. I shall return to these valuations below. Mr Chubb explains that there was a decline in demand for corporate jets as a result of the recession but nevertheless they obtained sales. In total, the Joint Receivers realised approximately £17,000,000, of which £14,500,000 was paid to the Bank under its security and £2,500,000 was paid in fees and expenses incurred in the course of the receivership.

6. The Joint Receivers ceased to act on 5 March 2013. The final result of the receivership was a shortfall to the Bank of some £98,500,000 with no assets available for distribution to the unsecured creditors of the Company.

7. As regards the winding up, Mr. Chubb says that he was surprised when he heard that a petition had been presented to wind up the Company. He was surprised because the creditor (CALL) knew about the appointment of the Joint Receivers and he says the creditor would have known or could have established without too much trouble that there would have been no assets to collect-in and distribute to the unsecured creditors. Mr Chubb instructed solicitors Hogan Lovells to write to CALL to find out more. The response came in an e-mail dated 5 October 2009 in which solicitors for CALL wrote his client had "serious concerns that the administrative receivership proceedings were flawed……They require details of all transactions concluded by the receivers which can also be reviewed and investigated by a liquidator as can the actions of directors of the company." This

communication put the Joint Receivers on notice that there may be challenges to the receivership and may have coloured their view regarding the liquidator's subsequent requests for documentation and information.

8. Within a week of his appointment as liquidator of the Company Mr. Green wrote to the Joint Receivers asking for an up to date receipts and payments account and the location of the Company records. The request started a chain of correspondence in which the liquidator consistently sought information and documents and the Joint Receivers questioned the reasons for delivery up and denied having the Company records stating that they were handed over to the MBO team. Mr. Green did not accept the answers provided, referred to the obligations of the Joint Receivers under the Statement of Insolvency Practice number 1 and eventually issued the Application. The Joint Receivers also identified privilege and confidentiality as reasons for not delivering the documents they held. In an e-mail dated 17 September 2010 the liquidator asked for a list of documents held and 'identify upon it those which you claim some form of qualified privilege'. One issue that seemed to loom large in the liquidator's mind was a payment of c£2.4million to an Isle of Man bank account. The liquidator was of the view that the payment was made by the Joint Receivers on behalf of the Company and wanted to know the reasons for such a large payment.

9. The Joint Receivers say that they provided (on 27 September 2013 - after the issue of the Application), Mr Green with a great volume of books and records which amounted to some 11 lever arch files. This did not satisfy Mr Green. In evidence Mr. Chubb contends that the Joint Receivers' policy in relation to the

Company was to correspond with third parties by letter, and the Receivers' disclosure of Company property was made on that basis. He explains that the Joint Receivers produced several thousand e-mails in relation to receivership and that 'the majority of these emails will not be Company property, as they are made up of PwC internal correspondence, or correspondence which came into being as a result of PwC's duties to the Bank'.

The Application

10. In support of the Application Mr. Green says that he needs to review the documents set out in the Application in order to establish the work carried out by the Joint Receivers and examine the justification for the substantial fees they were paid. In his first statement dated 12 June 2013 he explains:

> "I need to establish exactly what assets the Respondents' realised as Administrative Receivers and whether the assets sold were for proper consideration. In addition, I need to establish why the Respondents paid £20 million from the Company's assets to the Isle of Man Bank as referred to in Mr Meens email dated 30 July 2010. Further, there are a number of complex conduct issues, relating to the Respondents' appointment as Administrative Receivers of the Company, and possible criminal issues which I need to investigate and such need all available information including the information sought in the application."

11. In his second witness statement dated 8 July 2013 Mr. Green states that the Joint Receivers have continually refused to provide him with all documents they created, received or issued in relation to their duty to manage the affairs of the Company. He elaborates in his third witness statement dated 17 December 2013:

> "As stated, I have a duty to investigate the affairs of the Company and this includes establishing what assets of the

> Company have been sold, at what price and the circumstances surrounding the sale of the same. This can only be achieved by reviewing contemporaneous documentation including all sales agreements and emails sent at the time of sale(s)…… Notwithstanding this and that the Application does not make specific provision for production of any confidential documents where the Receivers acted as agent for the Bank, I am of the position that the emails sent between the Bank and the Respondents, which could be considered confidential should be disclosed by the Respondents. The Bank is currently under investigation for fraudulent trading in respect of its involvement with the Company and accordingly, I believe the emails should not be concealed from me and that it is in the interests of justice that the grounds of confidentiality be overridden (sic)".

