IN THE HIGH COURT OF JUSTICE **CLAIM NO: 354 OF 2011**
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

IN THE MATTER OF THE INSOLVENCY ACT 1986

AND

IN THE MATTER OF SWITCH SERVICES LIMITED – IN ADMINISTRATION

B E T W E E N

S B CORPORATE SOLUTIONS LIMITED Applicant

-and-

(1) COLIN ANDREW PRESCOTT
(2) ANDREW POXON Respondents

APPROVED JUDGMENT

Introduction

1. There is before the court an application, dated 26 September 2011, by S B Corporate Solutions Limited ("the Applicant"), for:-

> "A Declaration that the purported appointment of Mr Andrew Poxon and Mr Colin Andrew Prescott as joint administrators of Switch Services Limited on 17 March 2011 is null and void.
>
> And for an order that
>
> The Order made by Recorder David Blunt QC on 17 March 2011 putting Switch Services Limited into administration and appointing Mr Andrew Poxon and Mr Colin Andrew Prescott as joint administrators be rescinded under Rule 7.47(1) of the Insolvency Rules 1986."

2. The relief sought in this precise form cannot be granted because:

(1) Mr Poxon and Mr Prescott were not appointed joint administrators of Switch Services Limited ("Services") on 17 March 2011 (despite an erroneous reference to "interim administrators" in the court order based on counsel's draft). In fact, as the order itself recited, Mr Poxon and Mr Prescott were appointed interim managers of Switch Services Limited under paragraph 13 of Schedule B1 to the Insolvency Act 1986. No administration order was made on 17 March 2011.

(2) Although an *interim* order was made on 17 March 2011 suspending the powers of the directors in Services and vesting them in Mr Prescott and Mr Poxon, as licensed insolvency practitioners authorised by the Court, no *administration order* was made in relation to Services until 25 March 2011.

3. The relief sought cannot therefore be granted in the terms of the current application. Nevertheless, I approach the case on the basis that the Applicant seeks a declaration that the order in fact made on 17 March 2011 was made without jurisdiction, and should therefore be set aside accordingly or should be rescinded under Rule 7.47(1) of the Insolvency Rules 1986.

4. However, it should be noted that the Applicant is not, at least in these proceedings, seeking the rescission of the only administration order which was made in relation to Services, namely the one made on 25 March 2011.

5. In making the decisions which he did on 17 and 25 March 2011, Mr Recorder Blunt QC was sitting as a Deputy High Court Judge under Section 9 of the Senior Courts Act 1981.

Dominic and Marco Marrocco and their companies

6. This case is largely concerned with two companies Switch Connect Limited ("Connect") and Switch Services Limited. Both are or were engaged in the business of supplying telephonic services.

7. Until March 2011, these companies were under the management, ownership or control of two brothers, Dominic and Marco Marrocco. Dominic is a man of very substantial means and appears to be the principal investor behind the companies.

8. Until relatively recently, the shareholders in Services were Connect (97%) and Mike Thomas (3%). In turn, Connect was a subsidiary of Style Loop Limited ("Style Loop"). Dominic is the sole shareholder of Style Loop and Marco is its only director. Marco is also the sole director of Connect and Services.

9. At some time, alleged by the Applicant to be December 2009, the 97% shareholding in Services was sold or transferred by Connect to Style Loop. This purchase and/or transfer, whenever it took place, is under investigation by the administrators of Connect and/or Services as a potential transaction at undervalue.

10. There are other companies associated with the Marrocco family they include:

    (a) Burning Bed Productions Limited, of which Connect is the sole shareholder and Style Loop Limited the ultimate parent company; and

    (b) 186K Limited ("186K") of which Dominic Marrocco and David James Richards are the directors, and Dominic is the sole shareholder.

11. There is some concern among the creditors of Connect and/or Services that about £400,000 appears to have been paid to 186K by either Connect or Services. It is not entirely clear on what basis those payments could have been properly made. Moreover, there is a suggestion that 186K prevented Connect from accessing its computer server, effectively disabling it as a business and preventing it from providing customer support.

Commercial relationship between Services and Connect

12. Connect was incorporated on 15 February 2008 to purchase the business of a company called Switch Call Limited which entered administration on 18 December 2007. Switch Call Ltd. held 107,000 shares in Services and 20,000 shares in Burning Bed Productions Ltd.

13. Connect and Services were mutually dependant upon each other. Connect provided inbound telecom services via non-geographic telephone numbers such as 0800, 0845 and higher rated premium numbers beginning with 09. This was achieved through an Interconnect Agreement between BT Wholesale and Services. Services had been allocated a wide variety of telephone number ranges through OFCOM, the independent regulator for the UK communications industries.

14. When a member of the public telephones a number, the charge for the call is shared between several companies who are party to the call. This comprises the

networks which transported the call, including both fixed and mobile networks, BT, Services and eventually the ultimate customer who contracted with Connect for the use of the number. BT had no contract with Connect, but only with Services.

15. Accordingly, if Services terminated Connect's access to the network then not only would a substantial income stream for Services be lost, however temporarily, but also Connect would lose its income, because it could no longer provide the telephony services to its end customer.

16. BT paid for the extra charges in relation to these lines directly to Services, which retained 12%, and passed on the balance, 88%, to Connect. Exhibited to Marco Marrocco's witness statement, dated 20 October 2011, is a version of the Telephony Services Agreement between Services and Connect, effective from midnight on 2 April 2008.

17. In that agreement, Services was described as "Switch" and Connect as the "Reseller". Clause 6.5 of the Telephony Services Agreement provided:

> "6.5. Switch shall send the Reseller a monthly report within 10 days from the end of the month from which the traffic was generated. The Reseller must send Switch an invoice for the amount detailed in the Report, no later than 30 days from the end of the month in which the traffic was generated. Switch shall make payment to the Reseller 45 days from the end of the month in which the traffic was generated. If the Reseller fails to deliver an invoice within 30 days of the month end, Switch may delay, at its sole discretion, payment for one calendar month for each month that the Reseller fails to deliver an invoice to Switch as aforesaid.
>
> 6.6. All rates in the monthly reports shall be exclusive of all taxes or duties."

18. The authenticity of this document is not agreed. At least two different versions of this document have been produced in the course of the proceedings, yet senior employees of Connect and/or Services had no knowledge of the existence of any such agreement, even though they might reasonably have been expected to do so if it existed. Accordingly, the administrators of Services and Connect have expressed reservations about the authenticity of any Telephony Supply Agreement.

19. The income from telephone calls was shared among a long line of people. The amount generated from each call, once shared between the various parties, was small, but call traffic through premium rate numbers can be heavy.

20. Call traffic was monitored by Connect. The revenue each telephone number had generated was calculated either by a fixed price model or by reference to the time for which that telephone number was in use, and therefore generating income. Connect's customer was notified of the total number of calls made through the premium rate telephone number and the amount that it was entitled to invoice Connect. Details of the call traffic were forwarded by Services to BT Wholesale who verified the figures, using its own monitoring software, and then made payment to Services. Services should then make payment to Connect, less an administrative handling charge, which, in turn, would make payment to their customer, less an administrative charge. That customer would then make payment to its own customer, if there were one, and so on.

21. In practice, however, payments had been made in the past by Services direct to Connect's creditors and customers, rather than to Connect for onward transmission tothem.

22. Ian Conway, an employee of Connect, had informed Mr Prescott, one of the joint administrators of Connect and Services, that Service's outgoings consisted of payments to Connect and several other administrative expenses, none of which was substantial. Mr Prescott's understanding was that the operations of Services and Connect, although formally separate, were operated seamlessly, such that the employees of Connect had as much knowledge of the business of Services as they did of Connect.

Revenues Received

23. Considering only the last few months of 2010, Services received £366,119.91 on 30 September 2010, £381,749.63 on 31 October 2010 and £496,067.38 on 30 November 2010.

24. From that income, Services retained its agreed commission before paying the balance to Connect. In fact, Services often paid creditors of Switch Connect direct.

25. During the course of the hearing, I was provided with sales invoices rendered by Connect to Services. They include references to two of the three sums of money referred to immediately above.

26. On each of these four invoices from Connect to Services, there was a box for "Payment Terms". In each of the invoices that box was completed with "0 days".

27. I set out the relevant details of these invoices in the table below.

Invoice date	Invoice number	Payment terms	Payment by	Total excluding VAT	VAT (17.5%)	Total
05/10/2010	51296	0 days	05/10/2010	£324893.30	£56856.33	£381749.63
03/11/2010	51839	0 days	03/11/2010	£422185	£73882.38	£496067.38
01/12/2010	53382	0 days	01/12/2010	£465532.10	£81468.12	£547000.22
02/02/2011	56742	0 days	02/02/2011	£295892.98	£59178.60	£355071.58

28. As I understand it, the first three invoices were paid but the fourth invoice, dated 2 February 2011, has not been paid by Services to Connect.

29. In paragraph 57.1 of his witness statement, dated 20 October 2011, Marco Marrocco stated that the £355071.58 referred to in the fourth invoice was not payable until the 15 March, because the Telephony Agreement provided for payment to be made within 45 days. Of course, this still matured before 17 March 2011, the date of the interim order, and before 25 March 2011, the date of the administration order itself.

30. However, Mr Wolman (Counsel for the Applicant) argued that this unpaid invoice could not evidence any insolvency of Services on 17 March 2011, when Mr French (Counsel for the Respondents) argued that he made an oral application for an administration order before Mr Blunt QC. Mr Wolman pointed out that Mr Marrocco had overlooked the fact that February only had 28 days and that the fourth invoice was only due for payment on the last moment of 17 March 2011, by which time the interim order had already been made.

31. Mr French countered this submission by pointing not only to the invoices recited above, all of which provided for terms of payment of zero days and so flatly inconsistent with the alleged Telephony Agreement, but also to the fact that the employees of Services/Connect did not even know the existence of any such Agreement. Indeed, given the symbiotic relationship between Services and Connect, he argued that it was obvious that the common intention and practice was that Connect would be paid by Services almost immediately upon receipt by Services of the relevant funds from BT.

32. I am satisfied on the balance of probabilities that, whatever had been contained in any earlier written Telephony Agreement between them, the true agreement

between Connect and Services, at the very least by late 2010, had become one whereby Services was obliged to pay Connect almost immediately upon receipt by Services of payment from BT. I accept Mr French's submissions on this issue.

33. I prefer the evidence provided by the contemporary invoices which required immediate payment. This conclusion is much more consistent with the commercial inter-dependence of Connect and Services and their familial relationship than with the Applicant's evidence and contentions.

34. Accordingly, I find, as did Mr Blunt QC, that Connect was a creditor of Services from February 2011, and well before 17 March 2011, for a sum in excess of £355,000.

Financial difficulties

35. The annual return of Services, dated 18 November 2010, stated that Connect still held 107,000 shares in Services, some 97% of the issued shares. On 4 January 2011, Services filed its accounts for the period ending 31 December 2009. Those accounts were signed off by Marco Marrocco on 21 December 2010 and stated that Style Loop Ltd purchased 97% of the issued share capital of Services on 31 December 2009. There is therefore an inconsistency between the annual return and these accounts.

36. An administration order was made in respect of *Connect* on the *morning* of 17 March 2011, on the application of a creditor, Customer Services Numbers Ltd ("Numbers"), and Mr Prescott and Mr Poxon were appointed joint administrators.

37. However, Connect had already encountered financial difficulties by December 2010.

38. Connect was subject to a winding-up petition and two administration applications, before that administration order was made on 17 March 2011. The first administration application was presented by Telephone Plus, a creditor, in February 2011. They received payment and that administration application was withdrawn.

39. Another creditor of Connect, Tanla Solutions (UK) Ltd ("Tanla"), had served demands for payment on Connect as follows:

17 December 2010: £204,710.62;

21 December 2010: £44,001.68; and
27 January 2011: £41,711.40

40. Tanla presented a winding-up petition to the court on 21 January 2011 in respect of the first two demands, totalling £248,499.

41. However, that winding-up petition was dismissed on the making of the administration order in respect of Connect on the morning of 17 March 2011. That administration order was made on the application of Numbers.

42. No petition to wind-up Services had ever been presented, nor had any application been made for an administration order in respect of *Services* before 1.25pm on the *afternoon* of 17 March 2011.

The Applicant: SB Corporate Solutions Ltd

43. The Applicant gives advice to companies in financial difficulty. The sole Director of the Applicant now is Liam Joseph Charles LeRoy, a management consultant by profession. Until May 2011, his brother Desmond was also a Director. According to Liam's first witness statement, the Applicant:

> "… throughout that period [ie 2011] was instructed by Mr Dominic Marrocco, the ultimate owner of a group of companies of which Connect and Services formed part, and his younger brother Marco. Dominic was and is a successful entrepreneur with many interests who is resident in Nevada, USA, some 8 time zones away. He was content to leave Marco, who was based in Leeds, to serve as the sole Director of both Connect and Services. Our instructions were to advise on, and where appropriate to represent, the interests of the group of companies as a whole".

44. In paragraph 5 of his first witness statement, Liam LeRoy continued:

> "The Marroccos and their companies were very much my clients in a sense that it was I personally who had a close relationship with them. Although Desmond [LeRoy] performed valiantly in seeking to hold the fort during my illness, he lacked the detailed knowledge of their affairs. He therefore sought to avoid, or defer, the taking of any important decisions in relation to them".

45. On 8 February 2011, Connect changed its registered office address, which was formerly in Clifton, Bristol, to the Applicant's address at Chiltern House, Thame Road, Haddenham, Buckinghamshire.

46. The registered office of Services, as at 18 March 2011, was Switch House, 3 Berkeley Crescent, Clifton. Those Bristol premises were then empty.

47. On the Applicant's website, the following publicity material is or was to be found:

"We work in your interest, not in your creditors.

ABOUT SPENCER BROWN

SB Corporate Solutions is a firm of consultants whose partners have over 20 years experience in practice. Our business falls in to two specific categories being rescue and recovery and raising turnaround finance for these situations.

We are not Insolvency Practitioners (IP) but management consultants with absolute insolvency expertise.

The role of an Insolvency Practitioner is to act in the best interests of the creditors and should a conflict of interest arise between the requirements of the directors of a company and the needs of the creditors, the IP has little choice but to act in accordance with the wishes of the creditors. Our responsibility is to act in the best interests of the directors and members of our client companies. …".

Mr Wolman's correspondence before and after 17 March 2011

48. In the days preceding 17 March 2011, Mr Wolman had been writing letters on behalf of his client(s) to protect Connect's position. In Mr Wolman's letter, dated 16 March 2011, to Mr Hindle of Beachcroft LLP, Solicitors for Numbers, the applicant for the adminstration order against Connect, Mr Wolman made reference to a contract between Connect and Services.

49. Between pages 80-111 in volume 1 of the trial bundle is an unsigned Telephony Services Agreement, dated 1 March 2008. This is in a different form from the signed Telephony Services Agreement between Services and Connect, which was stated to be effective from midnight on 2 April 2008.

50. Mr Wolman's letter of 16 March 2011 (*"Customer Services Numbers Ltd v Switch Connect Ltd: Application for Administration Order"*) contained the following extracts:

"As I understand it from my instructions, the situation is as follows.

The main business of Switch Connect Ltd has derived from its contract with Switch Services Ltd, which in turn has the crucial "air minutes" contract with BT. Without the supply of those telecommunication services ie the air minutes, Switch Connect has no viable business.

Switch Services Ltd and the business of Switch Connect Ltd having both been previously under common ownership, were acquired at the same time in February 2008 by companies connected to Dominic and Marco Marrocco.

Shortly after those acquisitions, on 1 March 2008, Switch Connect entered in to a contract with Switch Services which substantially reflected the previous contractual arrangements between the two companies or their predecessors. The contractual terms were largely taken from other industry precedents. One of its purposes was to act as a fire-break in the event that either company was the victim of the *Artificial Inflation of Traffic*" ("AIT") as it is called in the contract. That clearly includes the £250,000 fraud of which Switch Connect became a victim last autumn and which has led to the current unhappy situation.

Under the terms of the contract, if Switch Connect, referred to as the "*Reseller*" in the contract, has either:

(1) Permitted, even unwittingly, its network to be used inappropriately for fraudulent purposes, in particular AIT, or

(2) An administrator [is] appointed over all or part of its business,

then Switch Services is entitled to terminate the contract forthwith. It also becomes entitled to *"early termination fees"* and a variety of other payments, as well as the return of the hardware and software which it has provided to Switch Connect.

Notwithstanding the occurrence of the first triggering event, Switch Services Ltd has so far refrained from exercising its contractual rights to terminate its supply to Switch

Connect of BT air minutes, in the hope that a sensible financial solution can be found between all the affected parties. But that has not proved possible, partly because of the uncompromising and ostrich-like stance so far taken by your client. From tomorrow, however, assuming your application for the appointment of an administrator is granted, I am advised that Switch Services will immediately exercise all its termination rights.

In that situation, I am instructed that Switch Connect will no longer have either the ownership or the benefit of any significant assets, either tangible or intangible. All the remaining value in the company will rapidly drain away. In addition, substantial further liabilities to Switch Services will crystallise.

I would therefore ask you and the creditors who support you say you have garnered to consider an adjournment of the hearing tomorrow for 14 days. That would be to permit a more concerted attempt to be made to hammer out a compromise or composition. Under its terms, third party funds would be made available to Switch Connect so that a large part of the value of its business could be preserved for the benefit of its creditors. At the same time, all parties would have to agree to bear some of the pain and financial consequences of the fraud (unless and until the stolen money and damages are recovered in full).

Yours faithfully
Clive Wolman
Barrister

Cc Kevin Hawthorn, the proposed Administrators, Marco Marrocco".

