Neutral Citation Number: [2022] EWHC 647 (Ch)

Case No: CR-2021-00547

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

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

Date: 21 March 2022

Before :

SIR ALASTAIR NORRIS

- -

IN THE MATTER OF BAGLAN OPERATIONS LIMITED (in compulsory liquidation)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

(1) COUNSEL GENERAL FOR WALES
(2) THE WELSH MINISTERS
(3) DŴR CYMRU CYFYNGEDIG
(4) NEATH PORT TALBOT COUNCIL
(5) SOFIDEL UK LIMITED

Applicants

-and-

(1) GARETH ALLEN (as Official Receiver) (in his capacity as the liquidator of Baglan Operations Limited (in compulsory liquidation))

(2) DAVID PIKE (in his capacity as a special manager of Baglan Operations Limited (in compulsory liquidation))

(3) MIKE PINK (in his capacity as a special manager of Baglan Operations Limited (in compulsory liquidation))

Respondents

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Ian Rogers QC and Owain Rhys James (instructed by **Geldards LLP**) for the First and Second Applicants
Ian Rogers QC, Thomas Robinson, Francesca Mitchell and Daniel Petrides (instructed by **Foot Anstey LLP**) for the Third and Fourth Applicants
Ian Rogers QC and Daniel Scott (instructed by **Dorsey & Whitney LLP**) for the Fifth Applicant
Jessica Simor QC, Daniel Bayfield QC and Roseanna Darcy (instructed by **Clifford Chance LLP**) for the Respondents

Hearing dates: 21 and 22 February 2022
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APPROVED JUDGMENT

Sir Alastair Norris :

1. By these two applications the Applicants seek to prevent the Respondents from completing the winding up of Baglan Operations Ltd ("the Company") until such time as the Applicants have managed to secure the provision by Western Power Distribution ("Western Power") of an electricity supply to premises at Baglan; and in the meantime they seek to secure the continued supply of electricity to those premises through the Company. As argued, the Applications raised fundamental issues of potentially wide import. But I intend to decide only what is necessary for the disposition of the Applications before me.

2. The relevant facts are relatively straightforward, because they were in large part uncontested: though notwithstanding the absence of challenge there remain important areas of uncertainty.

3. The Company was part of the Calon Group ("the Group") an independent UK power producer. The Group had three combined cycle gas turbine plants. One of those was a 525 MW plant at Baglan Bay near Port Talbot ("the Baglan Plant") of which the Company was the main operating entity. The Baglan Plant was served by a 12 km gas pipeline ("the Pipeline") which connected the site to the main gas infrastructure. It was also served by a pipe drawing water from the Port Tennant canal for generation purposes ("the Waterpipe"). The electricity generated by the gas turbine was fed into the National Grid via an on-site connection ("the Connection") and also distributed via a private wire network ("PWN") by means of a substation on the site. The PWN operated outside the scope of the Electricity Act 1989 and

was not regulated by Ofgem, and so was not subject to any "supplier of last resort" regime.

4. The Baglan Plant was near the end of its working life and as part of a cost-cutting exercise caused by the financial distress of the Group (resulting from the growth of renewable energy sources) it ceased generating electricity in July 2020 and was "mothballed". Whilst it generated power the Baglan Plant supplied (i) certain sites on the adjacent business parks known as the Baglan Energy Park and the Mardon Park; and (ii) other local customers. Upon ceasing to generate electricity, the Company reversed the Connection and imported high voltage electricity from an external supplier both for its own use (in safety and control systems) and also for on supply to its former customers on a conduit basis. Three customers are relevant to the present applications (though there are other such customers).

    (a) Electricity was supplied (either via the PWN or via the Connection) to four pumping stations belonging to the Third Applicant ("Welsh Water").

    (b) Electricity was supplied to the Fourth Applicant ("the Council") for the purpose of street lighting in Baglan Park and operating a pumping station adjacent to the M4.

    (c) Electricity and water were supplied to the Fifth Applicant ("Sofidel").

I must explain more about these customers.