12. Mr Green adds that part of his investigation concerns the Bank's involvement in the insolvency of the Company and its role in the sale of its assets. He explains prior to the incorporation of the Company, another company known as Chauffair Limited operated executive jet charters and was supported by three secured creditors including Capital Bank Plc ("Capital"). Capital appointed two individuals from PwC (not Mr Chubb or Mr Jervis) as joint receivers who then sold the assets of the company in a similar way to the sale of the Company's assets. The purchasing company was known as Quayside Corporate Services Limited which was incorporated for the purpose of purchasing the assets of Chauffair Limited. Mr Green states:

> "I understand that on 8 January 2013 the Crown Prosecution Service ("the CPS") charged Mr Scourfield, Mr Mark Dobson (another Bank employee), Mr Mills and Mr Michael Bancroft with Conspiracy to Corrupt contrary to Section 1 of the Criminal Law Act 1977. In summary, the allegations are that Mr Mills and Mr Bancroft provided Mr Scourfield with numerous high value gifts in return for the Bank recommending Quayside Corporate Services Limited's ("Quayside") services. I have seen some reference to Quayside in Board Minutes for the Company and Club (copies of which are exhibited at pages 417 to 439 of EHG3). It has been suggested to me in the past either by creditors or reports that I have come across that the Company may have utilised the services of Quayside. In

> addition, I have also been provided with a spreadsheet……..which details payments made by the Company. The spreadsheet refers to two payments made by the Company to Quayside The role of Quayside (which is understood to be Mr Mills' company) with the Company may need to be more fully investigated but it appears to have been some kind of turnaround company which may have been utilised by the Bank."

13. The payments made by the Company to Quayside were made prior to the appointment or involvement of the Joint Receivers.

14. As regards the payment to the Isle of Man bank account Mr Green says that he has identified the payment as an area of investigation in order to determine whether there has been serious wrongdoing, and possible criminality, on the part of Bank in relation to the Company and its subsidiaries.

The legal parameters of the application

15. Section 234 of the Insolvency Act 1986 allows an office holder to obtain company property. It provides (where relevant):

> (1) This section applies in the case of a company where —
>
> (c) the company goes into liquidation….
>
> (2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.

16. Section 235 of the Act relates to the provision of information and expressly names administrative receivers as persons who should provide such information:

(1) This section applies as does section 234; and it also applies, in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver, whether or not he is the liquidator.

(2) Each of the persons mentioned in the next subsection shall—

(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and

(b) attend on the office-holder at such times as the latter may reasonably require.

(3) The persons referred to above are—

(e) in the case of a company being wound up by the court, any person who has acted as a…….. administrative receiver …….. of the company.

17. The Joint Receivers are parties that come within section 236(2) of the Insolvency Act 1986. This section applies as does section 234 and give the court a power to require a person who falls within section 236(2) to produce any books, papers or other records in his possession or under his control relating to the insolvent company. In respect of this section Mr. Burton submitted that the extensive jurisprudence regarding the exercise of discretion under s.236 is not necessarily relevant in respect of company property although it does have a relevance in respect of books and records sought prior to the appointment of the Joint Receivers. He submits that there would have to be exceptional circumstances for the court to deny a liquidator company property when asked under section 234. He submits that the section is mandatory in nature: the Joint Receivers have no choice but to comply once asked by the office-holder. He accepts that this is not the case in respect of

information or property that cannot be classed as property of the insolvent company.

18. Sections 234, 235 and 236 may be termed the office-holder's 'investigatory provisions' as their prime purpose is to provide an office-holder with the ability to investigate and understand the affairs of the insolvent company by obtaining its property (books and records) and gaining relevant information. Lord Collins explained the origin of section 236 in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 (40):

> "This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542, the authorities (including, among others, the Lord Chancellor and the Chief Justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day."

19. The investigatory roll of the provision was explained eloquently by Buckley J in *Re Rolls Razor Ltd* [1968] 3 All ER 698 at 700 (in relation to the predecessor of section 236, section 268 of the Companies Act 1948):

> "The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible … to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way,

> concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim." (Emphasis added.)

20. Buckley J's explanation of the purpose of section 236 was approved by Lord Slynn in *British and Commonwealth Holdings plc v Spicer & Oppenheim* [1993] AC 426 at 438. *British and Commonwealth Holding Plc* is also authority for the proposition that section 236 is not limited to obtaining documents and records in order to reconstitute the company's knowledge. The jurisdiction is wide and because it is wide the court has to carrying out a balancing act:

> "…..the applicant must satisfy the court that, after balancing all relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrators' requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims……"

21. The limits of section 236 were challenged more recently in a directors' disqualification case, *Re Pantmaenog Timber Co* [2003] UKHL 49. Lord Millett explained (paragraph 64):

> "Section 236 contains no express limitation on the purpose for which it may be invoked. Of course it may be invoked only for a legitimate purpose in relation to the company which is being wound up, and the court, which has discretion to make or refuse an order, should be astute to see that the powers conferred by the section are not abused. It would plainly be an abuse to use those powers for a purpose which is foreign to the functions of the applicant in relation to the company which is being wound up. But I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the

> insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company."