51. Mr Prescott discussed the existence of the Telephony Agreement with Ian Conway, Andrew Cornes and David Greenfield, all employees of Connect. None of those employees was aware of any such written contract between Connect and Services.

52. Moreover, Beachcroft LLP, then solicitors for Numbers, also made numerous requests for a copy of that contract. A copy was also requested from Mr Wolman before the administration application hearing on the morning of 17 March 2011. It is said that Mr Wolman failed to provide a copy of the contract, despite those requests.

53. Further requests for the contract were made in correspondence between Beachcroft LLP and Mr Wolman, after the making of the administration order in respect of Connect and the interim order in respect of Services, at 14.53 and 22.14 hours on 17 March. Mr Wolman replied, at 23.24 hours, without providing the contract, but stating that he had received instructions to act for Services to seek an emergency injunction against Connect. At 23.53 hours, Beachcroft again requested a copy of the contract, as well as Mr Wolman's papers, on the basis that he had acted for Connect and therefore had documents to which the joint administrators were entitled.

54. At 8.17am on 18 March, Mr Wolman alleged that he had not entered in to a contract with Connect and suggested that he was not therefore under a duty to provide the administrators solicitors with any papers. He did not then provide a copy of the contract. Beachcroft then replied at 8.48am, questioning how Mr Wolman could act for Services *against* Connect, when he had previously acted *for* Connect. At 11.45am on 18 March 2011, Mr Wolman provided a copy of the contract, stating that his client was the Applicant.

55. In the hearing before me in November 2011, Mr Wolman, who was then representing the Applicant, clarified that he had acted on the morning of 17 March 2011 for Connect, to whom he had been introduced by the Applicant. Mr French appeared before me on behalf of Mr Prescott and Mr Poxon, having appeared for Numbers and the administrators of Connect on the morning and afternoon of 17 March 2011 respectively.

56. Mr Wolman had also been in correspondence with Tanla's solicitors, Blake Lapthorn, over alleged payments of at least £400,000 made by Connect and/or Services to 186 K Ltd, the company whose sole Director is Dominic Marrocco. This correspondence took place in the week before 17 March 2011.

57. Accordingly, Mr Wolman had been in correspondence about matters concerning both Connect and Services in March 2011. Connect's registered office had been transferred to the Applicant's address in February 2011.

17 March 2011

58. The following matters were before Mr Blunt QC on the morning of 17 March 2011 at Bristol Civil Justice Centre:

(a) The winding-up petition in relation to Connect presented to the Royal Courts of Justice on 21 January 2011 by Tanla; and

(b) An application by Numbers, presented to the Court in Bristol on 23 February 2011, for an administration order in relation to Connect.

59. On the morning of 17 March 2011, Mr French appeared on behalf of Numbers. Mr Boardman, counsel, appeared on behalf of Tanla, the petitioning creditor, and Mr Wolman appeared on behalf of Connect. Although Mr Wolman appeared on behalf of Connect on the morning of 17 March 2011, this was at the behest or recommendation of the Applicant. Mr Wolman had no instructing solicitor and was retained under the Bar's Direct Access Scheme.

60. Mr Wolman's instructions for the hearing on the morning of 17 March 2011 had been to seek an adjournment of the hearing. In this he was unsuccessful, because Mr Blunt QC made the administration order in respect of Connect at 1.00pm on 17 March 2011.

Administration application in respect of Connect on morning of 17 March 2011: Concerns about dissipation of money and the termination of the Telephony Agreement

61. There had been some discussion during the morning's application concerning Connect before Mr Blunt QC about allegations made against Connect. At page 13 of the transcript of the morning's proceedings (trial bundle page 1668) the following was said:

"THE RECORDER: Right, thank you. I think what I will do, Mr French, before I ask you about this caveat, which is the suggestion by Mr Boardman, I think I want to hear Mr Wolman, as to what he says the position is or should be.

MR BOARDMAN: My Lord, yes, of course.

THE RECORDER: Yes, Mr Wolman?

MR WOLMAN: My Lord, as I said, we do not oppose the administration application or the administration order, if that is what they want to do; nor indeed a winding up petition. I have been instructed to come along today just to see if there was scope

for negotiating a settlement with a substantial input of third party funds. But, if there is not, and that seems to be the position, then there is not. I suppose I was also sent along possibly because the director of Switch Connect felt that I ought to be here to defend the company against any allegations that have been made and, in this case, wholly unfairly.

The sequence of events is this. These companies, the two companies, Switch Connect and Switch Services were effectively companies which were associated with each other prior to 2008. The business of Switch Connect, which was the company called Switch Call, was itself insolvent or appeared to be insolvent. It was then bought from - I am not sure whether it was a liquidator or an administrator, but it was acquired.

THE RECORDER: So which one?

MR WOLMAN: The business of Switch Connect was acquired in February 2008 from an office holder, and a company was specifically set up, namely Switch Connect, to acquire that business.

THE RECORDER: Mr Wolman, no one, as I understand it, is asking me to make any adverse findings.

MR WOLMAN: No. Well, in that case, may be I do not need to say anything.

THE RECORDER: What is being said is that there are lots of questions and lots of mysteries from which, if there are not satisfactory answers, one might read certain conclusions, but I do not think anyone is actually saying those conclusions should be reached today.

MR WOLMAN: Then I do not quite see the point in raising all these insinuations, which, in our view, are wholly unjustified. They have told you only part of a story. In our view, Tanla, in particular, has been largely to blame, if not responsible for the fraud, which is what has brought this company down.

…

MR WOLMAN: …

If you are not interested in making any findings, then I do not know if I need to detain you on dealing with this correspondence. We say that we had an agreement with Tanla, by which they were supposed to withdraw the petition, and they did not do so. In our view, Tanla – and this is not a criticism in any way, and I am not extending this to the other creditors, including the applicant for administration – but, as far as Tanla are concerned, we think they behaved reprehensibly throughout. But if you are not going to make any findings, I do not need to detain the court and go in to details.

THE RECORDER: No, right.

MR WOLMAN: As far as the administration application is concerned, we accept we owe Switch Connect Services a lot of money, there is no dispute about that, and we are unable to pay it. Therefore, if they want an administration application, then we have to accept that they are entitled to get one. We invited them to see if we could find a way of negotiating a settlement about this, but of course that is in their hands. It is not for you, we would say, to try and preserve them from their own folly in taking a very hard line, when it would be more appropriate to bring in a third party [… who ...] is prepared to put in substantial [funds]. If they do not want to do that, then that is their decision. In that situation, we have to accept that there should be an administration order or a winding up, or whatever combination you want to do".

62. I assume that, in that last comment by Mr Wolman, he intended to refer to "Customer Services Numbers Ltd" rather than "Switch Connect Services".

63. In the end, an administration order was made in respect of Connect at about 1.00pm. The judge then rose.

64. However, as the transcript of the proceedings of the morning of 17 March 2011 indicated, there had been a brief adjournment (see page 18-23 of the transcript) during the hearing of the application for the administration order against Connect. I infer that the adjournment took place at some stage between 12.30 and 1.00pm, when the administration order in respect of Connect took effect.

65. Mr Prescott made reference to this in his first witness statement, dated 18 March 2011, where, at paragraph 63, he stated:

"I am also aware that there were discussions between Counsel, namely Mr Wolman (for Switch Connect), Paul French (for Numbers) and Christopher Boardman (for

Tanla) prior to the hearing of Numbers administration application. The discussion revolved around why the company would wish to terminate its agreement with Switch Connect in the event of Switch Connect's administration, since, with no other customers, the Company's income stream would be terminated immediately, as would Switch Connect's, which would hardly be in anybody's best interests. I understand from my solicitors and Counsel that Mr Wolman's response was quite simply "if the administration order is made, we will terminate the contract". I understand that the response from Counsel for Numbers was to question who the "we" referred to, and I further understand that no response was forthcoming. I also understand that Mr Wolman was questioned by Counsel for Tanla as to whether, to date, the Company had actually made any threats to terminate the contract, to which Mr Wolman said that he had seen a draft letter. I do not know who drafted that letter, when it was produced by the Company or when it was communicated to Switch Connect (and then on to Mr Wolman). I would have thought that would have been revealed by the communications between Mr Wolman and Switch Connect, but Mr Wolman has to date refused to provide them."

66. Mr French told me that it was during the adjournment to which I have referred, that further conversations involving the threatened termination of supply arose and it was only then, I infer between 12.30 and 1.00pm on 17 March 2011, that Mr French formed the view that he would have to make an oral application for an administration order in relation to Services, if an administarion order were made in respect of Connect.

67. This is the oral application which was heard by Mr Blunt QC on the afternoon of 17 March 2011, in the absence of Mr Wolman who had represented Connect and in the absence of any notice or written evidence, and which resulted in the *interim order* suspending the powers of the directors of Services and vesting them in Mr Prescott and Mr Poxon. This is the same interim order which the Applicant seeks, in these proceedings, to have declared null and void or to be rescinded.

68. Mr Wolman had remained in the court building until about 1.25pm when he left. It then appears that Mr French asked if Mr Blunt QC would be prepared to come back in to court, which he duly did.

69. The transcript of what took place thereafter is set out in Volume 1 page 679-684 in the trial bundle. It is noted on the front page of the transcript that both Mr French and Mr Boardman were present at a without notice application. However, the

identification on the transcript of the parties for whom they acted was not correct. Although Mr French was correctly noted as representing Connect (through its newly appointed administrators), Mr Boardman was wrongly recorded as appearing on behalf of Switch Services Ltd. Mr Boardman had attended on behalf of the petitioning creditor, Tanla.

The hearing before Mr Blunt QC on 17 March 2011 after 1.25 pm

70. During the course of the proceedings in the morning, relating to Connect, there had been some discussion of the court's powers under paragraph 13 of Schedule B1 to the Insolvency Act 1986 and of the court's power to make an interim order.

71. The administration order made in relation to Connect gave liberty to apply to the administrators and Tanla to rescind or vary the administration order in respect of Connect within 28 days.

72. However, during the course of submissions during the morning, the question arose whether or not it would be possible for the court, on the making of that order, to provide for it not to come in to effect for 14 or 21 days. If that order had been made, then the question would have arisen how was Connect to be controlled and managed in the intervening 14 or 21 days. Moreover, the outstanding winding-up petition presented by Tanla had to be dealt with. The automatic dismissal of a winding up petition only took effect when an administration order became effective.

73. Accordingly, as revealed between pages 16-18 of the transcript of the morning's proceedings concerning Connect (pages 671-673 of Volume 1), there had been a discussion about the court's power to make an interim order conferring powers of management upon insolvency practitioners and suspending the director's powers. In the end, it was not necessary for this route to be followed, since the administration order which was made was an immediate order, with liberty to rescind. On that basis, the administrators immediately took up their office.

74. I mention this exchange only to make the point that, when the same provisions were raised by Mr French in the afternoon during the without notice application in relation to Services, it was not unknown territory, since the very same provisions had been raised in the course of the morning submissions, albeit regarding Connect, not Services.

75. In the absence of Mr Wolman, Mr French began his application in connection with Services at 1.25pm as follows (see transcript page 680 of Volume 1):

"MR FRENCH: This is a without notice application on behalf of the administrators of Connect, Mr Prescott and Mr Poxon just having been appointed as administrators. We are hugely concerned on behalf of the administrators about two matters. First of all, the matter that Mr Boardman has already taken you to; that Services appear to be divesting itself of money, which would otherwise be due to Connect, and secondly, the threat of termination of the supply contract, in effect. Despite Services being in common ownership amongst the same family, the same ownership as Connect, who are all owned by the same family, the Marrocco Brothers, by way of a threat in order to preserve position, Services were intending to terminate the supply contract, which will thereby have an impact both on Services' business, Connect's business, and the businesses of the third parties with whom Connect provide services.

In those circumstances, on behalf of the administrators of Connect, Connect being a creditor of Services, because we understand that, for the last couple of months, Services has not been paying to Connect the sums which are due from Services to Connect under the supply contract, Services is getting money from BT, is sitting on it, not paying Connect deliberately in order to retain the cash, we think with a view to creating this indebtedness set off on termination of the contract to get out of the liability to pay Connect. So that is the smoke screen behind which everyone is operating. **So, from the point of view of the application that the administrators are seeking to make, the joint administrators of Connect will seek to obtain an administration order in relation to Services.** (My emphasis)

THE RECORDER: Right.

MR FRENCH: **It is a creditor of Services, because Services has not paid the sums due from Services to Connect in the last couple of months, and that is information that has been obtained by an employee of Connect, who has told the administrators that. We are a creditor. Services is insolvent, because it has not paid the money to us, and it is balance sheet insolvent on its last filed accounts. It has net assets exceeded by its liabilities. Thirdly, the purpose of the administration is the same purpose of the administration, to hold fire pending, so there can be an orderly wind down and an orderly realisation of the assets of both Services and Connect in due course.**(My emphasis)

THE RECORDER: Yes.

MR FRENCH: **What I am seeking is, under para 13 of what your lordship was taken to, on the administrators' undertaking to issue by the end of tomorrow an application for an administration order, because they now being in control of Connect, a creditor can do that, that they be appointed interim administrators pursuant to para 13, that they be entitled to exercise the entirety of the powers that are otherwise vested in the directors of the company, and the directors of the company, whether they are de jure directors, de facto directors or shadow directors …** (My emphasis)

THE RECORDER: Directors of Services?

MR FRENCH: Of Services. **They shall not be entitled to exercise any powers as directors of the company. Those are the three provisions that I seek on my undertaking to issue the application by the end of tomorrow.** (My emphasis)

THE RECORDER: What about service?

MR FRENCH: Service will be effective [effected] forthwith. There is one provision. This is what I drafted whilst we were sitting and your lordship was providing the costs; that the liberty to the company to apply on 48 hours written notice.

THE RECORDER: Yes.

MR FRENCH: I do not have instructions to give an undertaking in damages. Ordinarily, when an administrator or an office holder is seeking an injunction to preserve the status quo pending determination of an issue, whether it is the transaction [at an undervalue] or a [misfeasance] claim or something like that, the undertaking in damages would be given, and is commonly limited to the value of the assets of the company.

THE RECORDER: Yes, why can that not be done?

MR FRENCH: We do not know what we are getting in to. If we are prepared to limit that undertaking in damages to the value of the assets in the company, which would cap a potential liability, and, in the event, would not expose my clients to that liability, I would take some instructions, my lord.

THE RECORDER: Right.

MR FRENCH: But my clients having just got in to Connect and had only been appointed over Connect in the last 15 minutes, discussions with the risk officer Leonard Curtis have not been forthcoming as to liability. But, if your lordship is prepared to limit it to the value of the assets that are in Connect's hands, such that there is no personal liability, I will take some further instructions. There is also the possibility in due course, in relation to the share transfer that was referred to in due course, that the administrators of Connect would be taking proceedings against Style Loop, the ultimate owners of 97% shares now, to recover those shares, either in breach of fiduciary duty or as a transaction at an under value with restoring that 97% back […]

THE RECORDER: Yes, but you are not asking for injunctions now.

MR FRENCH: I am not asking for that yet, but that is something I may have to in due course, to preserve status quo in those circumstances.

THE RECORDER: Right. Mr Boardman, do you have any position?

MR FRENCH: I believe Mr Boardman is supportive.

THE RECORDER: Do you have any position?

MR BOARDMAN: My lord, yes. Obviously this is something that has developed out of the representations that we made in the light of what we heard this morning. My lord, in so far as I can formally express a view, obviously I have no locus because I am simply a creditor now of the company. But certainly, I would like to express support for the application that has been made. I do not have formal instructions from the client to appear on this application, but I would submit to you that, obviously, you have to be persuaded that it is an appropriate order. Obviously, there is no evidence before you, but my learned friend will, no doubt, put that before the court in support of it, and obviously, there will be other caveats that my learned friend has alluded to, which are entirely appropriate and I have nothing further to add to.

THE RECORDER: Ought we not to have a return date for this *ex parte* application?

MR FRENCH: It would be, because the administration application is normally on 5 days notice, so it would come back and will be listed in 5 days. We have had immense listing problems in relation to this.

...

MR FRENCH: Ordinarily, with without notice orders, one would expect it to come back before the same judge so that, in due course, obviously the matter can be discussed."

76. In the course of his submissions, Mr Wolman drew my attention to what he regarded as the unsatisfactory state of affairs which existed on the afternoon of 17 March 2011, namely that, although it was or might have been known he had a roving commission on behalf of the Applicant, Services and Connect, Mr French waited until he had left the building before making the without notice application shortly after 1.25pm, and did not tell him of his intention to make it.

77. Moreover, he felt aggrieved that Mr Blunt QC (who did not know that the without notice application was going to be made later in the day) did not call upon Mr Wolman to address the allegation which had been made by Mr Boardman that Connect had diverted £400,000 towards 186K Limited. He was also aggrieved that Mr French did not urge the judge to let Mr Wolman make his submission about the alleged diversion of money, if he was subsequently going to base his application for an interim order on it, albeit in part.

78. Mr French addressed these points as follows:

(1) Mr Wolman had not been instructed on behalf of Services. He had attended court on 17 March on behalf of Connect, not Services.

(2) Mr Wolman's own letter, dated 16 March (trial bundle 1 page 45), which referred to termination by Connect of its contract with Services, was regarded as a present threat. Therefore, to disclose to him the intention would have been to defeat the very object of the exercise, since it was felt that he would refer this matter back to the Applicant and/or Services.

(3) Furthermore, Mr French met the allegation that a freezing injunction coupled with an injunction preventing Connect from terminating its contract with Services would have been much less draconian than the interim order which in fact which he sought, by arguing that he had not seen a copy of any

version of the Telephony Services Agreement. Moreover, it was only one of two versions, both of which had been unknown to Connect's employees. In fact, a freezing injunction would not have helped solve the position, since such an injunction would not have prevented disposals in the ordinary course of business. His concern was that the Marrocco Brothers had no concept of what the ordinary course of business was, because they were disposing of assets belonging to Connect to an associated company, 186K Limited.