5. First, Welsh Water. The Baglan Plant originally (and now the Connection) supplies four Welsh Water pumps. Two of these pumping stations are supplied via the PWN and two (it was discovered relatively recently) by direct supply from the Connection. The usage was small, being about £300 per month. Three of the Welsh Water pumping stations are sewerage pumps directly serving Baglan Energy Park and Mardon Park; they ensure the transfer of foul wastewater to a larger pumping station in another location. The fourth controls the flow of waste and storm water from underground storage facilities to a nearby wastewater treatment works. This station ensures that at times of excessive rainfall or high tides raw sewage is not discharged into the sea, to the detriment of local bathing beaches and the commercial shellfishery in Swansea Bay. Together the four pumping stations provide part of the infrastructure serving 40 industrial and commercial users and about 69,000 ordinary customers, clearing foul water and protecting against flood risk. Whilst the system, when operating, is robust enough to cope with low-probability (1-in-30 year) high rainfall/high tide events, any failures could have a high impact in a matter of hours. Mr Wilson of Welsh Water (who has worked in the water industry for 29 years) states in evidence his opinion that (in a worst case scenario) if multiple pumping station failure were to coincide with a period of excessive rainfall (i) there would be major flooding in the Baglan Energy Park and in the wider area; and (ii) that in as little as four hours there would be severe environmental damage due to additional discharge into the sea and into protected shellfish waters and the risk of septicity from static sewage. He acknowledges that this impact would be short lived but notes that there would

be long term damage to local confidence and considers it potentially catastrophic. (I should note that Mr Wilson's opinion is not universally shared within Welsh Water, and that one of his colleagues who has been directly involved in detailed discussions over the closure of the Baglan Plant has, in correspondence, described the flooding risk as "low impact"). It is, however, unchallenged that these "1-in-30" events are occurring much more frequently: for example, in February 2020 Storm Dennis caused severe flooding and disabled 35 pumping stations.

6. Next, the Council. The Council is the local flood authority pursuant to the Flood and Water Management Act 2010 and the Flood Risk Regulations 2009 and has the statutory duty to prevent or mitigate the risk of flooding within its area. Surface water flooding presents a particular risk. As part of the Council's responsibilities it operates a pumping station near to the M4 to assist with the management of the highway and other surface water. The station is marked as a piece of critical infrastructure on the Flood Risk Management Plan. It is served by the PWN. So, also, is the street lighting around the Baglan Energy Park, including a designated "safe school route" for the 1400 pupils of Ysgol Bae Baglan. Two Council buildings originally connected to the PWN were subsequently connected to the National Grid.

7. Finally, Sofidel. Sofidel is part of an Italian group which produces tissue paper for sanitary and domestic use. Its Baglan operation is a fully integrated plant employing 328 people and producing about 7000 tons of product per month (about 10% by volume of all branded tissue products sold in the UK). It is successful and there are plans for its extension onto an adjoining site. The

Company supplies it with electricity through the PWN (at the 11KV required by Sofidel) and with raw water from local canals for its manufacturing operation. Sofidel now consumes about 95% of the power supplied through the PWN.

8. Once it ceased to generate electricity the Company lost its revenue stream. But it continued to incur the costs of keeping the Baglan Plant safe and secure and of supplying electricity to its former customers at a significant financial loss. It faced insolvency. An attempted "pre-pack" administration involving a new company supported by the tenants of the Baglan Energy Park and the Mardon Business Park could not be finalised because it was not supported by the principal secured creditor. On the 24 March 2021 the Company was placed into liquidation by Marcus Smith J. The Official Receiver was appointed liquidator. No firm of insolvency practitioners would have accepted the appointment given the absence of funding for the liquidation process and the health and safety risks relating to decommissioning the Pipeline, the Waterpipe and the Connection.