22. Accordingly the court will need to be satisfied that the applicant in any case has a reasonable requirement for the material sought by the order, that the section is not been used abusively and that production does not impose an unnecessary and unreasonable burden on the Respondents: *Galileo Group Limited* [1998] 1 BCLC 318 provides an example where the court was careful to ensure that a reasonable requirement could be identified. If a liquidator, as has been suggested in this case, is using the application to obtain evidence or admissions for use in an intended negligence or other action against the Joint Receivers rather than to gather information in order to decide on the merits of an action then the purpose would be improper: see *Sasea Finance Limited* (in liquidation) 1 BCLC 559. In a similar vein the Privy Council has cautioned against relief that is unconfined in nature and scope: *Singularis Holding Limited v PricewaterhouseCoopers* [2014] UKPC 36. A balance has to be struck in every case. A practical example of a balance being forged by the court when confronted by opposing policy considerations may be observed in *Re Trading Partners v Lomas* [2002] 1 BCLC 655, where Patten J (as he was) balanced the need of the liquidator to obtain the working papers of receivers appointed under a debenture (pursuant to the investigatory provisions), with the requirement of the receivers to comply with confidentiality agreements and maintain their rights in respect of material subject to an implied undertaking or otherwise covered by legal professional or litigation privilege.

23. The requirement of reasonableness introduced into section 236 by the common law is expressly present in section 235 (2) of the Insolvency Act 1986. The burden of proof lies with Mr. Green to show that he reasonably requires the documents and records sought in his application. If this is not self-evident from the language of the section, then Kitchen J made it clear in *Green v BDO Stoy Hayward LLP* [2005] EWHC 2413 (paras 28 and 29):

> "The scope of s 236 has always been understood to extend to reconstituting the state of the company's knowledge, however it is now well recognised that the scope of the jurisdiction also extends to all documents which the liquidator may reasonably require to see to carry out his functions: *British and Commonwealth Holdings (No. 2)* [1992] AC 426.
>
> Nevertheless, it is for the liquidator to establish his case under s 236. He must show that he reasonably requires the documents sought. In this connection the view of the liquidator is normally entitled to a good deal of weight: *Sasea Finance Ltd (Joint Liquidators) v KPMG* [1998] BCC 216 at 220. It is also recognised that the liquidator is required to establish only a "reasonable requirement" for information, not an absolute need and that he is under no duty to make out the requirement in detail. The court ultimately has an unfettered discretion which it will seek to exercise in the interests of the winding up without being oppressive to the party the subject of the application. As Lord Slynn explained in British and Commonwealth Holdings at 439, the proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the liquidator's requirements."

24. When considering the evidence before the court it may attach considerable weight to the office-holder's view. Although not bound by his assessment the office-holder is the person who has conduct of the liquidation and is more likely than able to provide the best and most independent view of his needs in order to carry out his statutory functions.

25. In an attempt to summarise, section 235 enables a liquidator to obtain information about a company (over which he has been appointed) from administrative receivers previously appointed by its debenture holder. Section 236 enables a liquidator to obtain an order for examination of 'any person' whom the court thinks capable of giving information about the matters set out in section 236(2)(c) of the Insolvency Act 1986 and compels production of books and records from that person. Although the purpose is to permit an office-holder to have the means to obtain a comprehensive understanding of the property and affairs of the company over which he is appointed there are limitations. One limitation is the need to show a reasonable requirement for the material sought; a second limitation is that ordinarily it should not be used to obtain sight of confidential material or communications passing between receivers and the debenture holders. This reflects a similar position taken in the High Court Australia where the courts ensure that privacy and confidentiality are not unfairly interfered with: *Hamilton v Oades* (1989) 166 CLR 486. A third limitation is that the section may not be used to obtain an insight into the strategy discussed and employed by the appointed administrative receivers.

26. As regards section 234 there is little or no argument that the court may order a person to deliver up books and records that belong to the company in question. Useful guidance on ownership of documents created during the receivership is to be found in *Gomba Holdings UK Ltd v Minories Finance Limited* [1998] 1 WLR 1231 at 1234A-B:

> "….the ownership of the documents in the tripartite situation of a receivership depends on whether the documents were brought into being in the discharge of the receivers' duties to the mortgagor or the debenture holder or neither. The fact that a document relates to the mortgagor's affairs cannot be determinative. All sorts of documents may relate to the mortgagor's affairs but to which the mortgagor cannot possibly have any proprietary claim."

27. At the present time it is not possible to decide which documents belong to the Company, the Joint Receivers or the Bank as they are not before the court. I shall order that documents belonging to the Company be delivered up and if an issue arises in the future as to whether a particular document is Company property the parties may have permission to apply. In addition I accept the submission made by Mr. Burton that it is not possible for the liquidator to know when or if the Joint Receivers have produced all the Company property as requested. Mr. Burton suggested in his submissions, that the Joint Receivers produce a list of all such documents. The parties should seek to agree a workable solution to achieve the production of documents and records that fall within section 234 and if not I shall make appropriate orders.