(4) The administrators of Connect could not understand what commercial justification there was for Services seeking to sever its connection with Connect, in the absence of any indication of who could have been substituted for Connect with a new purchaser from Services.

79. In the event, Mr French argued that his concern was truly justified because, although he did not know it at the time, Mr Marrocco had suggested that he had purported to terminate the contract by letter on 16 March 2011. However, the administrators have since confirmed that they have never come across any copy of that letter. Moreover, Mr French contended that no one has since returned to court to argue that Services was entitled to terminate the agreement, and how it was in Services best interest to do so.

80. In summary, therefore, against the background of inexplicable disposal of money amongst companies of which the Marrocco brothers had control and threats of termination, it was vitally important that Services be immediately placed under the management of licensed insolvency practitioners, who were also officers of the court.

81. Moreover, Mr French pointed out that the order made on the afternoon of 17 March 2011 gave liberty to apply to discharge the order before the return date on 25 March 2011. No one returned to argue that, despite the powers of the directors having been suspended, it was in the best interests of Services to cut off the supply and enter in to an agreement with some new purchaser.

82. In the end, the businesses of Connect and Services were sold to a new company, Equinet, a company under the control of the Marrocco brothers.

83. The interim order was, according to Mr French, a much less draconian approach than applying for the appointment of a provisional liquidator. Such an appointment

would have been be all but terminal, and the point of Mr French's application was to preserve the business of Services not to ruin it. The purpose was to keep the business of Services going, and to prevent any termination of supply, for the benefit of creditors both of Connect and Services.

84. Having read the transcripts of the hearings on the morning and afternoon of 17 March 2001 and listened to the submissions of Mr Wolman and Mr French to me, I am satisfied that, shortly after 1.25pm, Mr French was applying for an interim order under para 13 of Schedule B1 to the Insolvency Act 1986 in relation to Services on his undertaking, on behalf of the administrators of Connect, to issue a *formal* application with supporting evidence as soon as practicable.

85. However, he was applying for that immediate and urgent interim order within what I am satisfied was then a subsisting informal, but also *intended formal*, application for an administration order which was, despite theabsence of formal documentation and notice, then actually before the court .

86. It is obvious to me from the transcript, and in particular from the passages I have emphasised, that Mr French, was there and then addressing the threshold criteria for an administration order in relation to Services, namely that Connect was a creditor, that Services was insolvent and that the making of the order would achieve the statutory purpose, and, within that context, was making an application for an interim order, which the court could only grant 'on hearing an administration application'.

87. I am satisfied that the making of the oral applications for (i) an administration order, which everyone recognised would have to be adjourned to the return date of 25 March 2011, and (ii) an interim order against Services, having identified the basis for making an administration order and on the undertakings issued, would normally permit a court to proceed as if all the necessary formalities and pre-conditions had already been met. This approach would be consistent with the court's powers and practice, even after the introduction of the Civil Procedure Rules 1998, to grant urgent, and sometimes even draconian, interim relief and remedies in appropriate cases, on the basis of counsel's submissions and an undertaking to file evidence and proceedings confirming those submissions.

88. However, Mr Wolman's primary submission was that Mr Blunt QC simply did not have the jurisdiction to make the order which he did in relation to Services on the

afternoon of 17 March 2011, because there was no properly constituted application for an administration order before him, and because he was not and could not have been 'hearing an administration application', within para 13 of Schedule B1 to the Insolvency Act 1986.

The order made in relation to Services on the afternoon of 17 March 2011

89. On 18 March 2011, Mr Blunt QC approved the draft order prepared by Mr French relating to the proceedings on the afternoon of Thursday 17 March 2011. It is set out at page 519 volume 2 of the trial bundle.

It is entitled:

> "In the matter of an intended application for an administration order in respect of Switch Services Limited and In the matter of the Insolvency Act 1986."

It continued:

> "Upon the without notice application of Switch Connect Limited (in administration) (acting by its administrators Colin Andrew Prescott and Andrew Poxon ("the applicant")."

90. After the recital that Mr Blunt QC had heard from counsel for the applicant, and the recital of the undertaking in damages limited to the value of the net asset in the hands of the applicant, it recorded the applicant's further undertaking, as soon as practicable, to:

> *(i) Serve a copy of the order and*
>
> *(ii) Issue and serve an application for an administration order in respect of the Respondent at 10.30 on Friday 25 March 2011 at Bristol Civil Justice Centre.*

91. Mr Blunt QC, sitting as a Deputy Judge of the High Court, made the following orders:

> *(1) Pursuant to Para 13(1)(d) of Schedule B1 to the Insolvency Act 1986:*
>
> *1.1 Colin Andrew Prescott of Leonard Curtis, 2nd Floor, 30 Queens Square, Bristol, BS1 4ND,*
>
> *1.2 Andrew Poxon of Leonard Curtis, DTE House, Hollins Mount, Bury, Lancashire, BL9 8AT*
>
> *shall be appointed as interim administrators of the Respondent.*
>
> *(2) For the period that this order is in force:-*

2.1 Colin Andrew Prescott and Andrew Poxon shall be entitled to exercise all the powers invested in the directors of the Respondent;

2.2 The directors of the respondent, whether de jure, de facto or shadow directors, and in particular Marco Marrocco and Dominic Marrocco, shall not be entitled to exercise any powers as directors of the Respondent.

(3) Anyone served with or notified of this order, including the Respondent or its members, may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first give the Applicant's solicitors (Beachcroft LLP, Portwall Place, Portwall Land, Bristol, BS9 7UD; ref GIH) 48 hours' written notice. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

(4) This order shall:-

4.1 Take effect from 1.50pm on Thursday 17 March 2011; and

4.2 Remain in force until the final disposal of the administration application in respect of the Respondent, unless the Court in the meantime orders otherwise.

(5) The costs of this application are reserved to the Judge hearing the application for an administration order."

92. The reference in paragraph 1 of the order to Mr Prescott's and Mr Poxon's appointment as "interim administrators" of Services was wrong. There is no such office known created by the insolvency legislation as an "interim administrator": Re a Company [1987] 3 B.C.C 124. However, as is apparent from the opening words of the first order, the order was being made pursuant to paragraph 13(1)(d) of schedule B1 to the Insolvency Act 1986.

Jurisdiction to make an interim order

93. Paragraph 13 of schedule B1 to the Insolvency Act 1986 is in the following terms:

"*Powers of Court*

13(1) On hearing an administration application the court may –

(a) make the administration order sought;

(b) dismiss the application;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order;

(e) treat the application as a winding-up petition and make any order which the court could make under section 125;

(f) make any other order which the court thinks appropriate.

13(2) An appointment of an administrator by an administration order takes effect –

(a) at a time appointed by the order; or

(b) where no time is appointed by the order, when the order is made.

13(3) An interim order under sub-paragraph (1)(d) may, in particular –

(a) restrict the exercise of a power of the directors or the company;

(b) make provision conferring a discretion on the court or on a person qualified to act as an insolvency practitioner in relation to the company.

13(4) This paragraph is subject to paragraph 39 [effect of administrative receivership]."

94. What is plain from the face of the order is that Mr Blunt QC was making an interim order and not a final order and, moreover, he was not making the administration order itself. The order itself had been entitled "In the matter of an intended application for administration order". This was reinforced by the provisions of clauses 4.2 and 5 of the order.

95. Before he pronounced the order orally on the afternoon of 17 March 2011 - as the transcript of those proceedings showed – neither any written evidence in support of the application for the interim order nor any written draft order had been placed before the learned Judge.

96. Mr French's contention to me was that, on the afternoon of 17 March 2011, he was making an oral application there and then for an administration order in relation to Services. Indeed, he submitted that the learned Judge could then, had he wished to

do so – although no-one urged him to do so, have made a full administration order, and appointed Mr Prescott and Mr Poxon administrators of Services.

97. In summary, Mr French submitted that Mr Blunt QC was in fact hearing an application for an administration order and for the appointment of Messrs Prescott and Poxon as managers in respect of Services, in the context of which the Judge made an interim order under paragraph 13(1)(d) (invoking the director's powers under paragraph 13(3)) and adjourning the application to be heard on Friday 25 March 2011 on the basis of written evidence.

98. Mr Wolman submitted that Mr Blunt QC was not hearing, nor could he have been hearing, an administration application then because none of the mandatory prerequisites for making such an application had been complied with. Therefore, there was not, nor could there have been, any hearing of an administration application on the afternoon of 17 March 2011 in respect of Services.

99. Mr Wolman drew my attention to the express provisions of paragraphs 10, 12 and 13 of schedule B1 to the Insolvency Act 1986 which are in the following terms:

> "10 An administration order is an order appointing a person as the administrator of a company.
>
> 12(1) An application for the court for an administration order in respect of a company (an "administration application") may be made only by –
>
> (a) The company.
>
> (b) The directors of the company.
>
> (c) One or more creditors of the company.
>
> (d) …
>
> (e) A combination of persons listed in paragraphs (a) to (d).
>
> 13(1) On hearing an administration application the court may –
>
> ...
>
> (d) make an interim order;

100. In other words, unless there was a properly constituted application for an administration order before the court, it had no power to make any interim order. This 'core issue' is analysed later in this judgment, after I have dealt with the question whether the Applicant has sufficient standing to make this application.

101. Of course, Mr Blunt QC had heard, immediately before this application, the application for the administration order in respect of Connect, for which written evidence had been filed. The transcript of those proceedings is set out between pages 654 and 678 in volume 1 of the trial bundle.

102. One of the documents which had been before Mr Blunt QC in the morning was the witness statement of James Barrell of Numbers, which had been filed in support of the successful administration application in respect of Connect. Exhibited to Mr Barrell's witness statement (page 156) was an extract from the electronically filed documents for Services at Companies House, which showed that, as at the date of the annual return on 18 November 2010, Connect still held 97 percent of the issued share capital in Services. Yet, it had been said that, as early as December 2009, this 97 percent shareholding had been transferred by Connect to Style Loop Ltd.

103. Moreover, between pages 157 and 161 within the exhibits to Mr Barrell's witness statement, there were the unaudited abbreviated accounts to 31 December 2009 of Services. Those accounts, showing the years ended December 2008 and December 2009, revealed a net deficit of £2,100. Furthermore, the profit and loss account for those two years showed a loss of £112,000. In other words, both the net deficit and the profit and loss account showed the same balance for the two years, although the debtors cash at bank and creditors had significantly increased between 2008 and 2009.

104. Accordingly, there was material before Mr Blunt QC which showed, on the basis of the most recent filed accounts, that Services was balance-sheet insolvent.

105. The witness statement of Mr Barrell also exhibited the winding-up petition which had been presented against Connect by Tanla, which was originally due for hearing on 9 March 2011 alleging a debt. He then went on to describe how, on 14 February 2011, Telephone Plus Services Limited applied for an administration order in relation to Connect. That was due to be heard on 23 February 2011 but that debt of £187,986 was satisfied by a third party. Mr Barrell then said that Connect had closed its Bristol office, with two employees suspended on full pay, namely Andrew Cornes and Ian Conway. Andrew Cornes was the sales manager of Connect, having worked there for seven years.

106. Moreover, as I have already indicated, Mr Blunt QC was taken by Mr French to the provisions of paragraph 13 of schedule B1 to the Insolvency Act 1986 during the course of the morning's hearing (see page 61 of volume 1 of the trial bundle), where paradoxically Mr French pointed out (see page 672) that anyone appointed

under an interim order would not be an administrator. However, this was how he described the effect of the interim order in relation to services, by what I regard as an oversight.

Amended order

107. This was corrected on 25 March 2011 by an amendment to the earlier order deleting the reference to "administrators" and by eliding paragraphs 1, 1.1, 1.2, 2.1 and 2.1 into one paragraph which now read:

> *"1. Pursuant to Para 13(1)(d) of Sch B1 to the Insolvency Act 1986, for the period that this order is in force:*
>
> *1.1 Colin Andrew Prescott and Andrew Poxon shall be entitled to exercise all the powers vested in the directors of the respondent;*
>
> *1.2 The directors of the respondent, whether de jure, de facto or shadow directors, and in particular Marco Marroco and Dominic Marroco shall not be entitled to exercise any powers as directors of the respondent."*

108. It is regrettable that the order approved on 18 March 2011 contained a reference to the appointment of Messrs Prescott and Poxon as 'interim administrators'. This terminology was reproduced in a number of letters sent out by Beachcroft LLP to those who had dealings with Services.

109. Of course, the basis of the order made on the 17 March was that shown in the transcript of those proceedings to which I have referred, where Mr French repeated the concern about inter-company movements of funds within the same group, the cash flow insolvency of Services (because it had not paid Connect any monies in 2011) and because of its balance sheet insolvency. Moreover, I was told by Mr French that, present at court on 17 March 2011, providing information to Messrs Poxon and Prescott, were Mr Conway and Mr Cornes, former employees of Connect.

17 to 25 March 2011

110. On 18 March 2011, Mr Prescott made a witness statement in compliance with the undertaking given by Mr French to Mr Blunt QC the previous day. On 23 March 2011, he made a second witness statement to deal with matters that he was unable to conclude in his first witness statement owing to a lack of time. It is plain that both

those witness statements were heavily influenced by material and information supplied to him by Mr Conway.

111. I have already made reference to concerns over payments made by Connect or Services to 186K Limited, for which Messrs Prescott and Poxon could not find any obvious reason, and which had been the subject matter of correspondence involving Mr Wolman in the days before 17 March 2011.

112. Mr Prescott exhibited to his first witness statement other witness statements which had been made by James Barrell and Kevin Hawthorn in respect of the successful administration application and by Jane Thompson, of Telephone Plus Services Limited, in support of the first administration application which was withdrawn by consent.

113. The involvement of the Applicant, SB Corporate Solutions Ltd, had been a source of concern voiced by Mr Barrell in his witness statement, dated 23 February 2011, in support of the successful administration application in relation to Connect. He was concerned (see paragraph 6, page 119 of volume 1) that the best advice was not been given to the directors of Connect in respect of their duties to creditors.

Correspondence between 17 and 19 March 2011

114. Following their appointment as administrators of Connect on the morning of 17 March 2011, Messrs Prescott and Poxon were anxious to enquire into the affairs of Connect and, in particular, the transfer of £400,000 to 186K Limited.

115. At 11.53am on 19 March 2011, Kevin Hawthorn, a solicitor at Beachcroft, sent an email to the Applicant entitled “Switch Connect Limited – in administration (“the Company”) URGENT”.

116. Mr Hawthorne had previously written to the Applicant on 17 and 18 March 2011, informing them about the administration order made in relation to Connect and sending it a copy of the order.

117. These two letters were referred to by Mr Hawthorn in his email at 11.53 on 19 March 2011:

> “Dear Sirs
>
> Further to our letters of 17 and 18 March, we write to inform you that our clients were also appointed as interim administrators of Switch Services Limited (“Services”) on 17 March and a copy of the Order is attached. You will

note that the powers of any directors of Services are suspended and those powers have effectively transferred to our clients for the time being.

We understand that Spencer Brown have provided advice to the Company [i.e. Connect]. We also understand that you instructed Clive Wolman of 11 Stone Buildings under a Direct Access Scheme to act as Counsel for the Company [i.e. Connect] …"

118. In this email, Mr Hawthorne made reference to Messrs Poxon and Prescott's powers, as administrators of Connect, under section 236 of the Insolvency Act 1986, to require the Applicant to provide the administrators with such information and they might require regarding Connect.

119. His email concluded:

"When responding, please confirm whether you have been instructed by Services at any time."

120. The Applicant made no application to vary or set aside the order made on 17 March 2011, even though it was expressly made aware of it by that email. However, different counsel, Ms Lisa Walmisley, was instructed on behalf of Services for the hearing on 25 March 2011 at which the interim order was to be reconsidered, as was the question whether an administration order should in fact be made in relation to Services.

Hearing on 25 March 2011

121. Ms Walmisley's skeleton argument, on behalf of Services, is set out at pages 495 to 499, in volume 2 of the trial bundle.

122. In summary, Ms Walmisley made the following submissions:

(i) The interim order was void and should be set aside for procedural irregularity and/or want of jurisdiction;

(ii) It had not been demonstrated that Connect was a creditor of Services;

(iii) Services was not insolvent, having regard to (a) some draft management accounts prepared to 31 March 2011; (b) a cross claim which Services would have against Connect; and (c) because a director or third party would pay any money due to Connect;

(iv) Mr Poxon and Mr Prescott could not be administrators or managers of both Connect and Services, because they had a conflict of interest. This arose because Services denied the existence of any Telephony Services Agreement, and Connect was relying on such an Agreement;

(v) An adjournment of the hearing of the application for an administration order was necessary, because of late change of solicitors and late service of the application returnable on 25 March 2011. Moreover, counsel alleged that Mr Marco Morroco had been unwell and this limited his opportunity to provide full instructions;

(vi) A transfer of the proceedings to Leeds was appropriate.

123. Mr Blunt QC refused the adjournment, notwithstanding the short notice, Mr Marrocco's ill health and his difficulty in obtaining legal advice. Mr Blunt QC did not find those sufficiently persuasive factors to justify the adjournment. Nevertheless, he gave liberty to apply to rescind the order on five days written notice, exercisable by 4pm on Friday 8 April 2011. He then went on to abridge time to enable the application for the administration order to be finally heard and determined on 25 March 2011.

124. Having refused the application for the adjournment, the learned judge then went on to deal with the application for the administration order in respect of Services on its merits, having regard to Ms Walmisley's submissions (i) that the statutory criteria for making an order were not fulfilled and (ii) because of the potential conflict of interest arising between the same people being administrators of both Connect and Services.