9. At the time of his appointment the Official Receiver received a letter of indemnity from the Department for Business Energy and Industrial Strategy ("BEIS"). It was in these terms (so far as material): -

> "This letter is intended to provide you with assurances on your appointment as liquidator of the Baglan Group Companies…("the Companies") and ensure that the Companies' sites and operations can be secured and that health and safety concerns associated with the site can be addressed. Provided you have acted honestly and in good faith, and subject to you having used all reasonable endeavours to obtain value for money in relation to costs incurred in carrying out the liquidation, the Secretary of State for BEIS agrees to indemnify you and keep you indemnified against all costs arising from any claims incurred in connection with your appointment as Official

> Receiver and the liquidator of the Companies to the extent that such liabilities arise as a consequence of… carrying out the proper performance of your duties as liquidator of the Companies…. My obligation to provide you with cover under the indemnities referred to in this letter may be terminated by my giving you not less than 14 days' notice."

I will refer to this as "the BEIS Indemnity".

10. At the same time Mr Michael Pink and Mr David Pike were appointed as Special Managers of the estate and business of the Company to assist the Official Receiver. In his First Report to the Court (drafted in anticipation of the winding up order being made) the Official Receiver informed the Court as follows: -

> "It is not currently possible for the Baglan Plant to be decommissioned into a safe and dormant preservation state without disrupting the supply of electricity and water to the Energy Park Tenants. Whilst the power station itself is mothballed, certain control systems must be operated to manage the supply of power and water to the Energy Park. I understand that it would be likely to take over two years to design and deliver a long-term solution for the provision of alternative supply to the Energy Park. Consequently, it is important that the provision of supplies to the Energy Tenants are maintained until a full assessment has been made of whether maintaining such supply would be in the interests of the creditors of the Companies… A further important issue is that the Baglan Plant is also currently burdened with various health and safety and security hazards. These include: the presence on site of a large volume of dangerous and/or flammable chemical and turbine lubricant oil; the gas pipeline that supplies the Baglan Plant, which contains high-pressure gas; and the need to maintain "manned" security to ensure the valuable materials contained at the Baglan Plant are not at risk of theft…. It is clear that, due to the nature of the Company's operations, the requirements of the Energy Part Tenants and the health and safety and environmental issues arising from the Baglan Plant, the liquidation of the Companies will require a high level of specialisation… Therefore, having regard to the facts set out above, it is my opinion that in consequence of the nature of the Company's businesses and properties and in the interests and for the benefit of their creditors and contributories, a Special Manager to be appointed."

11. The Order appointing Mr Pink and Mr Pike said that they should have "all such powers as are necessary for the orderly operation and/or shutdown of the [Company's] business" and in particular should have power "to carry on the business of the [Company] so far as may be necessary for [its] beneficial winding up" and to "discontinue any part of a business when desirable in the interests of the estate". (In this judgment I will not distinguish between the actions of the Official Receiver and those of the Special Manager: I will simply refer to the Official Receiver).

12. It ought to have been plain to all those who used the PWN or the Connection (and to those whose statutory functions were affected by the maintenance of that supply) that continued supply of electricity by the Company was precarious as from (at the latest) 24 March 2021, and that the ultimate "fail safe" solution lay in the installation of a new connection by WPD. Of course, alternative courses might be explored; but it would be essential to put in place that only true "fail safe" as soon as possible in order to mitigate the consequences of the failure of any such alternative. There was before me no evidence from WPD or the National Grid as to when they were first approached, by whom, in what terms or upon what basis (nor, for that matter, as to what the timeline was for installing a new distribution network or breaking the Connection and making the Baglan Plant safe). The Applicants and the Official Receiver appear to have been provided with different information by different personnel within WPD and National Grid.

13. That general appreciation of the situation would have been brought into sharp focus both by a warning letter sent by the Official Receiver on 29 March 2021

and by the actions of the Official Receiver. If the expenses of maintaining and securing the Baglan Plant were properly taken into account, then the electricity was being supplied at a significant loss to the Company. The Official Receiver could therefore simply have disclaimed the supply agreements as onerous contracts and ceased supply. But, instead, when disclaiming the existing contracts he proffered Provisional Supply Agreements.