The Evidence in support of the application pursuant to section 235/236

28. The documents and records in issue fall into two broad categories. First the thousands of e-mails exchanged between the Respondents and the Bank. The main issue for the Respondents is the number of e-mails but they also claim confidentiality in relation to some. They claim it would be disproportionate to order all e-mails in respect of the Company to be delivered up. Further it is

argued that there is a failure on behalf of the liquidator to show that there is a reasonable requirement in respect of all the e-mails, particularly those created prior to the receivership when Mr. Chubb (and possibly Mr. Jervis) carried out an independent business review for the Bank. Related to the first category is the second category: 'details' of all work undertaken by PwC prior to the appointment of the Joint Administrators: during the course of the hearing this came to mean the general working papers relating to the independent business review undertaken by PwC.

29. As foreshadowed the onus is on Mr. Green to demonstrate that he has a reasonable requirement for the documents, records and information he seeks in the Application where those documents are not property of the Company. I shall attach considerable weight to his evidence on the basis that Mr. Green is in the best position to know what he needs in order to carry out his functions. However I also attach weight to the considered response made by the Joint Receivers. This is particularly so where the Joint Receivers provide sworn evidence regarding issues answered, details of matters they did during the course of the receivership and the impact further disclosure will have on the Bank. I accept of course that an administrative receiver, unlike an administrator or liquidator, is not an officer of the court. I take this into account. But as Pattern J observed in *Re Trading Partners,* their position as receivers does require them to have regard to the consequences for the debenture holders of disclosure.

30. The evidence in support of the Application is provided in three witness statements produced by Mr. Green. These witness statements have been

criticised by the Joint Receivers as either failing to provide evidence of a reasonable requirement or having an inconsistent quality about the reasons provided for the production of documents and records. It is said that the inconsistencies lead to a conclusion that the reasons advanced are not genuine or at the least demonstrate a scatter-gun approach with the result that the court should lend less weight to Mr. Green's evidence. I do not accept that submission. The liquidator is a stranger to the affairs of the Company so that his task continually evolves. His analysis of the affairs of a company may alter dependent upon new information: like receiving newly discovered pieces of a jigsaw his analysis may alter about how, what, when or if an insolvent company took appropriate action at an appropriate time. His witness statements may reflect a change in emphasis but his requirement to understand the affairs of the Company has not altered. In his first witness statement Mr. Green provides the background to the Application and rehearses some of the correspondence that exists between the parties. He explains that he reasonably requires the two categories of documents in order to:

30.1. review the fees of £66,403 paid to PwC on 29 June 2007 and £333,912 on 2 October 2007;

30.2. consider whether any book debts remained collectible or "the actions taken by the Respondents to collect the outstanding book debts";

30.3. assess whether assets were sold at an undervalue: "all asset valuations obtained by the Respondents in order to enable me to reconcile sale price of assets, business and aircraft sales for what they were actually sold for"

and "whether the assets were sold for proper consideration";

30.4. "to establish why the Respondents paid £20 million from the Company's assets to the Isle of Man Bank";

30.5. consider "…… a number of complex conduct issues, relating to the Respondents' appointment as Administrative Receivers of the Company, and possible criminal issues which I need to investigate and [sic] such need all available information including the information sought in the application".

31. Mr. Burton on behalf of Mr. Green submits:

31.1. It is difficult to explain why particular documents are required until Mr. Green has seen them. He doesn't know what documents are held by the Joint Receivers. The whole point of the Application is to understand what documents are held by the Joint Receivers, to obtain the documents and records and determine whether they lead to a line of inquiry or whether they satisfy existing investigations (such as those outlined above);

31.2. The Joint Receivers should produce a list of all documents they have control over in order to permit Mr. Green to make an informed decision as to what documents he will find useful to his investigations;

31.3 The matters set out in Mr. Green's first witness statement are just examples: there may be other issues;

31.4. The onus of proof to show reasonable requirement is not a high threshold; it means that the requirement does not have to be unreasonable. He accepts that the Rubicon would be crossed if the liquidator had decided to bring proceedings against the Joint Receivers but the

liquidator expressly says he has not made that decision (there is no issue regarding issuing to stop time running under the Limitation Act 1980);

31.5. There is no obligation on a liquidator to explain in his evidence what he is going to do with the documents once he receives them. That is a matter for the liquidator alone;

31.6 The Application is a summary process and detailed evidence is not required;

31.7. There are obvious information black-holes for the liquidator. These black-holes are created as a result of the Joint Receivers failure to produce documents and information required by the liquidator to carry out his functions. The liquidator reasonably requires the production of the documents set out in the Application to obtain a comprehensive understanding of the property and affairs of the Company with which he is concerned.