125. Mr Blunt QC was satisfied that Connect was a creditor of Services, particularly since no evidence had been filed to negate the evidence filed by Mr Prescott. Nor was he impressed by the conflict point, since the administrators would be officers of the court who could be expected to bring back to the court any difficulties which arose. Moreover, he declared that the creditors were likely to be in a better position if an administration order were made than they would be if Services went into liquidation. He found that it really was not open to Mr Morroco to contest this, since he had not produced the agreement between BT and Services to show that both administration and liquidation automatically triggered the termination of the Telephony Agreement.

126. He did not set aside the interim order which he made in relation to Services on the afternoon of 17 March 2011. It probably was unnecessary for him even to consider this, because Ms Walmisley's submission had been that the adjournment should have been granted and a new form of interlocutory relief imposed, such as the grant of a freezing and/or an injuction restraining the termination of the Telephony Agreement.

127. However, since Mr Blunt QC had refused the adjournment and went on to make the full administration order, he was not principally concerned with the technical matters which had been raised in Ms Walmisley's skeleton argument as to why the earlier interim order should not have been made.

128. The administration order and the appointment of Mr Prescott and Mr Poxon as the administrators of Services took effect at 2.25pm on 25 March 2011. However, as I have indicated, the order contained an express liberty to the directors of Services to apply to rescind the order on five days written notice to Connect, such right to be exercised by 4pm on Friday 8 April 2011. Time for making the application was subsequently extended by a court order dated 8 April 2011.

Application by Mr Marrocco and/or Services to rescind the administration order of 25 March 2011 in relation to Services

129. On 15 April 2011, Clarion Solicitors Ltd, Britannia Chambers, 4 Oxford Place, Leeds, on behalf of Marco Morocco, the sole director of Services, applied in Bristol for an order, under the liberty to apply provisions in the order of 25 March 2011 and/or rule 7.47 of the Insolvency Rules 1986, for the rescission of the administration order in respect of Services made on 25 March 2011. The application notice itself stated:

> "The principal reasons why the administration order ought not to have been made are that the first Respondent, Switch Connect Limited, was not and is not a creditor of the Company and the Company is not, and is not likely to become unable to pay its debts. Alternatively, and so far as may be necessary, the Applicant is willing and able to discharge all the liabilities of the Company and the costs and expenses of the administration so that the administration order ought to be rescinded ..."

130. The application sought alternatively for relief as follows:

> "An order that the appointment of the Administrators cease to have effect pursuant to para 81(1) of Sch B(i) to the Insolvency Act 1986, alternatively that the Administrators maybe directed to apply pursuant to para 79(1) ibid for the appointment to cease to have effect;"

131. In the end, this application was not heard or determined because, on 18 May 2011, I made an order, with the consent of the parties, recording the fact that the application dated 15 April 2011 was withdrawn, and that the hearing which was due to take place before me on 19 May 2011 be vacated, without any order as to costs.

132. What appears to have happened is that another company incorporated by the Marrocco brothers, Equinet, bought the business of Connect and Services from the administrators and, as part of the overall compromise, the application dated 15 April 2011 was withdrawn.

Proceedings under s 236 Insolvency Act 1986

133. The administrators of Connect made an application under section 236 of the Insolvency Act against the Applicant for disclosure of information. Documentation has been supplied by the Applicant and, in November 2011, a hearing for the oral examination of Mr Leroy about his knowledge of the affairs of Connect was imminent. It can be reasonably anticipated that a similar application will be made by Mr Poxon and Prescott under section 236 of the Insolvency Act 1986 against the Applicant in relation to Services. It may also be the case that an application will be made by the Applicant for Mr Prescott and Mr Poxon to be removed as administrators of either Connect or Services or both on the grounds of conflict of interest.

134. In his letter, dated 4 August 2011, to Beachcroft LLP now the administators' solicitors, Mr Liam LeRoy, on behalf of the Applicant, wrote:

> "If your client, purporting to act as administrators of [Services] intend to pursue me or [the Applicant] any further on the matter, we shall be making an application to the court for a declaration that your clients' appointment was not validly made and an order that the purported appointment be set aside. We shall also be seeking costs and damages and reserve our rights to invite other parties who have suffered loss as a result of your clients' bogus appointment to join us in making such a claim."

135. The administrators did decide to pursue the matter further.

The current application

136. On 27 September 2011, the Applicant issued the current application which was heard by me in November 2011. That was the same date as the hearing of an application for disclosure of documents, under section 236 of the Insolvency Act 1986, made by Mr Poxon and Prescott, in their capacities as administrators of Connect, against the Applicant. An order under s236 was duly made on that day.

137. Thus the prophecy contained in the letter of 4 August 2011 was fulfilled.

138. Mr French has argued that the underlying purpose of this application is to inhibit the administrators' getting information from the Applicant about its knowledge of the affairs of Connect and Services. Mr Wolman has confirmed that the Applicant has already complied with the order made against it for disclosure of documents, although the oral examination of Mr Leroy was imminent.

139. Mr French also contended that the Applicant has been fundamentally mistaken as to what has happened in the history of this case, so far as Services is concerned, because the interim order did not put Services into administration. This only happened on 25 March 2011. Moreover, Mr Poxon and Mr Prescott were not appointed as joint administrators on 17 March 2011 by the interim order. They were only appointed joint administrators of Services on 25 March 2011 by the administration order. This is why I have already said that relief cannot be granted in the form in which the application has been couched. The order which the Applicant seeks to have set aside was not made in not the terms alleged in the application.

140. The Applicant is neither a shareholder nor director of Services. The application does not seek to have the full administration order set aside, merely the interim order made on 17 March 2011 which was confirmed by the making of the administration order on 25 March 2011. It also seeks to traverse similar ground covered by Mr Marrocco and/or Services on 25 March 2011, and also in their later application, dated 15 April 2011, which was subsequently withdrawn.

What is the standing of the Applicant to make the application?

141. The Applicant invites me to declare that the order made by Mr Blunt QC on the afternoon of 17 March 2011 was null and void and to set it aside. Alternatively, the Applicant invites me to rescind the interim order made by Mr Blunt QC under rule 7.47 of the Insolvency Rules 1986. The Applicant is and has never been a director or shareholder in either Connect or Services. Mr French has argued that the Applicant lacks sufficient standing to make this application.

142. The Applicant claims to have standing to make this application because:

(a) As a person served with or notified of the order, it had liberty to apply at any time to vary or discharge the order on 48 hours written notice, and/or

(b) It is a creditor of Services and a person affected by the interim order. As a result of the order in relation to Services made on the afternoon of 17 March 2011, the existing director was removed, insolvency practitioners took his place and third parties were notified wrongly that an interim administration order had been made, all of which, inferentially, tipped Services into insolvency when it had not previously been insolvent. As a result, the Applicant, as a creditor, has lost its fees for 11-12 hours work done for Services and the potential of recovering a 'success fee', which I was told by Mr Wolman was £25,000.

143. If the applicant does have sufficient standing, then the substance of its application is that the court did not have jurisdiction to make the interim order on the afternoon of 17 March 2011, because the court was not at that time "hearing an administration application" which it had to do before it could make the interim order.

144. I have set out above the terms of paragraph 3 of the original unamended version of the order made on the afternoon of 17 March 2011. However, it is necessary to repeat it at this stage. It provided:

> "Anyone served with or notified of this order, including the Respondent or its members, may apply to the Court at any time to vary or discharge this order (or so much of it as affects that person), but they must first give notice to the Applicant's solicitors (Beachcroft…) 48 hours' written notice. If any evidence

is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance."

145. Mr Wolman's first point is that because a copy of the interim order was attached to the emails sent by Mr Hawthorne at Beachcrofts to the Applicant at 11.53 on 19 March 2011, the Applicant came within the provision of paragraph 3 of the order above, and is still entitled to apply to set aside that order.

146. I reject that submission for the following reasons:

(i) The interim order was served on the Applicant not as an interested party or as a party affected but as an agent or conduit for onward transmission to Services and Connect. The registered office of Connect was at the Applicant's premises and the Bristol premises had been vacated;

(ii) Even if the interim order were served on the Applicant as an interested party, it merely permitted an application to be made on 48 hours notice *before the return date* on 25 March 2011. It did not give a perpetual right to the Applicant, or any other person affected thereby served with the notice, to apply to set aside the interim order after the return date at their leisure.

(iii) Even if the Applicant were served as a person affected by the interim order, they had an opportunity to attend the court on 25 March 2011 and to be heard. After all, Services was then represented and there was a draft witness statement from Marco Marrocco. In my view, this all happened with the knowledge of the Applicant which chose not to attend or to be separately represented.

147. In my judgment, it is now far too late for the Applicant, even if it was once entitled to do so, to rely upon paragraph 3 of the interim order with which it was supplied as giving it standing, whenever it chose to do so, to make an application to set that interim order aside.

148. The Applicant's alternative claim to have sufficient standing to make this application is based on its alleged status as a creditor of Services.

Is the Applicant a creditor of Services?

149. Before analysing the various arguments which have been put forward in support of and against this contention, I should record the commercial background against which the liabilities of Services are currently being met.

150. By an Agreement of Understanding, dated 10 May 2011, between Services (in administration), Messrs Prescott and Poxon as joint administrators, Style Loop Limited, Marco Marrocco, 186K Limited and Data Electroserve Limited, it was recited that Services had sold its business and various of its assets to Equinet Limited for £250,000. That Agreement then provided that 186K, Mr Marrocco, Style Loop and Electroserve, and their directors and agents where appropriate, would meet the liabilities in the form of amounts owing to creditors of Services and expenses properly incurred in the conduct of the administration, after receiving credit for the £250,000 paid by way of consideration for the acquisition of the business of Services. The Agreement provided a mechanism for disputed debts to be resolved.

151. Therefore, in general terms, if the Applicant is correct in its claim to be a creditor of Services for work done, then this is a liability which may be met by the parties to that Agreement of Understanding. It would be a matter for the Applicant to satisfied those responsible for discharging the liabilities of Services that it was truly indebted. Of course, in this context, there may be a difference between any claim which the Applicant has for services actually rendered and its claim in respect of the success fee which it said it would have received but for the demise of Services, triggered or accelerated by the impugned interim order.

152. Mr Wolman argued that the Applicant was demonstrably a creditor of Services or at the very least, in the absence of any cross-examination of the Applicant's witnesses, they should not be disbelieved, since they had made positive averments supported by declarations of truth.

153. Mr French contended that the weight and balance of the evidence established that the Applicant was not a creditor of Services or that, at the very least, the Applicant had failed to discharge the burden of proof of establishing that it was.

Procedural framework for resolving the dispute whether the Applicant is a creditor

154. No oral evidence was called on this matter, nor was any witness cross examined. No order had been made requiring the makers of witness statements to attend for cross-examination.

155. The procedural framework within which this hearing took place was one set by the Insolvency Rules 1986.

156. Rule 7.7A reads as follows:

> "7.7A Witness Statements – General
>
> 7.7A(1) [Evidence in witness statement] Subject to Rule 7.9, where evidence is required by the Act, or the Rules as to any matter, such evidence may be provided in the form of a witness statement unless –
>
> (a) In any specific case a Rule or the Act makes different provisions; or
>
> (b) The court otherwise directs.
>
> 7.7A(2) [Cross examination of a person making witness statement] The court may on the application of any party to the matter in question order the attendance of cross-examination of a person making the witness statement.
>
> 7.7A(3) [Failure of person to attend] Where, after such an order has been made, the person in question does not attend, that person's witness statement must not be used in evidence without the leave of the court".

157. Rule 7.9 concerns the use of reports and is inapplicable to this case.

158. Rule 7.10(3) provides:

> "7.10(3) [Directions as to evidence] The court may give directions as to the manner in which any evidence is to be adduced at a resumed hearing and in particular as to –
>
> (a) The taking of evidence wholly or partly by witness statement or orally;

(b) The cross-examination of the maker of a witness statement; or

(c) Any report to be made by an office-holder."

159. No application was made for the maker of any witness statement to attend for cross-examination. Accordingly, I have dealt with the issue whether the Applicant is or was a creditor of Services on basis of the witness statements and the other written material which has been placed before me.

The evidence for and against the Applicant as a creditor

160. **Liam Joseph Charles LeRoy** is a management consultant by profession and now the sole director of the Applicant, which is also known as Spencer Brown. In his first witness statement, dated 26 September 2011, he made the following statements relevant to the status of the applicant:

"(3) Until May 2011, I was a joint director of SBCS [Applicant] with my brother Desmond LeRoy. He resigned after I had recovered and returned to work following a serious kidney-related illness from which I suffered in February and March 2011. This profoundly affected and handicapped my involvement in the above matters. It was at the time when both companies, Switch Connect Limited ("Connect") and Switch Services Limited ("Services") were put, or allegedly put, into administration as a result of the manoeuvrings of the Cross-Respondents and their lawyers.

(4) Throughout that period, SBCS was instructed by Mr Dominic Marrocco, the ultimate owner of a group of companies to which Connect and Services formed part, and his younger brother Marco. Dominic was and is a successful entrepreneur with many interests who is resident in Nevada, the US, some eight time zones away. He was content to leave Marco, who is based in Leeds, to serve as the sole director of both Connect and Services. Our instructions were to advise on, and where appropriate to represent, the interests of the group of companies as a whole.

(5) The Marroccos and their companies were very much my clients in the sense that it was I personally who had a close relationship with them. Although Desmond performed valiantly in seeking to hold the fort

during my illness, he lacked the detailed knowledge of their affairs. He therefore sought to avoid, or defer, the taking of any important decisions in relation to them."

161. Mr Wolman submitted to me that, at the time Mr LeRoy made this witness statement, Mr LeRoy considered that the 'liberty to apply' provision in the order gave the Applicant standing to make substantive application and that, therefore, it was not necessary for him carefully to analyse the contractual relationship between the Applicant and its various clients.

162. I do not regard this as a persuasive argument. Since Mr LeRoy was attempting to describe in that witness statement who his client or clients were, I seen no reason why, as a professional man, he should not have done so accurately.

163. In the letter of 4 August 2011, referred to above, **Mr Liam LeRoy** stated:

> "As far as the position of Spencer Brown is concerned, the company was instructed by Mr Marco Marrocco both personally and on behalf of Switch Services Limited. You claim to be representing the administrators of Switch Services Limited. But I have taken legal advice on this matter and I do not believe that your clients were validly appointed."

164. This is to be contrasted with what Mr LeRoy said in his first witness statement, dated 26 September 2011, when he said that the Applicant had been instructed by Mr Dominic Morrocco and his younger brother Marco.

165. When Beachcroft LLP received the Applicant's application, dated September 2011, for rescission of the order made on the afternoon of 17 March 2011, it wrote to Mr LeRoy on 6 October 2011 stating, amongst other things:

> "(3) You are not a creditor, director, member or contributory of the Company [i.e. Services]. You acted simply as an advisor to the Company. The order of 17 March was served on you on the basis that Spencer Brown was the registered office of the Company and also

acted as its advisor. The Order did not affect you and as such you have insufficient locus now to apply for an Order for rescission."

166. On 6 October 2011, Mr Liam LeRoy replied stating:

> "In relation to the third point of your defence, I can confirm that we were and are creditors of the Company. If necessary, I shall provide a further witness statement to that effect."

167. In paragraph 28 of his third witness statement, dated 7 October 2011, **Mr Prescott** wrote:

> "28 There is now shown to me… a copy of the Applicant's letter in reply in which the Applicant claims that they are creditors of the Company. That is the first mention that has been made of the Applicant being a creditor of the Company. There is no evidence amongst the records of the Company that that is the case. The Applicant's letter of 4 August… show payments totalling £50,000 to the Applicant in the period prior to administration. It is difficult to ascertain fees justifying payment of £50,000 let alone any greater sum being due."

168. **Mr Liam LeRoy** addressed this issue in his second witness statement, dated 11 October 2011, as follows:

> "3. The first matter which I need to nail down once and for all is the insinuation of Mr Prescott that SBCS is not a creditor of Switch Services Limited. SBCS provided approximately 11 – 12 hours advice and financial analysis to Switch Services Limited, at the request of the management of Switch Services, in particular of its director Mr Marco Morrocco, in the period from 9 to 17 March 2011.
>
> 4. This was noted and acknowledged by Beachcroft, the solicitors acting for the Respondents on 19 March, two days after they ceased control of Switch Services Limited. They said in an email to us…: *"We understand that Spencer Brown have provided advice to the Company*

[viz. Switch Services] …. [A]dvice to the Company… remains the Company's property."

5. On the basis that (presumably) this advice and *"property"* might have significant value, and on the basis that the Respondents have been appointed *"interim administrators"* with all the powers of the company's directors, Beachcroft in its email then proceeded to demand from us all kinds of information and documents.

6. In contrast to the above, Mr Prescott now says at paragraph 36 of his witness statement:

> *"There is no evidence amongst the records of the Company of any unpaid invoice."*

However, he disingenuously avoids mentioning the evidence amongst the records of the Company which shows that SBCS provided advice to it, as his solicitors stated on 19 March.

7. The reason that SBCS has not submitted an invoice to the Respondents for the work done in March is that I was told, and still believe to be true, that in May the Respondents entered into a conditional deal with Mr Marrocco. Under its terms as I understand them, Mr Marrocco and his associates will buy back Switch Services Ltd. – and pay off all its creditors including SBCS.

8. I have sought confirmation that SBCS is indeed entitled to payment for its advice in March from Mr Marco Morrocco in a letter that I sent to his solicitors yesterday… Mr Marrocco has not responded and our threat of issuing a witness summons against him remains. But I am advised that, under the procedural rules, such a summons, even if issued, could not be effective for tomorrow's hearing. I should add that when SBCS made its application two weeks ago, we were assured of the support of Mr Marrocco, and I said so in my first statement. I do not know what or who may have changed his mind since then, if indeed he has changed his made."

