Biog box
Helen Pugh is a barrister at 3 Hare Court with expertise in personal and corporate insolvency. Her practice encompasses misfeasance actions, unlawful distribution and antecedent transaction claims, DDA matters and a range of bankruptcy issues. She is increasingly involved in claims with an international or multi-jurisdictional element.
Email: helenpugh@3harecourt.com

Feature

Author Helen Pugh

A new tool for minority shareholders? Restoring a company to members' voluntary liquidation with the appointment of new liquidators: *In re Core VCT plc (in liquidation)*

KEY POINTS

- The without notice restoration of a company to the register with a view to investigating claims against former fiduciaries and former liquidators is not one for the faint-hearted.
- In a commendable judgment in *In re Core VCT plc (in liquidation)* [2019] EWHC 540 (Ch), Mr Jeremy Cousins QC dealt with some of the myriad of issues which arise in such cases.
- It appears that this is the first reported case in which minority shareholders disaffected by a members' voluntary liquidation (MVL) process have succeeded in restoring a company to the register with a view to new liquidators reviewing that MVL.
- It is unlikely that former administrators or liquidators (or most others) will have standing to contest an application to restore a company to MVL with new office-holders.

FACTS

Core VCT plc, Core VCT IV plc and Core VCT V plc ('the Companies') were fund vehicles for investments in SMEs. Mr Fakhry and Mr Edwards were partners of Core Capital LLP and Core Capital Partners LLP which were the Companies' fund manager ('the Manager').

On 16 April 2015 the Companies were placed into solvent MVLs following a vote supported by a majority of the members. The Companies were dissolved on 18 November 2016.

On a without notice application by two minority shareholders ('the restoration application'), the company's restoration was sought with a view to investigating three particular matters:

- The management of the Companies' investments and the level of fees and expenses charged by the Manager;
- The transfer by the Manager of a number of investment holdings from the Companies to another entity in 2011. It was alleged that the transfer may have been at an undervalue and that the Manager, Mr Fakhry and Mr Edwards benefited by virtue of their undisclosed beneficial interests in New Core I ('the 2011 Transfer');
- The transfer in August 2015, by the Manager under the delegated authority of the Former Liquidators, of the Companies' remaining SME investments to another entity. Again it was alleged that the transfer may have been at an undervalue to the undisclosed benefit of the Manager, Mr Fakhry and Mr Edwards. It was also alleged that the Former Liquidators failed to discharge their duties ('the 2015 Transfer');

collectively 'the Investigations'.

On 20 July 2018, Mr Justice Fancourt ordered that the Companies be restored to the register, that Mr Underwood and Mr Pagden of Menzies LLP be appointed as liquidators ('the Liquidators') and that Mr Fry and Mr Mather of Begbies Traynor Group plc ('the Former Liquidators') be served with notice within 21 days.

THE SET ASIDE APPLICATION

Subsequently Mr Fakhry and Mr Fry applied for an order: (i) setting aside the restoration order of Fancourt J; alternatively (ii) an order pursuant to s 108(2) of the Insolvency Act 1986 (IA 1986) removing the Liquidators and substituting Mr Fry; and in the further alternative (iii) an order pursuant to IA 1986, s 171(3)(b) directing that a meeting of the members of the Companies be held to consider whether the Companies should continue in MVL and if so the identity of the liquidator(s) ('the set aside application').

The learned judge dismissed the set aside application in its entirety, dealing with various arguments and contentions along the way. In this article the focus is on four of the key issues:

- The applicable test for assessing the factual evidence on the application.
- Whether the principle of majority rule applied to prevent a minority restoring a company to MVL.
- Whether the duty of full and frank disclosure had been complied with.
- Whether Mr Fahkry and Mr Fry had standing to appear on the restoration application.

ISSUE 1: THE APPLICABLE TEST

The parties' cases on the set aside application were underpinned by competing factual accounts relevant to the Investigations. The need for the Investigations was clearly a factor in the

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restoration and set aside applications. Yet, given that the purpose of the restoration application was to enable the Investigations to look into the factual accounts, it would be odd if the court was required to determine at this stage whether the factual accounts of one party or the other were on balance of probabilities likely to be made out.

The judge agreed that this would not be the correct approach. The test was 'whether there is a serious question for consideration' or 'a legitimate matter for consideration and perhaps investigation.' This was the correct test to be applied in relation to administration and liquidation cases. On the evidence presented by the Liquidators, this standard was met.

ISSUE 2: THE RELEVANCE OF MAJORITY RULE

Control of the MVL process, which involves a solvent company, lies with the shareholders. It is the members, or a majority of them, who determine to appoint a liquidator, decide upon that liquidator's appropriate remuneration, and who exercise a general power of supervision over that liquidator. That is distinct from other forms of liquidation where the process is controlled by the creditors.

The issue in this case was that the restoration application had been pursued by a minority of shareholders only. On behalf of Messieurs Falkhry, Edwards and Fry it was argued that permitting minority shareholders to take such a course of action would subvert the principle of majority rule underpinning MVLs. It was said that the majority had approved the Former Liquidators' appointment and removal from office upon approval of the Final Report.

The judge accepted the correctness of the majority principle as a starting point for the conduct of an MVL. However, it was not an absolute rule and once a liquidator was appointed by the members, that liquidator was subject to the court's supervision which was not constrained by the wishes of the majority. The views of the majority were a factor but were not determinative. The principles of majority decision-making had to accommodate wider concerns such as minority protection.