32. I accept that there is no obligation to explain in detail what the office-holder is going to do with documents but that should not be understood to minimise the need to show a reasonable requirement. Although a list of documents may be useful, to create a composite list of thousands of e-mails may lead to an unnecessary expense, is likely to be disproportionate and oppressive. It would not further the understanding of the liquidator or enable him to obtain advice as to whether to bring proceedings against the Joint Receivers or any other party.

33. In support of the black-hole submission Mr. Burton points to several documents in the hands of Mr. Green that he says gives rise to further questions. First the letter of engagement dated 4 April 2007 (produced by Mr Chubb on behalf of PwC and not the Joint Receivers) is evidence that the work carried out in the period prior to the appointment of the Joint Receivers was undertaken for the Company and the Bank. The letter is addressed to both parties. Clause 4.5 provides that the Company is responsible for giving instructions to PwC and will settle the professional fees of PwC. However that is only part of the story. Appendix 2 states the following:

> "In respect of all elements of the services, the deliverables will comprise the provision of a written report, as well as oral advice in the form of meetings and conference calls. We will prepare and deliver our reports to Mr Andrew Scott at the Bank……The deliverables will be addressed to the Bank…We will not provide to the Group our advice, recommendations and any other part of the deliverables prepared confidentially for the Bank."

34. This is to be read in the context of a letter of confidentiality sent by PwC to the Bank on 30 March 2007 and suggests that PwC had their duties to the debenture-holder firmly in mind during the course of the independent business review. It is also evidence of the asserted confidential nature of the work undertaken. I do not consider this letter of engagement as particularly helpful to the liquidator.

35. A further engagement letter was sent by PwC to the Bank and the Company on 14 August 2007. The letter is said to be a 'second supplemental letter' and 'forms part of the contract'. It reads:

> "In an earlier phase of our work we undertook an AMA sale process in respect of two of the Group companies, Club 328 Limited and Jet Engineering Technical Services Limited, with limited success. Although, there are some interest from third parties, it became apparent that the Company's existing management had a wider interest in acquiring the businesses and, over the last few weeks, it has been working up an offer for the purchase of the shares of all four operating subsidiary companies……..we have assisted BoS to develop an alternative strategy in respect of its lending to Group, in the event that the MBO is not achieved…….The purpose of the Further Additional Services is to assist BoS: a) to consider the MBO offer; b) to consider the issues around the implementation of the Alternative Strategy; and c) to monitor cash during the period until the implantation of either a) or b)."

36. Mr. Burton submits that these passages raise important questions for the investigating liquidator. First what was the Company's wider interest in acquiring the businesses? Second what was the extent of the cash monitoring? He seeks to make good these submissions in the following way. He argues that Mr. Green has a lack of information regarding the MBO and this becomes all the more important as Mr. Chubb states in his witness evidence that the MBO was the only viable option. This is in the context of a sale of a largely insolvent company on the same day as the appointment as the Joint Receivers: there is a lack of transparency. Further the liquidator is unable to gauge whether there was a fair trade for the '328' Shares' sold for £5m and completing in 2011 by the Joint Receivers. Mr. Burton emphasises that it is not for the Joint Receivers to say what documents are relevant but for the liquidator.

37. The last point is perhaps a reiteration of the weight to be given to the evidence of Mr. Green which I have dealt with above. As regards the sale to the MBO

team, the investigation, as Mr. Burton accepts, would relate to the value obtained for the business assets. What the liquidator is seeking to obtain is a comprehensive understanding of the values of the assets so he may determine whether or not the Joint Receives entered into a sale at an undervalue and were negligent as a result. He has made no decision about this, but does seek to investigate the issue. The fair trade of the 328 shares is an extension of this argument but the cash monitoring is to be viewed as separate. The liquidator may well need to understand what the Company was doing in its dying days, how the cash it obtained was being used, who was being paid and who was not being paid. Nevertheless I view advice provided to the debenture holder as to the terms of the sale as confidential within the terms of the engagement letters. In a similar way advice regarding the implementation of alternative strategies for the Bank will be strategic in nature and confidential.

38. In relation to the monitory of cash, Mr. Burton submits that it is relevant to the liquidation to understand what sums went in and out of the accounts of the Bank and why; and relevant to investigate the large sums paid by the insolvent Company to PwC directly before it was sold by way of an MBO. The basis of the fees require investigation. He adds that it is hard to accept that the work completed by PwC, paid for by the Company, was "in no way linked to the conduct of the receivership". He explains that there is a dichotomy of sorts where Joint Receivers may deny access to documents on the basis that those documents do not belong to the Company having been produced prior to their appointment but on the other hand were entitled to payment by the Company for work undertaken which cannot be now questioned. I agree with Mr. Burton that the last category relating to the monitoring of cash does not fall within the

category of strategic consideration or confidentiality. Monitoring of cash will be factual in nature and relevant to the investigations carried out by the liquidator.