169. In fact, Mr LeRoy had misinterpreted the email of 19 March 2011 to which he referred in paragraph 4 of his second witness statement. That email described its subject as: “Switch Connect Limited – in administration (“the Company”) URGENT”. Therefore, the references in that email to the “Company” to which Mr LeRoy referred were not to Services but to Connect.

170. **Marco Marrocco** did eventually supply a witness statement for the Applicant, dated 20 October 2011, in which he said that he had not seen either the application or the evidence filed by either party before making his witness statement. Mr Marrocco dealt with the applicant’s status as a creditor of Services in paras 51-53 of his statement where he stated:

> “51. I recognised that Connect and then subsequently Services needed professional advice from someone with specialist knowledge of turnaround and insolvency situations.
>
> 52. I instructed Spencer Brown (SB Corporate Solutions Ltd) who were recommended to me by Andrew Sacks. I understand he agreed an hourly rate of £250 per hour plus VAT. Subsequently I needed Spencer Brown to provide advice to Services. This advice was provided between in or around 9 and 17 March 2011. Services has made payment of monies to Spencer Brown but I believe that these monies were largely paid in respect of work undertaken by Spencer Brown on behalf of Connect and there is only a limited sum outstanding in relation to Services.
>
> 53. There is currently an issue between myself and the Administrator as to what sums were paid”.

171. **Desmond LeRoy**, in replying to Mr Hawthorne’s email of 19 March 2011, to which he had attached the order appointing Messrs Prescott and Poxon as interim managers of Services, wrote, at 15.24 on 21 March 2011:

> “Subject: Re: Switch Connect – In Administration – URGENT
>
> Dear Sirs, I have the letter that you emailed to our office over the weekend. The main client manager and fee earner, Mr Liam LeRoy, is seriously ill at the moment so it has been left to me to respond.

We were engaged by Dominic Marrocco, who we believed to be the ultimate owner of a group of companies including Switch Connect Ltd and Switch Services Ltd. We later got instructions from Switch Connect Ltd but only on the understanding that our first responsibility was to the group of companies of which it was part. In fact, Mr Marco Marrocco, the brother of Dominic and sole Director of SC, told us that he accepted that if it was decided to sell off, or let go of, Switch Connect Ltd (or for that matter Switch Services Ltd), our duties and the duties of those we might need to commission (including a lawyer such as Clive Wolman) would be exclusively to Switch Connect's parent company and its ultimate owner. Switch Connect Ltd would make no demands of us or them in that situation. We would not have been prepared to go ahead on any other basis.

Two or three weeks later we instructed and signed a client care letter with Clive Wolman, a Barrister of 11 Stone Buildings, who we have previously used in legal disputes dating back to 2008.

It was not suggested that when we did this we were meant to be agents of Switch Connect Ltd or even that we have commissioned Clive Wolman with the authority of that company. We did not do so. On the contrary we got Mr Wolman on board on our own initiative, knowing that we would have to pay his fees. However, it was after a conversation with Dominic from which we realised that the situation of Switch Connect Ltd got so much worse but it was likely to accept help including a barrister, at an urgent hearing the next day, from whoever could offer it. Mr Wolman did indeed attend the next day hearing.

I hope this answers your points.

Kind regards".

172. At the time that he wrote that Desmond LeRoy was a Director of the applicant. There was no suggestion in that email that there was any contract between the Applicant and Services.

173. The other evidence upon which the applicant comprised the two witness statements from **Andrew Marc Sacks**. Mr Sacks is a chartered accountant, who was a financial advisor both to Connect and to Services. His witness statements are dated 20 October 2011 and 4 November 2011.

174. Mr Sacks became involved when a fraud had been discovered which detrimentally affected Connect and Services.

175. Apparently, two fraudsters obtained approximately 700 mobile phone numbers operated via Vodafone and used them systematically to instigate and receive multiple text messages, using a £10 per text premium rate reverse billing SMS number. Vodafone initially recognised those mobile numbers as belonging to its network and paid the monies charged to Tanla who in turn paid Connect. Vodafone was then unable to recover those monies from its customers, because the numbers no longer belonged to their customers. Therefore, Vodafone sought to recover those payments from Tanla in or around October 2010,and in turn Tanla sought to recover them from Connect. There was an issue about whether the fraudsters were in fact Vodafone employees and/or whether or not they were contractually out of time to make any claim.

176. Because all his could have impacted on the solvency of Connect, Mr Sacks became involved as an advisor. It became apparent to him that Connect needed professional advice from someone with specialist knowledge of turnaround and insolvency situations. He then recommended Spencer Brown to Connect, towards the end of January 2011, to deal with statutory demands served on Connect by Tanla.

177. Mr Sacks' witness statement then continued:

> "20. During the course of the negotiations it became clear to the directors [of Connect] that there were problems with the management team and it appeared that they were in collusion with some of Connect's creditors which was later justified by a witness statement from one of the key sales people within the company.
>
> 21. The shareholders of Services were concerned about protecting the BT contract within Services, and then asked Spencer Brown to assist in protecting the assets of Services from the creditor's disputes within Connect and the actions of the management team in Connect.
>
> 22. The remuneration package for Spencer Brown was agreed on a time cost basis and a substantial success fee based on successfully protecting Services from the actions of Connect Managemeneam and creditors who appeared to be working together.

23. The package was agreed but never formally finalised with Spencer Brown as the interim administration order was placed on Services without the company being able to defend itself as noted in points 7 and 8 above and asked that the interim administration order was placed on Services the Directors were advised that no agreements could be formalised without the Administrators agreement.

24. I am aware of the considerable amount of hours that Spencer Brown spent in relation to Services including liaising with the company solicitors at their own expense".

178. As at the date of the annual return on 18 November 2010, the shareholders and Services were Connect (97%) and Mr Thomas (3%). At some stage, it was suggested that 97% shareholding had been transferred from Connect to Style Loop Ltd in December 2009.

179. According to paragraph 21 of Mr Sacks' witness statement, it was the shareholders of Services who asked the Applicant to assist in protecting the assets of Services. This witness statement does not say that Services itself contracted with the Applicant, as opposed to the shareholders of Services.

180. Nevertheless, the suggestion is that Services is indebted to the Applicant in relation to work done in March on a time charge basis, and would have been entitled to a substantial success fee based on successfully protecting Services from the actions of Connect and its creditors.

181. In his fourth witness statement, dated 28 October 2011, **Mr Prescott** sought to analyse the Applicant's claim to be a creditor of Services. In paragraphs 6-21 and paragraphs 30-32, Mr Prescott highlighted (i) the absence of any documentation establishing any contract between the Applicant and Services and (ii) inconsistencies in the various accounts which have been given on behalf of the Applicant as to who the contracting party was. Specifically, Mr Prescott made the following points.

1. There was no engagement letter setting out the charging basis and the terms of service, no invoice or time records evidencing the work done for which payment was being sought. This position has remained so, notwithstanding the fact that the Applicant has had the opportunity to file further evidence relating to this issue. None has

been filed except the witness statements of Mr Marrocco and Mr Sacks.

2. Mr Marrocco stated in his witness statement that he had instructed the Applicant on the recommendation of Mr Sacks. However, Mr Marrocco was not a shareholder of Services, and Mr Sacks stated that it was the shareholders of Services who had instructed the Applicant.

3. Mr Marrocco stated that the Applicant was to be paid an hourly rate of £250 plus VAT, as agreed by Mr Sacks, but the basis of his understanding was not given. Nor was any explanation given as to why Mr Marrocco would instruct the Applicant, only for Mr Sacks thereafter to negotiate the terms of the engagement.

4. Mr Marrocco stated that the Applicant gave advice to Services in the period 9-17 March and, whilst acknowledging that Services made a payment to the Applicant, his evidence was that the payment was made in relation to advice given by the Applicant to Connect. He stated there was only a limited sum owing to the Applicant, which suggested that only a limited amount of work could have been done by the Applicant. Yet it is unclear on what basis he made that assertion, given the complete lack of any supporting documentation.

5. Although there is clear evidence of the Applicant having created a client account for Services, the Applicant received payment of £30,000 from Connect and £20,000 from Services. Moreover, £20,000 was paid to Mr Wolman out of Services' bank account on or shortly before 17 March 2011. Yet, Mr Wolman appeared on behalf of Connect on the morning of 17 March 2011, not Services. Mr Marrocco's evidence is lacking in any supporting documentation showing any work done by the Applicant for Services. Nor is it apparent why Services paid the Applicant £20,000.

6. No documentary evidence is exhibited in support of Mr Sacks witness statement. Mr Sacks is inconsistent with Mr Marrocco, in that the former indicated that the shareholders of Services instructed the Applicant, whereas Mr Marrocco stated that he did, yet he is not, nor was he a shareholder of Services. Moreover, it is implicit from Mr Sacks first witness statement that the shareholders of Services agreed the terms of engagement with the Applicant, but Mr Marrocco has stated that Mr Sacks agreed those terms.

7. Mr Sacks stated in his first witness statement that the Applicant had, as part of his remuneration package a “substantial success fee”. However he then went on to concede that the remuneration package was never formally finalised. For his part, Mr Marrocco did not mention any success fee at all. Nor is it clear to me precisely what the terms were of any such success fee.

8. It appears that there were problems between Mr Sacks and Mr Liam LeRoy, because unless instructed to do so, Mr LeRoy indicated that he would not discuss the matter of Connect with Mr Sacks after 11 February 2011. It is therefore unclear,in the context of that bar, when the retainer with the Applicant was negotiated and what actual knowledge Mr Sacks could have had in relation to the alleged engagement.

9. The Applicant raised an invoice to Firenet Ltd. In the Applicant’s client account ledger for Services, £12,000 is shown as having been paid on 25 February 2011. There is only evidence of one invoice for £12,000, and Mr Prescott believed that this invoice was raised by the Applicant, for work done in relation to Services, and was addressed to Firenet Ltd.

10. Accordingly, there was no formal basis upon which the Applicant had been instructed by Services. From the evidence which had been filed, it had been variously claimed that the Applicant had been instructed on behalf of:

    (1) Dominic Marrocco;

    (2) Mr Marco Marrocco in his personal capacity;

    (3) Mr Marco Marrocco in his capacity as a Director of Services;

    (4) Services;

    (5) Firenet;

    (6) The shareholders of Services.

11. Mr Sacks stated that the Applicant’s retainer was never formally finalised. That statement was itself unsupported by any evidence of a retainer letter and the evidence has been confused by the numerous contradictions in terms of who actually instructed the applicant.

12. Mr Sacks prepared a draft Statement of Affairs of Services, which did not show the Applicant as a creditor. Mr Prescott attempted to contact Mr Sacks since he produced the Statement of Affairs, but he has failed to reply to Mr Prescott.

182. **Mr Sacks' second witness statement**, dated 4 November 2011, was prepared to address points made about him by Mr Prescott in his fourth witness statement, dated 28 October 2011.

183. Mr Sacks made the general point that Mr Prescott would not accept Mr Sacks' quotation to do the work which he considered would take 35 hours, at a charge out rate of £150 per hour. Mr Sacks maintained that Mr Prescott told him to spend less time and specifically asked him to produce just his best estimate for the assets and liabilities of Services at 17 March 2011. Moreover he complained that Mr Prescott said he could not send him any of the documentation, whether contracts or records, relating to Services' professional advisors. He told him to rely on the computer records which Mr Sacks said he did. The computer system recorded only invoices, VAT and, at most, written contracts creating specific liabilities. It did not record, for Services, any liability to Spencer Brown because Spencer Brown had not submitted any invoices to Services.

184. He believed it was not his job to assess the contingent liabilities of Services based on any success fee nor was it his job to make enquiries about how long professional advisors spent on particular matters. Moreover, he was dealing with total liabilities of Services of about £600,000 and "to the extent that I thought about Spencer Brown at all, I would have realised that his fees were not going to make much of a difference to that £600,000 figure".

185. However, Mr Sacks dealt specifically in his second witness statement with Mr Prescott's observations in his fourth witness statement. Mr Sacks stated that:

> "3. Mr Prescott seeks to attack the credibility of my assertions in paragraphs 21-24 of my first witness statement. I said that:
>
> (a) A remuneration package for Spencer Brown was agreed by Services on a time cost basis for its assistance in protecting the assets of Services from the fall-out of the dispute between Switch Connect, some of its management and some of its creditors;

(b) A substantial success fee was also agreed for Spencer Brown contingent on Services successfully defending itself;

(c) The package was agreed orally but never formally executed in documentary form because those in control of Services were taken by surprise by the interim administration order made without notice on 17 March which prevented them from doing anything further; but

(d) I was aware of the considerable amount of hours that Spencer Brown had spent in relation to Services".

186. Of course, what Mr Sacks said in his second witness statement was not a completely accurate paraphrase of what he had said in his first one, where he had suggested it was the shareholders of Services who had instructed the Applicant, not Services itself.

Invoices and Accounts

187. I have already mentioned the absence of invoices. For the sake of completeness, I mention here some invoices which were referred to in the course of the proceedings before me.

188. With the letter from the Applicant to Beachcroft, dated 4 August 2011, Liam LeRoy enclosed a spreadsheet showing payments to the Applicant from Services and from Mr Marco Morrocco and how those payments were applied.

189. Unfortunately, they are not easy to understand.

190. Page 534 in the trial bundle is a document which purports to be the Applicant's ledger, showing its account with Services. It records the receipt, on 3 February 2011, of £20,000 from Services and, on 18 February 2011, of £90,000 from Marco Morrocco.

191. Of these sums, £90,647.49 was paid into a current account and earmarked for Lewis Onions, solicitors acting for a petitioning creditor of Connect. This was to buy off an extant or threatened winding up petition.

192. On 25 February 2011, £12,000 was taken out of the account and paid into the current account, and earmarked for the Applicant's invoice 011-1399. The other deductions from the account, again on 25 February 2011, were to 11 Stone

buildings (£3444 in respect of Mr Wolman's fees) and £4347 paid to CRG, a computer resource company.

193. Page 535 was the Applicant's client account in relation to Connect. This showed a payment in of £12,000 on 3 February 2011, and a payment out of £9816.09 to Memery Crystal on 3 February 2011, as well as sums of £1,745.42 and £438.49 to 11 Stone Buildings and Services respectively. Connect's trade account with the Claimant showed two payments in of £9000 on 1 and 3 February 2011, which were applied in satisfaction of the Applicant's invoice 011-1374.

194. I have not seen any of the invoices referred to in any of those accounts, namely the Applicant's invoices 011-1399 and 011-1374.

195. However, at pages 620 and 622 in the bundle, there are two copies of the same invoice in the sum of £12,000 (£10,000 plus £2,000) sent by the Applicant to Firenet in Lurgan, Northern Ireland. This invoice 011-1400 is for the same amount, and is dated on the same date, as the invoice 011-1399 which featured on Services' client account ledger with the Applicant.

196. In summary, the position is somewhat confusing and no invoices addressed to Services have been produced showing the Applicant levying a charge on Services.

Submissions on whether the Applicant is a creditor

197. Mr Wolman made the point that whatever these invoices related to, they cannot represent any payment by or on behalf of Services to the Applicant for work done by the Applicant for Services between 9 and 17 March 2011. Mr French's point in reply was that such is the vagueness of this material that one does not know what the payments related to or whether they were pre-payments.

198. Mr Wolman's subsidiary point was that the Applicant is a creditor, even if no specific agreement can be proved, because it would be entitled to be paid for the work which it did for Services on a quantum meruit basis or in a restitutionary claim, on the grounds that Services would otherwise be unjustly enriched at the Applicant's expense by incontrovertibly benefitting from and/or by freely accepting the Applicant's advice. He relied on The Law of Restitution by Goff and Jones (2007), paras 1-017 to 1-023 and 1-044 to 1-054, although he did not develop the point in oral argument.

199. In my judgment, this is not necessarily the case. If a third party (eg Dominic Marrocco) had agreed under a valid and binding contract with the Applicant to pay

for the work and advice supplied by the Applicant to Services, and the work had been done by the Applicant on that basis, I do not see why a quantum meruit claim would arise against Services. In any event, the Applicant's case is that there was an agreement between it and Services, whereby Services would pay the Applicant for advice given. Furthermore, without knowing the details of any work done or advice given, it is impossible to asses whether Services, as opposed to other companies, freely accepted the Applicant's services or incontrovertibly benefitted therefrom.

200. Mr Wolman alleged that it was unfair for the Respondents to criticise the Applicant for lack of contractual documentation and invoices, when he contended that the Respondents' solicitors, Beachcroft, had done the same thing. He referred to Mr Prescott's fourth witness statement, paragraph 4, where Mr Prescott referred to the costs incurred by the administrators of £5094.50, but said that "no expenses were incurred".

201. Mr Wolman suggested that solicitors must have done some work for which a bill was to be rendered, in respect of which there had been no paperwork or time costs.

202. In summary, Mr Wolman's point was that the absence of formal documentation did not mean there was no concluded contract for professional asssistance between the Applicant and Services, nor that Services was not obliged to pay for the advice given.

203. Mr French dealt with Mr Wolman's contention that Beachcroft had itself failed to provide contractual documentation for any fees justifying payment for any work they did for Services in the week between the interim and final order by pointing out that:

(i) Mr Prescott had provided a detailed time statement showing how his own fees were calculated in this period;

(ii) The creditors have approved these time costs of Mr Prescott;

(iii) Only two documents had been written by Beachcrofts concerning the interim order emails dated 19 March 2011 and 21 March 2011. No bill had been rendered by Beachcroft for any work which they may have done.