14. I can take as an example that proffered to Sofidel. It is clearly headed "**Provisional** Supply Agreement" (emphasis supplied). Recital (D) says that it

> "sets out the terms and conditions on which [the Company] agrees to supply and [Sofidel] agrees to purchase electricity on a provisional basis while the Official Receiver and Special Managers carry on the business of [the Company] as long as may be necessary for its beneficial winding up."

Subject to clause 9 of the Agreement, it was for a defined term: clause 9.3 of the Agreement provided that the Official Receiver could terminate it on 14 days' notice. The original agreement was entered into on 10 May 2021 and was restated in June 2021, August 2021 and in October 2021. The term in the October restatement expired on 30 November 2021. When in November the agreement was further extended until 14 January 2022 Sofidel was informed that this would be a final extension because the Official Receiver no longer needed a supply of electricity to the Baglan Plant for decommissioning purposes. Under the agreement Sofidel pays substantially more for its supply (because the pricing model takes into account a wider cost base than did the original agreements and because it adds a 5% margin to those fees). But the price charged cannot reflect all costs incurred in running the site of the Baglan Plant.

15. Clause 14.9 contained a contractual indemnity by Sofidel against all costs, expenses and liabilities arising as a result of the Official Receiver providing any of the services envisaged under the Provisional Supply Agreement. Each of such Agreements contains a cap on that indemnity: it is £1 million in the case of Welsh Water and the Council, and £5 million in the case of Sofidel. It is plain on its terms that each contractual indemnity relates only to costs and expenses arising as a result of supply to the customer giving the indemnity. Whether that would include a proportionate part of general overheads is unclear.

16. Associated with the Provisional Supply Agreement was a Provisional Connection Agreement. This also recited that it was a provisional arrangement whilst the Official Receiver carried on the business of the Company "as long as may be necessary for its beneficial winding up". It was for a fixed term but contained (in clause 5.2) a provision that the Official Receiver could terminate the agreement at any time and with immediate effect.

17. The Group had been funded by a term loan and a revolving credit facility extended by Beal Bank USA ("Beal Bank"); this was secured by a guarantee by the Company and by fixed and floating charges over almost all the assets of the Company. Beal Bank was thus a secured creditor in the liquidation. The Company was also co-obligor under a funding agreement between an Australian bank and another Group company which grants security over the assets of the Company (an inter-creditor agreement adjusting the priorities between them). There were a number of unsecured creditors: but such was the deficiency that they had no hope of a dividend in the liquidation. The liquidation of the Company is therefore not focussed upon the realisation of value for creditors,

but upon the safe, efficient and orderly winding down of the Company leading to a disclaimer of its burdensome assets under s.178 of the Insolvency Act 1986 ("the 1986 Act").

18. For clarity of narrative, I should briefly summarise the response of the principal parties to these Applications to the winding up of the Company in consequence of the failure of the Group.

19. First, the Welsh Government. It first sought a commercial solution through buying or leasing the Baglan Plant or to buy the PWN: but it was unable to offer terms acceptable to Beal Bank. (I do not know and express no view upon the reasonableness of the sum offered or demanded). It next explored compulsory purchase options but thought the timescale would be too extended. It established a task force and held weekly contingency meetings. It engaged consultants.

20. As to implementing the ultimate "fail safe" solution, in April 2021 the Welsh Government began the process of ascertaining the maximum capacity requirements for each customer served by the Connection in order to provide WPD with the necessary technical information for the design of a new distribution network. WPD's agreement to construct an 11KV and a 33KV network was reached in September 2021, though further detailed connection offers were not received until December 2021. It was at that point that the Welsh Government confirmed funding for the project.

21. Welsh Water appears to have taken no independent steps to agree with WPD a program for installing a new connection with the National Grid. It assumed that the Welsh Government would achieve this through engagement with other parts

of the UK Government and that the problem would be resolved through government-to-government interaction.

22. The Council had engaged with WPD from February 2021 (i.e., immediately before the making of the winding up order in relation to the Company) about securing an alternative supply for some of its affected assets (not those with which these Applications are concerned). But in respect of its pumping station and street lighting requirements (which could not be served by this alternative means) it also assumed that the Welsh Government would take steps to arrange and accelerate the procedure for WPD to install a new grid connection to replace the PWN.