39. As regards the payment to the Isle of Man bank account, Mr Green says that he has identified the payment as an area of investigation in order to determine whether there has been serious wrongdoing, and possible criminality, on the part of Bank in relation to the Company and its subsidiaries.

40. I note that in his third witness statement Mr. Green claims that any e-mails which passed between the Bank and the Joint Receivers and are confidential should also be disclosed.

Conclusions

41. It is important to consider the Application in light of all the facts and circumstances which I have referred to in my judgment. It is also important to have in mind that the documents sought under section 235/236 of the Insolvency Act 1986 predominantly relate to the period prior to 26 September 2007: payment of fees; the sale of assets; collection of book debts; the payment to the Isle of Man bank. In addition the possibility of wrong-doing will be not be time specific. Public interest will require investigations of the management that pre-date the time when the assets were sold. Further I take into account that the Joint Receivers have been communicating with Mr. Green regarding the issues from a time shortly after his appointment as liquidator.

42. As explained in *Sasea Finance Limited* [1998] 1 BCLC 559 and applied in *Green v BDO Stoy Hayward LLP* [2005] EWHC 2413 the liquidator has to explain why the documents sought are required to carry out his functions. I would add that for the requirement to be reasonable the explanation needs to have substance.

43. I accept Mr. Burton's submission that in order to obtain a comprehensive understanding of the Company's affairs the liquidator should be able to inspect and copy the records and files created by the Joint Receivers during the course of the Receivership. These will include documents and records that form 'property' of the Company.

44. In order to understand the failings of the Company, the role played by the management in the failure of the Company, an understanding of the value of the assets sold, the reasons why the assets were sold without being exposed to the open market and to a connected party, the extent of book debts and knowledge of the management as to the trading position throughout the insolvent period Mr. Green reasonably requires the information he seeks and therefore sight of the e-mails passing between the debenture holder and Joint Receivers (and vice-a versa) (paragraphs 1.8 and 1.11 of the Application).

45. Similarly in so far as section 234 does not bite the Joint Receivers should deliver up documents and records issued on behalf of the Company to third parties and received in their capacity as Joint Receivers from third parties (paragraphs 1.2 to 1.5 and 1.12 and 1.13 of the Application). Such documents may provide relevant information relating to the indebtedness of the Company, its book debts and assist the liquidator in determining whether there

are any relevant claims for the purpose of swelling the Company's assets. I also accept the submission made by Mr. Burton that the receipt of such records is likely to enable to liquidator to work more efficiently and incur less expense than would otherwise be the case.

46. I understand the Joint Receivers objection on the basis that they have already delivered up 11 lever arch files and any documents that remain appear to reside in the thousands of e-mails. They will not be under an obligation to deliver up the same documents twice. As regards the enormity of the task regarding e-mails, I will hear submissions regarding the cost of undertaking the exercise. However the fact that there are many e-mails stored on different computers and/ or servers does not remove the obligation to serve the public interest by making disclosure when asked by another office-holder.

47. The Application seeks (paragraph 1.6) the sales reports and PwC letters of engagement (relating to the independent business review). These documents have been disclosed and are in evidence. I shall make no order regarding this category of documents.

48. As regards details of all work undertaken during the course of the independent business review and prior to the appointment of the Joint Receivers (paragraph 1.7 of the Application) subject to the limitations regarding privilege, confidentiality and strategic considerations (if the later were in play during this period) these are, in theory, disclosable under section 236 (3). As Mr. Chubb carried out or headed–up the business review he falls with section 236(2)(c) of the Insolvency Act 1986. In his third witness statement Mr. Green seeks to extend the Application by adding that he requires all of the Joint

Receivers' 'e-mails concerning the Company…..even in their reporting capacity to the Bank'. He says he regards all confidential documents flowing between the Bank and the Respondents as disclosable. He says he reasonably requires such documents as the 'Bank is currently under investigation for fraudulent trading in respect of its involvement with the Company and accordingly, I believe the emails should not be concealed from me and it is in the interests of justice that the grounds of confidentiality be overridden'. As confidentiality is not ordinarily overridden (but it may be) a more detailed consideration of the liquidator's case for such documents and records is called for, and a balance is to be struck weighing the requirement against oppression, privacy and a third party's rights to keep information confidential.