204. Accordingly, he submitted that Mr Wolman's point was misconceived.

205. Mr Wolman contended that was therefore, at the very least, an arguable case, based on the totality of the evidence, especially the evidence of Mr Liam Leroy, Marco Marrocco and Andrew Sacks, that the Applicant was a creditor of Services, in relation to its claim for time costs (eleven to twelve hours at £250 per hour) between 9 and 17 March 2001 and a "success fee". He argued that the Applicant was likely to have done work for Services, for which it was to be paid by Services and for which it expected to be paid.

206. In this regard, he drew my attention to the provisions of proving a debt in Rules 2.72 to 2.75 and in Rules 13.12.1, 13.12.3 and 13.12.5 in the Insolvency Rules 1986 . He argued that, given the width of the definition of 'debt' in these rules, a contingent liability of the kind for which he contended would inevitably constitute a debt within the meaning of the Rules.

Conclusion on the Applicant's status

207. I have reminded myself that the Applicant's evidence in support of its status as creditor has not been tested in cross-examination, and that I have not had the opportunity of assessing these witnesses in the witness box.

208. Moreover, the Applicant's evidence includes the evidence of Mr Sacks, a chartered accountant. I have borne that very much in mind.

209. However, having considered all the evidence in this case on this issue, and mindful of the fact that the burden of proof is on the Applicant to show that it is a creditor of Services, the Applicant has, in my judgment, failed to satisfy me that it is or was a creditor of Services on or after 17 March 2011.

210. The evidence relied upon by the Claimant is internally inconsistent in important respects. Different accounts have been given of who instructed whom to do what. There was no engagement letter. There was no accounting for the time. It is not apparent what was done for whose benefit, when and why, and no invoice had been raised by the Applicant on Services for any work done between 9 and 17 March 2011. The evidence of the client accounts and invoices is opaque, and it appears that one company was paying for services supplied to another in a way which has not remotely been explained or justified. I accept Mr French's submissions, and reject Mr Wolman's submissions in this regard.

211. Frankly, I have no confidence at all in the evidence adduced on behalf of the Applicant in support of its contention that it was a creditor of Services.

212. However, I go further. The weight of the evidence in this case leads me to conclude, on the balance of probabilities, that Services was not indebted to the Applicant and, whatever advice was given or work done to or for the benefit of Services by the Applicant between 9 and 17 March 2011, I am satisfied that it was undertaken and given on the basis that it was not Services which was liable to pay for it either as a matter of contract, restitution or quantum merit. I find the evidence of Mr Prescott, which I prefer, to be cogent and compelling on these issues.

213. I have reached these conclusions in relation to the Applicant's claim for its time costs of eleven or twelve hours done between 9 and 17 March 2011.

214. However, when it comes to the question of the success fee, the evidence is even more vague and insubstantial.

215. In my judgment there is no meaningful evidence of what it was that the Applicant had to do to win the success fee. The necessary detail of this arrangement was never concluded or formalised and remains a vague and unparticularised allegation totally lacking in substance or sufficient certainty.

216. In summary, therefore, the Applicant was not a creditor of Services on or after 17 March 2011.

217. That finding alone is sufficient to dispose of the Claimant's application. Nevertheless, out of deference to the arguments which have been advanced by counsel on the core issue, I will consider what my conclusions would have been, had I found that the Applicant was a creditor sufficiently affected by the interim order to warrant my intervention in the exercise of my discretion.

The Core Issue

218. The primary relief that the Applicant is seeking is a declaration that the appointment of the Respondents as managers under the interim order of 17 March 2011 is null and void.

219. This claim turns on the meaning and application of the provisions of the appointment of an administrator under Schedule B1 of the Insolvency Act 1996 and the associated parts of the Insolvency Rules 1986.

220. The crucial point in the Applicant's submission is that in order to be permitted to take control of a company under an interim order, the Respondents had to follow strict statutory provisions. If they do not, Mr Wolman contended, then a fundamental

principle is engaged, namely the protection that the law gives against the arbitrary seizure of power either by the state or by anyone else. He argued that that included those such as the Respondents, who acted as officers of the court in exercising their statutory powers.

221. In summary, his submission was that this principle meant that no person may seize control of a company or its business and/or usurp management properly appointed by its owners, other than by due process under the rule of law. Specifically, he relied upon Entick v Carrington [1765] 19 Howells State Trials 1029 and on the principle enshrined in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interests and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions to penalties."

222. Mr Wolman submitted that the "conditions provided for by law" are specifically those set out in Schedule B1 to the Insolvency Act 1996, in particular paragraphs 10-13, and in the Insolvency Rules, in particular, Rules 2.2 - 2.8.

223. As explained in the first witness statement of Liam Leroy, the Applicant's case is that the Respondents made no attempt whatsoever to comply with those provisions. Mr Wolman argued that, despite this, the Respondents were permitted to take control of a company and to oust the existing management without providing:

(i) Any evidence of insolvency, with the consequence that a possibly healthy and solvent business was taken from its owners and its shares rendered valueless or diminished in value;

(ii) Any evidence of the purpose the administration would serve;

(iii) Any notice to the existing owners or management of the company so to give them an opportunity for them to defend their position and resist a seizure.

224. He argued that the court had no power to make the interim order on the afternoon of 17 March 2011, because the court was not then "hearing an administration application" in relation to Services. He argued that the court could only be hearing an administration application in relation to Services, if it was hearing an application for an administration order appointing a person as the administrator of Services. Because of what he submitted to be the fundamental pre-conditions for an application for an administration order, none of which had been complied with in this case, the court was not hearing an application for an administration order. Therefore, the court had no jurisdiction to make the interim order under paragraph 13(1)(d), which could only be made by a court when "hearing an administration application".

225. Mr French's submission was that he made an *oral* application for an administration order in respect of Services on the afternoon of 17 March 2011, and so the court was hearing an administration application, on the basis of an undertaking by Connect, acting through its administrators, the Respondents, to "issue and serve an application for an administration order in respect of [Services] returnable at 10.30am on 25 March 2011 at Bristol Civil Justice Centre."

226. Mr French accepted that there was a drafting error in his reference to an "interim administrator" on the order which he settled. Nevertheless, I am perfectly satisfied that the source of the court's power was correctly identified on the order as being an interim order made under paragraph 13 of schedule B1 to the Insolvency Act 1986 and, in particular, one involving the exercise of a power under paragraph 13(3) of that schedule.

227. Nevertheless, Mr Wolman's point was that, at best, all Mr French was doing was indicating an *intention to apply* for an administration order in respect of Services, but that there was not, at that time, before the court an administration application to be heard or determined.

228. Mr French's reply was that it has always been the case, and still is the case, that, in appropriate circumstances and on an undertaking to lodge the appropriate application and supporting evidence, the court can proceed on the basis that the application is before it, even though the procedural formalities had not yet been complied with. Indeed, as the transcript of the proceedings of the afternoon of 17 March 2011 indicated, Mr French was making an application then to the court (i) on behalf of a creditor (Switch Connect in administration) in relation to (ii) an insolvent debtor (Services) for an administration order (iii) to serve a statutory purpose,

namely to achieve a better result for the company's creditors as a whole than would be likely if a company were wound up (without first being in administration).

229. Indeed, Mr French went so far as to submit that it would have been open to Mr Blunt QC, on the afternoon of 17 March 2011, to have made the administration order there and then, on the basis of the undertaking offered and on the basis of what he had been told by counsel.

230. The Learned Judge knew that (i) Connect had not paid Services sums which had fallen due; (ii) Services was balance sheet insolvent as a result of the accounts before the court in the morning's proceedings and (iii) the risk to Connect represented by Services' threat to terminate the telephony supply to Connect was a real one. Moreover any cross-claim, which it is alleged Connect had against Services, to extinguish any debt owed by Services to Connect only arose on termination of the telephony contract. Accordingly, if there was no termination there was no cross-claim.

231. There are different rules in relation to administration and winding-up proceedings for set-off. In the latter the court has a discretion not to make a winding up order in the event of a cross-claim. However, Hammonds (a firm) v Pro-Fit (USA) Ltd [2007] EWHC 1998 (Ch), confirmed that, because of the different statutory purpose of administration, the existence of such a cross-claim did not remove an applicant's status as a creditor, or necessarily prevent the making of an administration order.

232. Mr Wolman's primary submission was that there was not before the court, on the afternoon of 17 March 2011, any application for an order appointing a person as the administrator of Services. He argued that no such application was ever made by the Respondents on 17 March, nor was any such application ever heard then by Mr Blunt QC. Mr Wolman contended that the order itself acknowledged this fact, by its reference to an undertaking by the Respondents to issue and serve an application for an administration order. Therefore, it was argued, if it was necessary to issue and serve the application for an administration order, there could not have been an application for an administration order before the court on the afternoon of 17 March 2011.

233. Mr Wolman argued that the reason why that without notice oral application on the afternoon of 17 November could not have been an administration application was because of the Respondents failure to satisfy eight of the mandatory criteria set out in the Insolvency Rules 1986. Mr Wolman contended that the mandatory nature of

these requirements was obvious by the use of words such as “shall” or “must” in the relevant Rules

Procedure for the making of an administration order.

234. Chapter 2 of Part 2 of the Insolvency Rules 1986 sets out the procedure for an application for the appointment of an administrator by the court. The rules relevant to this case are as follows:

> “2.2(1) [Witness statement required] Where it is proposed to apply to the court for an administration order to be made in relation to a company, the administration application shall be in Form 2.1B and a witness statement complying with Rule 2.4 must be prepared, with a view to its being filed with the court in support of the application.
>
> 2.2(3) [Application by creditors] If the application is to be made by creditors, the witness statement shall be made by a person acting under the authority of them all, whether or not himself one of their number. In any case there must be stated in the witness statement the nature of his authority and the means of his knowledge of the matters to which the witness statement relates.
>
> 2.3(3) [Application by single creditor] If made by a single creditor, the application shall state his name and address for service.
>
> 2.3(5) [Statement by proposed administrator] There shall be attached to the application a written statement which shall be in Form 2.2B by each of the persons proposed to be administrator stating -
>
> (a) That he consents to accept appointment;
>
> (b) Details of any prior professional relationship(s) that he has had with the company to which he is to be appointed as administrator; and
>
> (c) His opinion that it is reasonably likely that the purpose of administration will be achieved.
>
> 2.4 Contents of application and witness statement in support
>
> 2.4(1) [Inability to pay debts] The administration application shall contain a statement of the applicant’s

belief that the company is, or is likely to become, unable to pay its debts, except where the applicant is the holder of a qualifying floating charge and is making the application in reliance on paragraph 35.

2.4(2) [Company's financial position etc.] There shall be attached to the application a witness statement in support which shall contain -

(a) A statement of the company's financial position, specifying (to the best of the applicant's knowledge and belief) the company's assets and liabilities, including contingent and prospective liabilities ...

(e) Any other matters which, in the opinion of those intending to make the application for an administration order, will assist the court in deciding whether to make such an order, so far as lying within the knowledge or belief of the applicant.

2.6 Service of the application

2.6(3) [Persons to be served] The application shall be served in addition to those persons referred to in paragraph 12(2) –

... (e) On the company, if the application is made by anyone other than the company.

2.8 Manner in which service to be effected

2.8(1) [Service not less than five days before hearing] Service of the application in accordance with Rule 2.6 shall be effected by the applicant, or his solicitor, or by a person instructed by him or his solicitor, not less than five business days before the date fixed for the hearing.

7.4(6) [In case of urgency] Where the case is one of urgency, the court may (without prejudice to its general power to extend or abridge time limits) –

(a) hear the application immediately, either with or without notice to, or the attendance of, other parties, or

(b) authorise a shorter period of service than that provided for by paragraph (5);

and any such application may be heard on terms providing for the filing or service of documents, or the carrying out of other formalities, as the court thinks just."

235. By paragraph 7.1 of the Insolvency Rules 1986, Rule 7.4 (6) set out above does **not** apply to an application for an administration order under Part II.

236. The following provisions of the Insolvency Rules 1986 and the Civil Procedure Rules 1998 are also of relevance. Rules 7.55, 7.51A(2) and 12A.55 of the Insolvency Rules state:

"7.55. No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defectn or irregularity, and that the injustice cannot be remedied by any order of the court. "

"7.51A(2) Subject to paragraph (3), the provisions of the CPR (including any related practice direction) not referred to in the table apply to proceedings under the Act and Rules with any necessary modifications, except so far as inconsistent with these Rules.

12A 55 (1) The provisions of CPR rule 2.8 (time) apply, as regards computation of time, to anything required or authorised to be done by the Rules.

(2) The provisions of CPR rule 3.1(2)(a) (the court's general powers of management) apply so as to enable the court to extend or shorten the time for compliance with anything required or authorised to be done by the Rules."

237. The Civil Procedure Rules 1998 provide:

"3.1 – (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application

for extension is made after the time for compliance has expired);

... (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

238. By CPR Rule 1.1, the overriding objective is to enable the court to deal with cases justly.

239. Paragraph 4.2 of Practice Direction 23A states:

> "Where an application notice should be served but there is not sufficient time to do so, informal notification of the application should be given unless the circumstances of the application requires secrecy."

240. Mr Wolman, in paragraph 71 of his skeleton argument wrote, in relation to the application before Mr Blunt QC on the afternoon of 17 March 2011:

> "The subterfuge in which the Respondents engaged by waiting until I left the court before making their without notice application was not only unjustified legally, it was also unnecessary – unless the Respondents realised that I would raise the same procedural objections to their application that are raised in the skeleton argument."

241. However, Mr Wolman had been instructed by or on behalf of Connect in the morning, and this was the same company which was making the application before Mr Blunt QC on the afternoon of the same day against Services. It seems difficult to see how Mr Wolman could have acted for Connect in the morning and then against his former client in the afternoon.

Mr Wolman's arguments that the Court lacked jurisdiction to make the Interim Order, and Mr French's replies thereto

242. I now turn to the eight points which Mr Wolman argued were mandatory preconditions to the hearing of any administration application, which was itself a precondition to the making of any interim order.I take them from paras 44-78 of his skeleton argument, which I have renumbered below. I set below each point Mr French's answer, again taken from his skeleton argument.

"**THE FAILURE TO SATISFY EIGHT CRITERIA**

ONE: NO APPLICATION.

1. The application was not in Form 2.1B, with the creditor's name and address, in accordance with IR r. 2.2(1) and r. 2.3(3). Indeed the application was not in writing at all.

   Mr French: There was an oral application, as a matter of urgency.

TWO: NO EVIDENCE

2. No witness statement - or for that matter any other testimonial or documentary evidence - was prepared or filed in accordance with IR r. 2.2(1).

   Mr French: The evidence was partially written, in the sense that Deputy Judge had already seen the evidence of insolvency, and partially oral, on instructions and by reference to what had happened in respect of the termination threat, which the Deputy Judge had already heard in relation to Connect.
   This was confirmed by the later witness statement evidence of Mr Prescott.

THREE: NO SUFFICIENT KNOWLEDGE TO MAKE AN APPLICATION

3. Contrary to IR r. 2.2(3), not only was no witness statement made for the hearing of 17th March but no witness statement could have been made by the Rs or anyone acting on their behalf who had sufficient knowledge <u>at that time</u> of the matters to which the witness statement had to relate. Those matters were necessary to satisfy the court in accordance with Paras. 11 and 12(1)(c) of Sch. B.

4. Para. 11 says that the court may make an administration order *"only if satisfied- (a) that the company is or is likely to become unable to pay its debts, and (b) that the administration order is reasonably likely to achieve the purpose of administration."* Para 12 says that an administration application may be made only by the company itself, its directors or its creditors.

5. The Rs had no sufficient knowledge at that time to provide any evidence on these matters because they had only just been appointed as administrators of the creditor, or alleged creditor, viz. SwitchConnect, 15 minutes earlier, as Mr French admitted to the court.

6. Handicapped by that lack of knowledge, the Rs had only the thinnest of justifications for asserting that SwitchConnect was a creditor of Services. As Mr French explained (see transcript p.): *"Services has not paid the sums due from Services to Connect in the last couple of months, and that is information that*

has been obtained by an employee of Connect, who has told the administrators that."

7. Thus the only *"evidence*" that the Rs had of outstanding payments that were properly due to SwitchConnect from Services was hearsay evidence from an unidentified employee who may or may not have had sufficient factual or legal knowledge. This was at a time when several of the managers of SwitchConnect (including the employee?) had been suspended from their jobs for attempting secretly to exploit its financial difficulties by organising a cut- price buy-out of its assets.

8. Similarly the only evidence that the Rs had for asserting that Services was or was *"likely to become unable to pay its debts"* was that the balance sheet of Services in December 2009, i.e. 15 months earlier, had shown its liabilities to be slightly in excess of its assets. But no one had obtained a court judgment or issued a statutory demand, let alone a winding-up petition against Services since December 2009 and the owner of the group, Mr Dominic Marrocco, MM's brother, had given every indication that he would inject funds in support of Services, if that were necessary. The evidence of the 2009 balance sheet was wholly inadequate to satisfy the court that the company was insolvent in March 2011.

Mr French: There was knowledge of insolvency from Services' last filed accounts.
There was knowledge of insolvency from the fact that Services had not paid Connect for a few months, confirmed to Mr Prescott by an employee of Connect who was at Court. This was confirmed by the later witness statement evidence of Mr Prescott.
The fact of insolvency was confirmed by the making of the Administration Order, in which respect insolvency is a necessary pre-requisite. There was knowledge of the termination threat, because it had been communicated by Mr Wolman and express reference had been made to it during the course of the hearing in respect of Connect.

FOUR: NO STATEMENT ON ACHIEVING THE PURPOSE OF ADMINISTRATION

9. Contrary to IR r. 2.3(5)(c) the Rs failed to make any written statement that in their opinion it was reasonably likely that the purpose of the administration would be achieved. This provision is not just an empty formality. As licensed insolvency practitioners seeking to become officers of the court, the Rs would be expected to review the legal, financial and trading situation carefully and thoroughly before making such a statement. They could not have possibly done so within 15 minutes.