23. Sofidel instructed professionals in May 2021 to make an application to WPD for a direct National Grid connection. This involved the building of a substation on Sofidel's land to reduce the 33KV supply voltage to the 11 KV which its factory requires. In December 2021 builders were engaged with an anticipated start date of the end of January 2022. In the meantime, Sofidel installed a diesel and gas generator farm on its factory site designed to be capable of supplying the appropriate amount of electricity to the factory in the event that the PWN was disconnected before the National Grid connection had been made.

24. Because the Company operated in a highly regulated environment due to the environmentally impactful nature of its operations and the hazardous materials involved with its former activities, once in office the Official Receiver appointed specialist consultants to undertake a detailed risk assessment and to formulate a detailed closure plan for the de-energisation and disconnection of the Baglan Plant and the disposal of hazardous materials on it. A high-level

version of the closure plan was shared with the Welsh Government on 3 August 2021. The detailed planning process was completed in November 2021. The plan included (i) the purging and blanking-off of the Pipeline and the disclaimer of the leasehold interests in the land through which the Pipeline passes; and (ii) disconnection of any remaining PWN customers by isolating their connections, disconnecting the substation and switch yards of the Baglan Plant that serve the PWN, and ultimately de-energising the Connection itself. These plans were to be implemented upon a carefully scheduled basis having regard to the availability of specialist contractors.

25. Upon his appointment the Official Receiver also took advice from a leading insolvency QC (who did not appear on the application) as to the scope of his powers and as to the manner in which he should exercise them. That advice was constantly kept under review. Whilst privilege in that advice has not been waived its tenor is in evidence. In summary it was: -

(a) pursuant to section 143(1) of the 1986 Act the primary role of the Official Receiver was to secure that the assets of the Company were got in and realised and (subject to the payment of liquidation expenses) distributed to those entitled;

(b) pursuant to section 178 of the 1986 Act the Official Receiver could disclaim onerous property;

(c) pursuant to section 167(1) and paragraph 5 of schedule 4 to the 1986 Act the Official Receiver

could continue to operate the business of the Company so far as may be necessary for its beneficial winding up;

(d) closure activities at the Baglan Plant would be necessary as part of the beneficial winding up so as to mitigate the risks of liability whilst the Official Receiver was in office and after dissolution;

(e) the provision of power to the Company's existing customers could continue whilst the Official Receiver developed and implemented his closure plan, because although the supply of electricity was not itself necessary for the beneficial winding up of the Company, a connection to the National Grid was necessary for closure purposes and that connection could be utilised by existing customers provided that they bore the full costs of so doing;

(f) once the implementation of the closure plan reached a stage such that a supply of electricity from the National Grid network was no longer required at the Baglan Plant for closure purposes then there was no longer any justification for the Company continuing to trade (because the supply

of electricity was ancillary to the closure activities);

(g) that was particularly so where the maintenance of the Connection and its associated supply of high voltage electricity to much of the infrastructure on the Baglan Plant itself posed risks;

(h) once the winding up had been completed in an orderly way the Official Receiver could disclaim the Baglan Plant.

26. In the light of that advice the Official Receiver considered (i) that he had no discretion to continue trading the business where doing so was not necessary for the closure of the Baglan Plant (even if that were to be cost neutral to the Company, or even profitable); (ii) that he had no duty to continue to trade for the benefit of commercial third-party businesses or to step into the shoes of the Welsh Government to discharge its duties to maintain flood defences or to mitigate the wider effects of the liquidation.

27. On 19 October 2021 the Official Receiver notified the Welsh Government and the Company's PWN and conduit supply customers that the power supply would be terminated on 14 January 2022. That notice was repeated by a further letter on 18 November 2021. The context in which those notices were given and received, and the action which they prompted may be summarised thus.