49. In order to support his view that he reasonably requires such documents to carry out his functions as liquidator of the Company he explains that there was a positive balance of £14,137,000 in relation to the Chauffair Limited receivership and as no further reports were filed it is unknown what happened to that balance. He then links the receivership of Chauffair Limited with loans made by the Bank to enable its operating subsidiary to buy, sell and lease aircrafts. He says he may need to investigate the matter further as Mr Mills was a nominee of the Bank and appointed in 2003 to the board of the Company. The significance of this is that Mr. Mills is now facing charges under section 1 of the Criminal Law Act 1977 for conspiracy to corrupt (the Bank recommended Quayside Corporate Services Limited in return for Mr. Mills and Mr. Dobson receiving gifts). Mr. Green says that the Company never traded without the large borrowings from the Bank and effectively was balance sheet insolvent from incorporation. Although I have reservations

about the test applied to reach his conclusion regarding balance sheet insolvency (following *BNY Corporate Trustee Services Limited v Eurosail UK* [2013] UKSC 28) it is fair to say that the Company could not have purchased the assets it did purchase without secured lending.

50. Mr. Green wishes to investigate, he says, the involvement of the Bank in a potential fraudulent trading claim and any confidential documents and records produced by Mr Chubb in his capacity as a reporting accountant when undertaking the business review will assist. I do not consider that the evidence is sufficiently cogent to permit confidential information to be disclosed. In order to obtain relief under section 213 of the Insolvency Act 1986 a liquidator must satisfy the court that the business of the company was carried on with an intent to defraud creditors or any other persons. Mr. Green would have to demonstrate that the Bank was a knowing party to the carrying on of the business with an intent to defraud or for fraudulent purposes. There is no suggestion in the evidence that the Bank was involved in a scheme to defraud creditors or evidence to support that fraudulent trading took place at a time when PwC were undertaking their independent business review. To state it as a proposition readily exposes a weakness on the facts of the case (not dealt with in the evidence of Mr. Green). I accept Mr. Burton's submission that an application of this sort is a summary process, however that does not detract from the obligation to lead evidence of a reasonable requirement. The Bank was by far the largest creditor and even after realisations remain a creditor for the sum of approximately £100m. The Bank wanted a review of the business in order to determine its options. It may have assisted in the purchase of assets through the provision of loans and overdrafts and it may be that the Bank was

always a creditor of the Company but it obtained security for the lending, putting it ahead (in terms of ranking) of ordinary creditors. In other words the Bank legitimately reduced its risk on its lending by taking a secured position. That formed part of the bargain between the Company and the Bank at the outset. If it is true that Mr. Mills was introduced to the board of the Company by the Bank he was never a Bank employee. There is no evidence that he reported directly to the Bank, received remuneration, bonus or commissions from the Bank or that the Company took instructions from the Bank. The minutes of meetings obtained by Mr. Green do not support his position.

51. It may be that Mr. Green wants to investigate the dealings with Quayside in more detail but if that is the case he may obtain documents from Quayside. This line of inquiry, as I understand it, is more focussed on understanding Mr. Mills' involvement with payments to Quayside by the Company (Quayside being a company owned by Mr. Mills). That is a different issue and far removed from the suggestion that the Bank was involved in fraudulent trading and unconnected with the independent business review. In addition it would appear that the time scale of wrong-doing that may be alleged by Mr. Green was in the period prior to the involvement of the Respondents. Accordingly there is no reasonable requirement for disclosure of this category of documents or records. In my judgment to state that the liquidator is seeking to investigate a claim for fraudulent trading without more is merely re-stating his functions. He is bound to investigate all potential claims which may present an opportunity to swell the assets of the Company for the benefit of creditors. Mr. Green has tried to make a link with Quayside and Mr. Mills to substantiate his requirement but in my view there is little or no connection temporal or

otherwise. Accordingly I reach the conclusion that there is no reasonable requirement and insufficient evidence has been adduced to override duties of confidentiality. In so far as I am wrong about that I would dismiss the request as it was not properly formulated in the Application but only appeared in the third witness statement of Mr. Green.

52. I do, nevertheless, accept that Mr. Green has made out a reasonable requirement to obtain the working papers created or produced by Mr. Chubb in his capacity as business reviewer. The limitation I impose is that Mr. Green is not entitled to such working papers that comprise documents or records that are confidential, privileged, or relate to the strategic considerations of the receivership. I will deal with valuations of assets and documents relating to the Isle of Man bank account separately below. Subject to these constraints the production of the papers may include documents relating to the monitoring of cash from the period 14 August 2007 (prior to the appointment of the Joint Receivers) to the date when the Company was wound up. This will save the liquidator considerable time and expense and enable him to efficiently carry out relevant investigations in connection with his functions as liquidator pursuant to section 143 of the Insolvency Act 1986.