10. What is also striking is that, as the transcript shows, Mr French failed to make even any oral submission on behalf of the Rs that they believed that the purpose of an administration would be achieved. He gave an undertaking that an administration application would be filed by the Friday evening, 18th March, and that application would need to include such a statement of belief. But how could he give such an undertaking when he could not have known what opinion the Rs would, if acting in good faith, reach about achieving the purposes of the administration?

11. Meanwhile, he was asking the court to let the Rs seize immediate control of the company, which the court duly did. The Rs within the following 24 hours wrote emails and letters and spoke to large numbers of suppliers, sub-contractors, counterparties and employees. They said that the company had been put into "interim" administration and they therefore had to follow their instructions, not those of the previous management.

12. How would the situation have been unravelled if the Rs by the following evening had failed to conclude in good faith that the purpose of the administration could be achieved?

Mr French: The statement of purpose was communicated orally (in so far as it had to be to justify the hearing of an application for an administration order on which an interim order could be made).
This was confirmed by the later witness statement evidence of Mr Prescott.
The fact of appropriate purpose was confirmed by the making of the Administration Order, in which respect the achievement of a purpose of administration is a necessary pre-requisite.

FIVE: NO EVIDENCE OF INSOLVENCY

13. Contrary to IR r. 2.4(1) the court had before it no statement of insolvency viz. a statement of the Rs' belief that Services was, or was likely to become, unable to pay its debts. For the reasons set out above, the Rs were in no position to make such a statement at 1.25pm on 17th March. Again, assume that by 5pm on 18th March, when they were due to file an administration application in accordance with their undertaking, the Rs had come to the conclusion, perhaps after discussions with the management and owners of Services, that the company was after all able to pay its debts. Once again, the question has to be raised: how would they have unravelled their seizure of control of the company and their usurpation of its management?

14. The only conclusion to be drawn from the above is that the Rs were not acting in good faith or as independent insolvency practitioners in accordance with the ethics of their profession. They had already decided in advance that they were going to say that the company was unable to pay its debts and that the purposes of the administration would be achieved, regardless of what they discovered over the subsequent 24-27 hours.

Mr French: There was knowledge of insolvency from Services' last filed accounts. There was knowledge of insolvency from the fact that Services had not paid Connect for a few months, confirmed by an employee of Connect who was at Court.
This was confirmed by the later witness statement evidence of Mr Prescott. The fact of insolvency was confirmed by the making of the Administration Order, in which respect insolvency is a necessary pre-requisite.

SIX: NO EVIDENCE OF FINANCIAL POSITION

15. Contrary to IR r. 2.4(2)(a), there was no statement and no evidence of Services' financial position, other than an oral submission about its 2009 balance sheet.

Mr French: See the points re knowledge and knowledge of insolvency above. Mr Sacks, in his draft Statement of Affairs has confirmed insolvency.

SEVEN: NO DISCLOSURE OF ADVERSE MATTERS

16. Contrary to IR r. 2.4(2)(e), there was no statement of any other matters which would assist the court in deciding whether to grant an order. This provision overlaps with the common law duty of an applicant making a without notice application to disclose fully and fairly to the court any matters of fact or law which are adverse to his case. See the Chancery Guide (2010 version) para. 5.22.

17. So for example Mr French claimed that Services was insolvent because *"it is balance sheet insolvent on its last filed accounts",* without disclosing that those accounts were nearly 15 months old and that there was no evidence that Services had any unpaid creditors other than (arguably) SwitchConnect. More fundamentally, the Rs failed to point out to the judge any of the legal flaws or weaknesses in the procedure that they were following, as outlined in this skeleton argument. The fact that the Rs may not have intended to mislead the court is irrelevant.

18. In the analogous procedure for the appointment of a provisional liquidator, when (in contrast to the appointment of administrator) an application can be

made without giving notice to the company (although not without providing evidence), the court has set aside an order obtained as a result of material, although innocent, non-disclosure. See Re OJSC Ank Yugraneft; Millhouse Capital UK Ltd v Sibir Energy plc [2008] EWHC 2614 (Ch), [2009] 1 BCLC 298, In that case, Mr Justice Christopher Clarke held at [107]: *"Whilst I have no doubt that there was no intention to mislead the court I am satisfied that, for whatever reason, inadequate disclosure was made to Evans-Lombe J, and that the extent of the non-disclosure is such that, had I not struck out the claims, I would have set aside the order appointing a provisional liquidator and dismissed the claim. It would then be open to Yugraneft to commence new proceedings."*

19. Further, the transcript of the two hearings on 17th March shows that the Rs not only failed to discharge its duties of full and fair disclosure of adverse matters but actually acquiesced in the suppression of such matters.

20. Thus, in the first hearing of the application for the administration of SwitchConnect, after Mr Boardman, counsel for Tanla, another creditor, made several allegations against SwitchConnect, I said, according to the transcript p. 13: *"the director of SwitchConnect felt that I ought to be here to defend the company against any allegations that have been made and, in this case, wholly unfairly".*

21. This led to the following exchange (with my emphasis added):
"THE RECORDER: Mr. Wolman, no one, as I understand it, is asking me to make any adverse findings.
MR. WOLMAN: No. Well, in that case, maybe I do not need to say anything.
THE RECORDER: What is being said is that there are lots of questions and lots of mysteries, from which, if there are not satisfactory answers, one might read certain conclusions, ***but I do not think anyone is actually saying those conclusions should be reached today.***
MR. WOLMAN: Then I do not quite see the point in raising all these insinuations, which, in our view, are wholly unjustified. They have told you only part of the story...."

22. I then started to relate part of the background to the fraud that led to the SwitchConnect's insolvency but did not deal with the allegations made by Tanla, or SwitchConnect's complaints against Tanla. I concluded: "*if you are*

not going to make any findings, I do not need to detain the court and go into details." (p.15)

23. At this stage in the proceedings, the Rs and/or their legal representatives must have been contemplating the making of a further application that day, for an administration order against Services, which is what they did a short while later. But to make that application, they would have to ask the Recorder to do precisely what he said they were not going to ask him to do. That was "*to make any adverse findings...today"* (sic) arising from the questions, *"mysteries"* and allegations about SwitchConnect and its associated companies.

24. Indeed, as soon as Mr French began his submissions on the second without notice application, he said: *"We are hugely concerned on behalf of the administrators about two matters. First of all, the matter that Mr. Boardman has already taken you; that Services appears to be divesting itself of money, which would otherwise be due to Connect, and secondly, the threat of termination of the supply contract, in effect."*

25. The matter to which Mr Boardman had taken the court was one of the key subjects on which, as the transcript indicates, I had intended to address the court by way of explanation or rebuttal. But the Rs and their lawyers did nothing to contradict what the learned judge said to prevent me from doing so viz. that this was not an issue on which anyone wanted him to reach adverse conclusions on that day. At the very least, even if (which is not accepted, see below) the Rs were justified in concealing their intentions from me as the representative of the Services group, the Rs' counsel could still have said to the Recorder: "*We suggest that it might be fairer to let SwitchConnect's counsel deal with these allegations now, in the way he wishes to, because what he says may be of relevance to submissions that we may have to make later."*

Mr French: No disclosure of adverse matters.
There are no adverse maters that required disclosure.
The Deputy Judge had just heard the administration application in respect of Connect and was well capable of recalling those matters.
The purpose of the application for the Interim Order was to preserve the position, pending the full hearing of the Administration Application.
There were no adverse findings against anybody on the making of the statement of purpose.

EIGHT: FAILURE TO NOTIFY THE COMPANY

26. The last defect in the procedure followed by the Rs is perhaps the most fundamental. It is simply not possible to do what the Rs sought to do viz. to obtain an administration order against a company without giving notice to the company and to various other statutorily prescribed parties.

27. The Rs said they were concerned to ensure that the incumbent management of Services could not terminate its contract with SwitchConnect and disconnect its datafeed, which they alleged would have been an entirely uncommercial and self-destructive step. Therefore they wanted to seize control without giving any warning to the management. In fact, as is made clear in WS-AS, para. 28, p. , it would have taken Services several hours to cut off SwitchConnect, so the Rs could have given Services (through me) notice of their intended application. The CPR Practice Direction 23A, r. 4.2 says: *"Where an application notice should be served but there is not sufficient time to do so, informal notification of the application should be given..."*

28. The subterfuge in which the Rs engaged by waiting until I left the court before making their without notice application was not only unjustified legally. It was also unnecessary - unless the Rs realised that I would raise the same procedural objections to their application that are raised in this skeleton argument.

29. Further Services had a perfectly sound commercial reason for replacing SwitchConnect with other counterparties. See WS-AS para. 27. There were many other resellers who could have stepped into the shoes of SwitchConnect and Services had both the contractual right and a legitimate commercial motive to arrange for them to do so.

30. In any event, if the Rs believed that Mr Boardman's allegations (that Services was siphoning off money) would withstand judicial scrutiny, they could have sought a freezing order against Services on a without notice application (although not without proper witness evidence). Another avenue was also open to the Rs if their fears were genuine and well-grounded enough to persuade a judge. They could have applied on a without notice basis for an interim injunction restraining Services from terminating its contract with SwitchConnect and from cutting off its datafeed.

31. Finally, under s. 135 of the IA and rr. 4.25 and 4.26 of the IR, it would also have been possible to obtain the appointment of a provisional liquidator without notice, although once again witness evidence is always essential. However, an application may be made only after a winding-up petition has been presented against the company in question and before a winding-up order has been made. In our case, no winding-up petition, or even statutory demand, had been presented against Services.

32. The provisions requiring notice of an administration application to be given to the company, in particular IR rr. 2.6(3) and 2.8, are explicit. Although in cases of great urgency, the statutory five business days' notice period can be abridged by the court under CPR r. 3.1(2)(a), the notice period cannot be abolished. These rules are quite different from those for the appointment of a provisional liquidator. The contrast makes clear that the difference between them is intentional and not the result of an oversight by the Parliamentary draftsman.

33. The presumed reasoning of Parliament is that if the allegations against a company, typically of fraud or wrongful trading, are serious enough to justify its seizure by insolvency practitioners and the ousting of its existing management without giving them notice, then they must also be serious enough to warrant the prior presentation of a winding-up petition. The very presentation of a petition does at least put the company and its management on notice that their survival is under threat, allowing them the possibility of taking pre-emptive action (for example obtaining a moratorium for a Company Voluntary Arrangement).

34. By contrast, the procedure followed by the Rs, if legitimated, would allow companies to be seized from their owners and managers out of the blue and possibly tipped into insolvency without giving them any opportunity to defend themselves. That is, and must be, a breach of the ECHR First Protocol, Art. 1 and of the principle dating back to Entick v Carrington,

35. If creditors or others such as the Rs feel that they are justified in seeking urgent sanctions against a company without giving the owners or managers notice, then they must content themselves with more limited and less draconian forms of intervention."

Mr French: As regards the failure to notify Services, such notification would have defeated the object of the Interim Order.

It was necessary to preserve seamless supply of telephony services between Services and Connect, in order that Connect could supply services to its customers.
The supply of services from Connect to its customers was the route by which Services earned its money; without that supply, there would be no money for Services or its creditors.
Ordinarily, there would not have been an issue, because the majority of the shares in Services were owned by Connect, so that Connect could maintain control.
There was an issue about that, because of the dubious share transfer.

Unbeknownst to Connect, it appears that a letter of termination had already been prepared and, allegedly, served.
However, despite having been in effective control of Services from 17 March 2011 onwards, Mr Prescott never saw that letter until the exhibits to Marco Marrocco's witness statement dated 20 October 2011 were served.
The letter was never acted upon, because the supply continued, for the benefit of Services and Connect.
After the event, that justifies the Interim Order even further.

There were two reasons for not notifying Mr Wolman of the proposed application. The genuine view (still maintained) was that he had been representing Connect at the hearing of the application for an administration order in respect of Connect, and was not representing Services at that hearing.

In so far as Mr Wolman might have been representing Services, he was the channel through which the termination threats had been channelled, both in correspondence before the Connect hearing and at the hearing.
It is entirely appropriate to seek an order without notice where notification of an intention to seek such an order might bring about the very event that brings about the jeopardy in the first place. Advance notice of the proposed application to Services would have made the position worse, not better.

Provisional liquidation would have been pointless, as that, as a rather more drastic step than the proposed administration, or the position under the Interim Order, could very well have brought about the termination of supply. Administration would not; the whole point of the administration of Services was the continuation of business with a view to an orderly sale and the business could not have continued in the event of a termination of services."

243. Leaving aside for the moment IR 7.55 (see above), I agree with and accept Mr French's submissions above.

244. In cases of urgency, the court has power to grant interim relief even before the issue of a formal application and in the absence of written evidence. Moreover, where the need for secrecy demands it, such an application can be made without even informal notice to the other side. I detect nothing in the Insolvency Act or Rules 1986 which prevents this procedure being used as it was on the afternoon of 17 March 2011.

245. Although IR 7.1 expressly disapplies IR 7.4(6) (above) in the case of an application for an administration order (but not expressly an interim order), this does not, in my

judgment, abrogate the long standing practice set out in CPR 25.2 and 25A PD, paragraph 4, for urgent interim remedies before the issue of any claim. IR 7.51A(2) imports the Civil Procedure Rules into insolvency proceedings, except for any inconsistency between the CPR and the Insolvency Rules. I detect no such inconsistency. The court was not seeking to use these powers to make an administration order in relation to Services on 17 March 2011, but rather to grant urgent interim relief pending the final disposal of the application for the administration order for which notice, supported by written evidence, was to be given. A similar conclusion could be reached on the basis of the court's case management powers under CPR 3.1 (2)(m).

246. I am satisfied that there was before Mr Blunt QC, on the afternoon of 7 March 2011, an oral application for an administration order, which was going to be adjourned to 25 March 2011, within those extant proceedings ('extant' because of the undertakings given) an interim order was being sought pending the final disposal of the administration application.

247. This conclusion is consistent with the usual practice relating to the grant of urgent interim relief before the formal issue of proceedings. Indeed, even *ex parte* administration orders have been made in some authorties cited to me, albeit decided before the Civil Procedure Rules 1998, the First Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the amendments to the the Insolvency Act 1986 by the Enterprise Act 2002.

Without notice administration orders

248. I emphasise once more that the court did not make an administration order on the afternoon of 17 March 2011, merely an interim order pending the final disposal of an application for an administration order.

249. Of course, making an administration order without notice to the company concerned, or without an issued petition or sworn written evidence would indeed be a unusual step.

250. However, in a number of authorities cited to me, this is exactly what happened.

251. In Re Shearing & Loader Limited [1991] BCC 232, directors applied, without notice, for an administration order on an undertaking to present the petition forthwith. The order was made. However, the fee for the petition had been paid and there was a written petition and sworn evidence before the court. The problem had been that a

member of the court's staff declined to issue it formally because of the intention to move the petition *ex parte*.

252. In Re Cavco Floors Limited [1990] BCC 589, an administration order was made on the company's application, based on an undertaking to present an administration petition forthwith, following its bankers' refusal to appoint an administrative receiver despite the directors' request to do so.

253. In Re Chancery plc [1991] BCLC 712, an administration petition had been presented earlier that afternoon by the directors of the company, a bank, yet an administration order was made that day, without proper formal service because of the urgency of the situation.

254. In Re Halliwells LLP [2010] EWHC 2036 (Ch); [2011] 1 BCLC 345, an administration order was made on the firm's own application on short notice.

255. However, in none of these cases was the intended petition hostile to the company affected by the order. The application was either by the company itself or *bona fide* by its directors.

256. However, in Re GallidoroTrawlers Ltd [1991] B.C.C. 691 there was an *ex parte* application by Lloyds Bank plc on suitable undertakings to present a petition for an administration order, for abridgement of the time between service and hearing of the petition and for the appointment of an "interim manager" over the hearing of the petition. The petition would allege that the company was or was likely to become insolvent, that among its assets were ships mortgaged to the bank and fishery licences, and that it was threatening to dispose of the licences which would diminish the value of the ships.

257. There was before the judge a draft written petition and a draft affidavit. Harman J said:

> " … There are plainly negotiations being carried on for disposal of either the licences or the ships or both on some arrangement intended to remove the licences from the ships. There are also allegations made that the licences are not the property of the company but are, in fact, the property of the managing director of the company personally. It seems to me on the face of it improbable that that is so, but nonetheless that is the claim made and there are threats that the licences may be disposed of separately from the ships. The ships are plainly assets of the company. They are mortgaged pursuant to

ship mortgages in the proper form to the bank, but if the ships are not available with fishing licenses the evidence is that they will be substantially less valuable and the company's assets will not cover its debts.

In those circumstances Mr Adkins applies on behalf of the petitioning creditor for the appointment of a manager, described as an interim manager, to cover the position between the presentation of the petition and its service upon the company and the hearing of the petition. He also applies for abridgement of time for the hearing of the petition which, in my view, is clearly desirable and, indeed, necessary.

The evidence shows that there are difficulties attendant upon the realisation of the assets and the carrying out of the threats to realise them. It seems to me this is not essential in this case to appoint a manager to run the whole affairs of the company in the shortish interval between presentation, service and hearing of the petition, but that it would be right to restrict, pursuant to sec.9(5) of the Insolvency Act, the powers of the directors and of the company to dispose of its assets in the meantime…"

258. This case seems to me to have many parallels with the case before me. It was a hostile application by a creditor for interim relief, where no petition had yet been issued. None of the procedural formalities had been complied with before the interim order was made.