28. Upon receipt of the notice the Welsh Government increased the frequency of its meetings (both internally and with the Official Receiver). It emphasised (but

without the data assembled for the purposes of the Applications) the potential consequences of terminating supply. It pressed the Official Receiver to continue supply, though it offered no proposals as to how the direct and indirect costs of so doing could be covered (other than saying that contractual indemnities from the customers must be relied upon). For his part, the Official Receiver took his stand upon what he saw as the limitations upon his power to continue to trade. The Official Receiver was also of the view that the consequences of continuing to supply electricity pending the creation of a permanent alternative distribution network were not purely economic. Knowing of the plan for a disconnection in January and a complete closure at the end of February 2022 the skeleton workforce (experienced, trained, and familiar with the site) would be looking elsewhere for jobs: and if they left, then trained replacements would be difficult to attract to the Company (given that it was in the late stages of liquidation). Inadequate staffing would lead to breaches of health and safety regulations and potential criminal liability and would create the very hazards the appointment of the Official Receiver was designed to avoid. So little progress was made.

29. On 1 November 2021 Welsh Water commissioned modelling work as to the flooding risk. It is the results of that modelling work (available on 18 November 2021) which Mr Wilson of Welsh Water has recorded in his evidence and which I have summarised above. It was not available to anyone (and could not have been known to the Official Receiver) at the time when the Official Receiver made his decision to terminate supply. The specific nature of the flood risk was only really addressed with the Official Receiver on 1 December 2021. Diesel generators were put in place to provide a temporary supply to the Welsh Water pumping stations: but Welsh Water has no experience of operating them over a

long period (such as 10 weeks), regards them as unreliable in wet weather and as exposed to the risk of theft. Moreover, their operation (which would not necessarily be continuous) would contribute to the cumulative risk of deteriorating air quality.

30. The Council continued to look to the Welsh Government to provide a solution: though on the ground its technicians cooperated with the contractors engaged by the Official Receiver in the implementation of the disconnection programme and the Council's pumping station was disconnected from the Company's supply and a diesel generator substituted. It was reconnected to the Company's supply shortly after the first hearing of the Applications. Thus, the temporary substitute supply was not tested by Storm Eunice on 14 February 2022.

31. Sofidel had in place a generator farm: but there are concerns about its contribution to the cumulative total of local emissions and to a potential breach of air quality objectives, particularly at the Baglan Plant itself. That impact could be mitigated by the use of hydrotreated vegetable oil and by the erection of smokestacks. Sofidel applied to Natural Resources Wales ("NRW") for a permit to operate the farm on 24 January 2022. This begins a process that may take months to complete (depending upon the priority accorded by NRW). Sofidel has not embarked upon any mitigation measures, such as the building of high smokestacks.

32. On 12 January 2022 the Applications were issued. Each seeks an order pursuant to section 168(5) of the 1986 Act reversing the decision of the Official Receiver to disconnect the Connection prior to the establishment of a new connection to the National Grid for the benefit of all businesses on the Baglan Energy Park;

and in the alternative an order modifying his disconnection decision so as to require the Official Receiver lawfully to ensure the continuation of the supply of power until such time as an alternative connection to the National Grid could be established.

33. The Official Receiver was alerted to these present Applications that day (having been given no warning at a meeting on 10 January 2022 that the Applications were under consideration). Consent orders governing the position until disposal of the Applications were agreed the following day. The Official Receiver undertook to refrain from taking any further steps in connection with the closure plan for the Baglan Plant or the disconnection of the PWN. The Welsh Government gave (and underwrote the giving by Welsh Water and the Council of) cross undertakings in damages in the event that the undertaking given by the Official Receiver "caused loss".

34. The terms of the undertaking given by the Official Receiver do not prevent the Official Receiver from conducting other, non-related, closure activities in implementing the closure plan. But they do mean that the Official Receiver cannot pursue the disconnection and de-energisation activities which will in turn both (i) delay the date upon which the Baglan Plant can be disclaimed (so incurring additional supervision, maintenance and security costs) and (ii) involve the cancellation and rescheduling of the specialist contractors (there being a narrow window for the booking of such contractors having regard to a regular period of high activity over the summer months). The evidence of the Official Receiver recognises the difficulty of estimating these additional costs: but his best estimate is that they will run at the rate of £580,000 per month, of

which about 39% is recoverable under the existing Provisional Supply Agreements (leaving a monthly shortfall of £358,000 that would have to be provided for out of the liquidation of assets, but none of which can be so provided). Given the availability of assets within the liquidation, these costs would need to be pre-funded. Having given the undertakings contained in the Consent Order the Official Receiver requested of the Welsh Government an upfront payment of £350,000 to cover the position pending the determination of the Applications: but such a payment was not forthcoming.