53. I now turn to the valuations of Company property obtained by the Respondents (paragraph 1.10 of the Application). Mr Green's concern is to investigate "*whether the assets were sold for proper consideration*". Mr Al-Alttar relied on a case where a similar issue arose: *Maltby Holdings Ltd v Spratt* [2012] EWHC 4 (Ch). In this case Warren J refused Terra Firma's requested for PwC to disclose pre-appointment valuations and other material

relied upon by PwC to discharge its duties as administrator of EMI. Warren J said, at [54]-[55]:

> "Whatever other complaints TF may have about the way in which the JAs came to be appointed and about how EMI Group came to be sold to Citi without any opportunity for discussion with TF, the only issues which could justify pre-action disclosure of the Valuations and other documents of which disclosure is sought are issues which relate to value or valuation. To seek a sight of those documents in order to impugn the behaviour of Citi or the JAs would be no more than the proverbial fishing expedition. Value is relevant, of course, to two matters. First, it is relevant to whether MIL was unable to pay its debts (within the meaning of the SFA or for the purposes of Schedule B1) and secondly, it is relevant to whether the sale to Citi was at an undervalue. What is important in each case is the actual value of EMI Group.
>
> It does not appear to me that TF need any of the Valuations in order to be able to formulate their claims insofar as those claims turn on the value of EMI Group. The results of the Valuations are, so far as material, known to TF, in particular, they know that none of the Valuations resulted in a figure anywhere near the amount of Citi's secured indebtedness. That they do not know the precise methodology of the Valuations is obvious, not having seen them; indeed, as I have mentioned, one of Mr Breure's concerns about the Hawkpoint Valuation is precisely that TF do not know the approaches adopted in it. But that does not, it seems to me, matter in terms of formulating a claim. TF have had all the relevant financial information about TF which they need in order to instruct their own valuers to effect a valuation of EMI Group as of 1 February 2011. At least, that is what I understand the position to be and there has certainly been no application whether by way of disclosure or anything else within the process of the administration seeking such material. They have the resources to obtain such a valuation and to progress litigation without there being any fear that cost will keep them from the seat of justice."
>
> The application in the *Maltby* case was made under the inherent jurisdiction of the Companies Court and by way of pre-action disclosure under CPR 31.16. In my judgment the jurisdiction although superficially similar is distinct. Under CPR 31.16 a document falls within the scope of pre-action disclosure if it would have to be disclosed pursuant to CPR 31.6 (standard disclosure) if proceedings had started. Further disclosure would take place if it could be shown that it was desirable to (i) dispose fairly of anticipated proceedings (ii) assist the dispute

> to be resolved without proceedings or (iii) save costs. The jurisdiction under the investigatory provisions is not confined to resolving a dispute or even targeted at disputes. It is targeted at providing an office-holder with information to enable him to understand the affairs of the relevant insolvent company. It has a public interest element (unlike CPR 31.16) and so its jurisdiction may be exercised for reasons other than bringing proceedings. The documents obtainable under the investigatory proceedings may be property of the insolvent company or may not. The investigatory provisions therefore permit not only a different sort of disclosure, are wider than those provided under CPR 31.16 but are aimed at obligations imposed upon an office holder by statute. Accordingly *Maltby* has no binding effect on the jurisdiction under the investigatory provisions.

54. Further distinctions can be drawn in respect of the *Maltby* case. The Administrator conducted a pre-pack and obtained several valuations. Unlike this matter a SIP 16 Statement was produced providing an element of transparency in relation to the dealings. The SIP 16 Statement referred to valuations giving details of the methods of valuation used (the market approach and income approach), and explained that the business was valued on a going concern basis without any discount factor in respect of a sale by an administrator. The liquidator has no such information.

55. It is true that the valuations carried out or commissioned by PwC in this matter would have been property of the Bank and not the Company (it was not suggested otherwise). More relevant in my judgment is that the Joint Receivers have disclosed the assets sold; the date of the sales; the sale prices; the sale agreements and provided information regarding the sales are of the aircraft. Mr. Green knows that the sale of the assets was insufficient by a large margin to repay the Bank its secured lending. I take into account that in order for the unsecured creditors to benefit in respect of their interest in the equity of

redemption the value of the business assets will have to be significant in comparison to the sale prices. It is because of the information already disclosed that there is no reasonable requirement, in my judgment, for the liquidator to have copies of the valuations to consider any claims against the Joint Receivers.

56. As regards the payment made to the Isle of Man bank account the Joint Receivers have explained in a statement signed with a statement of truth that there was no payment "by the Respondents" of the £20,000,000 from "the Company's assets" to the Isle of Man Bank. The Isle of Man Bank was a creditor of Euromanx with the benefit of a guarantee from the Bank. Euromanx called on the guarantee, which was honoured by the Bank and the debt added to the secured debt owed by the Company under the Bank's rights of indemnity. In my judgment this is sufficient information for the liquidator to conclude his inquiry on this issue. If the liquidator has not received a copy of the indemnity he should be entitled to that document.

57. I will hear counsel as to the form of the order and on any consequential matters such as costs.