ISSUE 3: FULL AND FRANK DISCLOSURE

Restoration applications are governed by the Practice Note entitled 'Claims for an order restoring the name of a company to the Register' ('the Practice Note'). Paragraph 5.3 of this Practice Note provided that 'if the company was dissolved whilst in or following its liquidation, original evidence of service of the claim form on the Official Receiver or the former Liquidator if one was appointed' was required to be filed at court.

In this case Fancourt J was told that para 5.3 had not been complied with and an explanation provided. An order was made for service on the Former Liquidators within 21 days. However, it was common ground that Fancourt J (i) had been innocently but incorrectly told that the Registrar of Companies had known of, and agreed to, the Former Liquidators being notified 21 days after any order for restoration contrary to para 5.3 and (ii) had not been told that the Former Liquidators had been released as a result of resolutions passed at the general meetings in August 2016.

The judge accepted that restoration applications are effectively *ex parte* and that there is accordingly a duty of full and frank disclosure upon the applicant in relation to all material facts. He also accepted that there had been inadvertent mistakes and omissions in the information given to Fancourt J. The issues were firstly, whether the matters complained of were material and secondly, whether it led the court to make an order substantially different from the order it would have made if proper disclosure had taken place.

The judge held that neither of these thresholds were met. The material facts were the existence of the requirements of para 5.3 of the Practice Note, the fact that these had not been complied with and the fact that the proposed liquidator was different from the Former Liquidators. All these were known to Fancourt J.

Complaint (i) was not material because Fancourt J himself was aware that para 5.3 had not been complied with. Similarly, there was no force in complaint (ii) because the release of the Former Liquidators by the members, or a majority thereof, was not a complete bar to further proceedings against them which could still be brought under IA 1986, s 212.

Further, the judge found that he did not consider that Fancourt J's judgment would have been affected by full disclosure for the same reasons.

ISSUE 4: STANDING

In any event, the judge rejected the argument that the Former Liquidators ought to have been notified of the restoration application pursuant to para 5.3 so as to give them the opportunity to appear at the hearing. The Former Liquidators were not a party to the application and so had to satisfy the court that the requirements of Civil Procedure Rules (CPR) r 19.2 were met, namely that it was desirable to add the new party so that the court could resolve all matters in dispute or that there was an issue involving the new party and an existing party which was connected to the matters in dispute and it was desirable to add the new party so the court could resolve that issue.

Relying on previous authority, the judge noted that a third party who merely wishes to argue that the proceedings which the revived company proposed to bring against that party have no prospect of success does not satisfy the CPR r 19.2 test. Both Mr Fry and Mr Fakhry sought to object to the restoration application on this ground alone and accordingly would have had no entitlement to participate in the restoration application in any event.

PRACTICE POINTS FOR THE FUTURE

As set out above, the judgment discusses and resolves a number of important issues in applications of this kind. Legal principles aside, there are at least three important practice points to draw from the case.

The first practice point concerns the robust and analytical approach of the judge to the question of full and frank disclosure

which is to be welcomed. Rather than seizing upon the omissions at the first hearing and dwelling little on the questions of materiality and causation, the judge focused on these two questions. That said, it is implicit in the judgment that materiality and causation are related: the less material a matter is, the more likely a court will find that the initial decision would not have been affected by proper disclosure.

Secondly, it seems that this is the first reported case in which minority shareholders disaffected by a MVL process have succeeded in restoring a company to the register with a view to new liquidators reviewing that MVL. It may become a very potent tool for disaffected minority shareholders in the future. Whether it does so will in part depend on whether this judgment becomes confined to the (implicit) factual finding that the majority shareholders did not approve the Former Liquidators' Final Report in full knowledge of the facts.

Third and finally, it is unlikely that former administrators or liquidators (or most others) will have standing to contest an application to restore a company to MVL with new office-holders. It will normally be left to the court to police such applications on an *ex parte* basis. ■

Further reading

- LexisPSL Restructuring and Insolvency: News: Validation of an order for restoration without a notice to former liquidators *(Re Core VCT plc (in liquidation))*
- LexisPSL Restructuring and Insolvency: Practice notes: Company restoration – restoration by court order
- LexisPSL Restructuring and Insolvency: Practice notes: Voluntary striking off and dissolution

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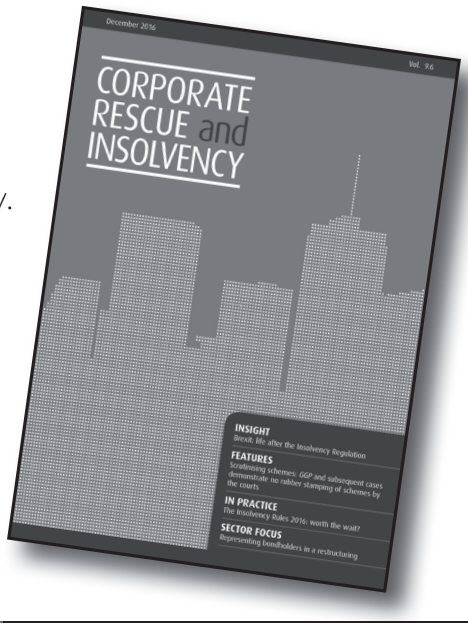

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