259. Mr Wolman argued that all these cases preceded the Civil Procedure Rules, and are, therefore, distinguishable. In my judgment, there is no material distinction between the procedure which was followed in Re Gallidoro and the modern procedure under the Civil Procedure Rules.

260. Nor do I see the procedure which was adopted before Mr Blunt QC as infringing the First Protocol to the European Convention. What happened was not an arbitrary seizure of property. It was a temporary but urgent measure taken in accordance with a procedure clearly recognised and prescribed by the Insolvency Rules 1986 and the Civil Procedure Rules 1998.

261. Finally, Mr Wolman sought to distinguish these authorities on the grounds that they were decided under the statutory code in existence before the amendments made by the Enterprise Act 2002. He contended that the previous provisions, contained in ss.8 and 9 of the Insolvency Act 1986, drew a distinction between the 'power' to make an administration order (set out in s.8) and the 'application' for the administration order (set out in s.9, with the power to make an interim order

contained in s.9(5)). He suggested that, under this regime, the power to make an interim order did not depend on satisfying the conditions for the making of an administration order. An application for an administration order was a sufficient condition for the grant of an interim remedy, not not a necessary condition.

262. He contrasted this former legislation with paras 11 ('Conditions for making an order') and 13 ('Powers of court') of Schedule B1 to the Insolvency Act 1986. He argued that the insertion of the word 'only' in para 11 ('The court may make an administration order… only if satisfied) meant that a proper application for an administration order was a necessary condition for the grant of interim relief under para 13. Therefore, he argued, in the pre-2002 cases, interim relief could be granted under the power granted by ss.8 and 9, even if the application had not been made in accordance with the procedural requirements of s.9.

263. I reject this analysis. In my judgment, there is no material difference between ss.8 and 9 of the pre-2002 legislation and para 11 and 13 of Schedule B1 to the Insolvency Act 1986. The transposition of the word 'only' into para 11 of Schedule B1 (which sets out the conditions for making an administration order) makes no difference. It was implicit in the former legislation anyway. In both sets of provisions, the meaning is and was plain, and the comparable provisions remain (s.8/para 11, s.9(4)/para 13 and s.9(5)/para 13 (3). Only if the conditions for making an order were satisfied, could the court make an *administration* order. However, in my judgment, it is not a prerequisite to obtaining an *interim* remedy that all the criteria for granting an administration order are satisfied.

264. Two of the leading textbooks in this area have not suggested administration orders can no longer be made without notice to the company affected.

265. At paragraph 5-023, in The Law of Administrators and Receivers of Companies (2007), by Sir Gavin Lightman and Gabriel Moss QC and others, the learned authors wrote:

> " The question of whether or not the court may dispense with service has caused some difficulty in the past ...Dillon L.J. expressly approved earlier criticism by Harman J of the practice of obtaining administration orders on such undertakings. Despite the criticism of this practice, it is considered that in special cases and administration orders can and should continue to be made on undertakings."

266. In Corporate Insolvency Law and Practice (3rd edition), by Edward Bailey and Hugo Groves, the lone authors wrote, at para 10.22:

> " The period fixed for the service of the application inter alia enables the person entitled to appoint an administrator an opportunity to consider whether or not to support or oppose the making of the order. If cicumstances demand urgent action this period may be abridged and, if this is contemplated, it is normal to obtain written consent of short notice from the person entitled to appoint an administrative receiver. In *Re a Company (No00175 of 1987)* …The Court was influenced by the parlous position of the company, the necessity to place the business in the hands of an administrator quickly and the fact that the bank knew at local branch level of the intention to present the application on the same day that the director received advice that effect; the Court considered that this was a case in which to exercise his general power under IR 1986, r.12.9 to abridge the service period. The court has displayed a flexible and creative approach in expediting the making of an administration order, ranging from the appointment of a manager to the making of an order upon an undertaking to present an application."

267. For these reasons, I can find no rational basis on which to distinguish Re: Gallidoro Trawlers Ltd. In any event, I am satisfied that the learned judge had the jurisdiction to make the orders he did in relation to Services on the afternoon of 17 March 2011.

268. Accordingly, I decline to grant the declaration sought.

Rescission

269. A creditor has standing to make an application for rescission under IR 7.47: Cornhill Insurance Plc v Cornhill Financial Services [1992] B.C.C. 818.

270. Rule 7.47 of the Insolvency Rules 1986 states:

> "7.47(1) [Powers of courts] Every court having jurisdiction for the purposes of Parts I to 4 of the Act and Parts I to 4 of the Rules, may review, rescind or vary any order made by it in the exercise of that jurisdiction."

271. The learned authors of Sealy & Milman: Annotated Guide to the Insolvency Legislation 2011 have commented, at 155 (vol1) on the ambit of this rule as follows:

> "The jurisdiction under r.7.47 is very wide, and extends even to the review, rescission or variation by a High Court judge of a decision of any judge of that

court: *Re W & A Glaser Ltd* [1994] B.C.C. 199 at 208, per Harman J. A judge can review his or her own decisions under Rule 7.47(1) – *Re Thirty Eight Building Ltd (No.2)* [2000] B.P.I.R. 158. The court has power to make retrospective orders under IR r. 7.47(1) – see *Re Roches Leisure Services Ltd* [2005] EWHC 3148 (Ch); [2006] B.P.I.R. 453 (retrospectively extending date for expiry of administration)."

272. In Papanicola (as trustee in bankruptcy for Mak) v Humphrey and others [2005] EWHC 335 (Ch); [2005] 2 All ER 418, at p 424, Laddie J, albeit considering the similarly worded s375 Insolvency Act 1986, summarised the relevant principles to be followed when exercising the wide discretion to review, vary or rescind any order made in the exercise of the bankruptcy jurisdictionas follows:

> **"[21]**
>
> Mr Riley says that this demonstrates that exceptional circumstances are not needed and is consistent with his argument that the high hurdle imposed by *Fitch*'s case is restricted to cases where the rescission of a bankruptcy order is in issue. In a case like the present one, the wide scope of s 375 allows the court to assess the matter afresh.
>
> **[22]**
>
> I do not accept these submissions. First, the fact that the court has a wide jurisdiction does not throw light on how the jurisdiction should be exercised. In *Fitch*'s case the Court of Appeal noted that the power bestowed on the court by s 375 was 'in theory at least, virtually unlimited', that the 'statutory discretion is in terms unlimited' and that it created an 'absolute discretion' to rescind or vary any of its orders. Nevertheless the court said that the discretion could only be exercised in exceptional circumstances.
>
> **[23]**
>
> Second, there is nothing in the wording of s 375 which suggests that it should be applied in a significantly different way in different cases. The authorities do not support that approach either. Even if Millett J's decision in *Re a debtor* (*No 32*/*SD*/*1991*) can be construed as suggesting a lower threshold where what is being sought is the rescission of a refusal to set aside a statutory demand, that view does not appear to have commended itself to the Court of Appeal in *Fitch*'s case. Millett J's judgment was cited to the court in *Fitch*'s case yet it held that s 375 applied to '*any* order made in the exercise of the bankruptcy jurisdiction' and that it could be applied 'to rescind or vary *any* of its orders' without distinguishing in any way between them (my emphases).
>
> **[24]**
>
> Third, I do not accept that *Re a debtor* (*No 32*/*SD*/*1991*) supports Mr Riley's argument. On the contrary, Millett J said:
>
> 'As a matter of discretion I have no doubt that the jurisdiction ought to be rarely exercised, since the effect of doing so would be to

allow what would amount to a renewed application to set aside a statutory demand after the period limited for making the application.' (See [1993] 2 All ER 991 at 995, [1993] 1 WLR 314 at 318.)

[25]

It seems to me that a number of propositions can be formulated in relation to s 375. Some of them are derived from the passages cited above. (1) The section gives the court a wide discretion to review vary or rescind *any* order made in the exercise of the bankruptcy jurisdiction. (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour. (3) Those circumstances must be exceptional. (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order. (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time. (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any
explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.

[26]

The second and fourth of these propositions merit some expansion. Inherent in s 375 is the concept that something has changed so that it is appropriate for the court to reconsider its own earlier order. If there is no change in circumstances, the only way to challenge the order is by appeal. The court is not to review its order simply on the basis that the applicant wants to present essentially the same facts and the same arguments but more forcefully or attractively. This is apparent from the following passage in *Fitch*'s case:

'[A]n appellate court can quash a bankruptcy order only if it is satisfied that, on the evidence which was before the court which made the order or on new evidence which is admitted in accordance with the rule in [*Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489], the order should not have been made. An application under section 375(1) is essentially different. It must be based on a change in circumstances since the order was made or, more rarely, on the discovery of further evidence which could not be adduced on appeal.' (See [1996] 1 WLR 242 at 246.)

[27]

The same requirement that there should be something new appears to be inherent in Millett J's judgment in *Re a debtor* (*No 32*/*SD*/*1991*):

'Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of

> fresh evidence, whether or not it might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale of the rule in *Ladd v Marshall* that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds has no bearing in the bankruptcy jurisdiction. The very existence of s 375 is inconsistent with such a rationale.' (See [1993] 2 All ER 991 at 995, [1993] 1 WLR 314 at 318–319.)
>
> **[28]**
>
> This passage supports the sixth proposition set out at [25] above."

273. In Re: Metrocab [2010] EWHC 1317 (Ch); [2010] 2 BCLC 603, the principles set out above were applied to an application under IR 7.47(1) to rescind winding-up orders some three to four months after they were made. IR 7.47(4) required such applications to be made within seven days after the order was made. In refusing to grant the relief sought, the learned judge held that the relevant factors to consider, when deciding whether to grant an extension of time, were those set out in the 'checklist' in CPR 3.9.

274. There is no time limit within which the current application has to be made. However, a failure to do so timeously, especially when the Applicant had notice of the interim order within days of the order being made, seems to me to be one of the circumstances to which the court is entitled to have regard when considering the exercise of its discretion under IR 7.47(1).

275. In my judgment, when exercising my jurisdiction under IR 7.47(1), it is not for me to decide whether, on the factual merits of the material placed before him during the application on the afternoon of 17 March 20111, Mr Blunt QC was right or wrong to grant the interim order. That is a matter for an appeal to the Court of Appeal. I have dealt with the question of whether he had jurisdiction in law to make the interm order, because the Applicant has asked me to declare that Mr Blunt QC lacked jurisdiction, as a matter of law, to make the interim order.

276. Mr Wolman put his application for rescission in his skeleton argument thus:

> **"THE APPLICATION FOR RESCISSION**
>
> Finally, as a fallback application, if for any reason, the court refuses to grant the declaration of nullity that is sought, SBCS seeks rescission of the

administration order under IR r. 7.47(1). It is accepted that in order to succeed in such an application, SBCS must show that the circumstances are exceptional and probably that the order would never have been made if the correct procedure had been followed and the full facts had emerged.

The facts outlined in the various witness statements and the legal arguments set out above provide more than sufficient basis for the court to conclude that the circumstances are indeed exceptional and that the Rs should never have succeeded in obtaining their order."

277. In my judgment, the Applicant has failed to demonstrate the existence of circumstances which justify the exercise of the discretion in its favour. The evidence relied on and submissions made by Mr Wolman do not reveal any materially different circumstances to those before the learned judge on the afternoon of 17 March 2011. They certainly do not raise any exceptional matter or circumstance. They are in reality a restatement of the matters contained in Ms Walmisley's skeleton argument which was before the same judge on 25 March 2011, and which did not cause him to conclude that he had been in error in granting the interim order on 17 March 2001.

278. For these reasons , and for the additional reasons of utility and discretion, which are set out below, I would not have rescinded the interim order of 17 March 2011 in relation to Services, under rule 7.47(1) of the Insolvency Rules 1986.

Utility of the application

279. It is necessary now to consider what the purpose or utility of the Applicant's application is.

280. Mr Wolman argued that the utility of the application made by his client includes the following:

(i) It is for the general good of the body of creditors that the administrators cannot claim their fees or any expenses incurred between 17 and 25 March 2011 when the interim order was in force. However, as I have already indicated, the creditors have approved these fees.

(ii) The application sends a powerful message to Leonard Curtis, the firm for which the Applicants work, that it cannot displace the management of a company without due process and strict compliance with the statutory code set down in the Insolvency Act 1986 and the Insolvency Rules 1986;

(iii) It will allow the Applicant to back up its claim that it was wrongfully denied of this success fee, or the opportunity to earn it, by the unwarranted interim order;

(iv) It will pave the way for the setting aside of the administration order itself made on 25 March 2011, if the administrators wrongly got in control of Services and thereby tipped it into insolvency;

(v) It would provide a basis for the creditors to ask these administrators to stand down as administrators of Services;

(vi) It will make clear the legal position of all the parties.

281. Mr Wolman contended that there was a conflict of interest between the Respondents as administrators of Connect and as administrators of Services, because as administrators of Connect they would wish to assert there was a subsisting Telephony Agreement, whereas, as administrators of Services, they would seek to deny its existence. Furthermore, Mr Wolman argued that if the interim order were set aside it would give an opportunity to all the creditors to make their views known.

282. Mr French countered this by saying that the real reason for the application was to save the Applicant having to comply fully with the administrators' applications for disclosure of information and documents by the Applicant and /or the oral examination of Mr LeRoy, under section 236 Insolvency Act 1986. In this context, Mr French relied upon a letter from Mr LeRoy to Beachcroft, dated 6 October 2011, where Mr LeRoy stated:

> "I note that you say, as part of your case, that 'no application has been made against you or Spencer Brown by the administrators of the Company. The application [i.e. under section 236] was issued by the administrators of Switch Connect Limited'.
>
> As of today, that assertion is correct. However, are you prepared to give an undertaking on behalf of the administrators of Switch Services Limited that no application or claim will be made against SB Corporate Solutions Limited or any of its directors or officers personally? Are you also prepared to give an undertaking that none of the confidential and/or privileged documents that I have provided or may provide to the administrators of Switch Connect Limited, either pursuant to the order of last week or otherwise, will be used by or on behalf of those same persons in their capacity as administrators of Switch Services Limited? Finally, if it is established that Switch Services Limited does indeed still owe this company fees for advice given earlier this year, will you undertake to pay those fees?
>
> If you are willing to provide these undertakings, then I will agree (subject to the resolution of any cost issues) to withdraw my application which is due to be heard next Wednesday."

283. However, Mr French argued, even if this application were successful, Messrs Poxon and Prescott would still be administrators of Services. Moreover, the current application ignores the fact that Mr Marrocco attempted to set aside the interim order on 25 March, but failed to do so, on substantially the same grounds. He also withdrew his later application to rescind the administration order in relation to Services. Indeed, the Marrocco brothers have continued to deal with the administrators and, through Equinet Limited, have purchased the businesses of Services and Connect, and have undertaken to meet the liabilities of Services.

284. Even if the order of 17 March 2011 were set aside, the Respondents would still be administrators of Services. The order of 17 March 2011 ceased to have any force when a full administration order was made in respect of Services on 25 March 2011.The interim order was only effective until the final disposal of the administration application. Therefore Mr Poxon and Mr Prescott are no longer interim managers, in lieu of the directors or controllers of Services. They are administrators under an administration order.

285. Moreover, I do not see any real force in the conflict of interest argument. As officers of the court, they can be trusted to resolve any problem over any conflict through normal court procedure, as in Beattie v Smailes and another (Norris J, Chancery Division, 24 May 2011).

286. I simply cannot see how this application serves any useful purpose.

Discretion

287. In my judgment, even if I had found that the Applicant was a creditor (which I have not) and was adversely affected by the interim order (which it was not), I would nevertheless have refused, in the exercise of my discretion, to grant the relief sought, even if there had been any procedural impropriety in securing the interim order.

288. The Applicant had ample opportunity to apply to the Court between 17 and 25 March 2011 to set aside the order, if so advised. Moreover the Applicant could have attended on 25 March to argue why the order should have been set aside. The Applicant did neither of these things.

289. Thereafter, Services unsuccessfully applied to set aside the interim order and also withdrew a later application to set aside the administration order.

290. The Applicant then waited until September 2011 before making this application, not to set aside the full administration order but merely the interim order which the full administration order replaced. Moreover, that appears to have been prompted in no small measure by an imminent hearing to secure an order for disclosure against the Applicant in relation to its knowledge of affairs and disclosure of documents concerning Connect.

291. This application has been made far too late, when the opportunity was present to make it much earlier. It seeks relief which had been unsuccessfully sought by Services itself. Moreover, the interim order had ceased to exist and has been subsumed within the full administration order made on 25 March 20111. I am also of the view that the relief claimed serves no material utility.

Conclusions

1. Connect was a creditor of Services on 17 March 2011.

2. The Applicant lacked the necessary standing to make this application. It was not a creditor of Services, alternatively it has not been proved to have been such a creditor, on 17 March 2011 or thereafter, nor did the order of 17 March 2011 itself give the Applicant the right to make this application. Furthermore, the application was made far too late, without any sufficient justification for the delay, and serves no practical utility.

3. In any event, the court had jurisdiction to make the interim order in relation to Services on 17 March 2011, since it was made within the context of an extant oral application, supported by the necessary undertakings, for an administration order in respect of Services. In so far as it is permissible or appropriate for this court to express a view, the court was entitled to make the order it did on the afternoon of 17 March 2011, on the basis of the evidence then before it.

4. There is no basis for a rescission of the order of 17 March 2011 in respect of Services, under IR 7.47(1).

5. Had there been any formal defect or irregularity, I would nevertheless have found that no sufficient injustice had been occasioned thereby sufficient to invalidate these insolvency proceedings, and I would have exercised my discretion under IR 7.55 in favour of the Respondents and against the Applicant.

292. For these reasons, the application fails and is dismissed.

His Honour Judge McCahill QC

Specialist Chancery Judge

Bristol

Approved Judgment handed down in Court on 22 December 2011