35. As at the date of the hearing before me the position had altered in three respects.

36. First, an indemnity offered by the Welsh Government ("the Welsh Government Indemnity") was under discussion. This indemnity was first offered on 20 January 2022. Until then the attitude of the Welsh Government had been that the Official Receiver must look to the BEIS Indemnity (so that the financial burden fell upon the UK Government and not the Welsh Government). The original form of the Welsh Government Indemnity was an indemnity against all liabilities, costs, expenses, damages, and losses arising out of any delay in the termination of the provision of electricity to Welsh Water and the Council (including the cost of supply) and against any other costs or liabilities arising from the continued occupation of the Baglan Plant which would not otherwise have been incurred had termination of the Connection occurred on 14 January 2022. But it required the Official Receiver to pursue any potential claim for recovery under any relevant contract of insurance or against third parties before claiming under it or otherwise to assign the claim to the Welsh Government: and there were doubts whether the wording covered (i) the irrecoverable costs

of supplying other PWN customers or (ii) the general expenses of continuing to run the liquidation *and associated liquidations which cannot be brought to an end* whilst the Company continues; or (iii) liabilities arising from and expenses incurred in relation to health and safety events which occurred after the intended closure date. There was a further lack of clarity as to whether the Official Receiver was obliged to assign the benefit of the BEIS indemnity. At the end of the first day of the hearing the Welsh Government confirmed that it was not its intention to require an assignment of the BEIS indemnity, but that it was its intention to include the costs of other liquidations within the scope of the indemnity. What is clear, and what is clearly intended, is that the Welsh Government Indemnity does not cover the costs of supply to Sofidel (or costs expenses or liabilities arising from such supply).

37. Second, WPD had provided a firmer timescale for the installation of an alternative distribution network. Earlier informal indications had been 11 KV supply (suitable for Welsh Water and the Council) would be in place by March 2022 and 33 KV supply to the Sofidel sub-station would be in place by June 2022. By the time of the hearing WPD was only prepared to commit in writing to an 11 KV supply by 19 August 2022, and to a 33 KV supply by 30 September 2022: but these dates had been proposed taking into account worst case scenarios, and orally it had been stated that WPD were confident that they would be able to complete the work significantly sooner. There does, however, remain a lack of clarity about what is required for disconnecting the Connection. The Applicants say that the disconnection itself only takes a day's work which can be undertaken at any time, and that the remaining "Make Safe" procedures can be done at any time (albeit at increased cost). The Official Receiver has been

told (and has received a confirmatory email to the effect that) if there is any delay in the scheduled start date for the works in April then resources are likely to become committed up to (possibly) November 2022. As it is based on detailed working discussions, I regard the information provided to the Official Receiver to be more reliable than views solicited in the course of litigation.

38. Third, it emerged that the air quality concerns were less significant than had been thought. The original modelling had suggested that absent mitigating measures the pollutants would be between 20 and 40 times above the World Health Organisation guideline standards. But a Review of Potential Air Quality Impacts based upon data available as at 11 February 2022 (and, of course, founded upon certain assumptions) concludes (i) that Air Quality Objectives are unlikely to be exceeded at most receptors on the Baglan Energy Park or in the surrounding residential areas; (ii) that at two non-residential locations (of which the Baglan Plant itself is one) it is likely that there will be high air pollution; (iii) that on a "worst case" scenario, at nine other locations, including care homes and schools, there would be occasional short-term exceedances of Air Quality Objectives. The review says that "the latest modelling presents a more re-assuring picture with few exceedances of national air quality objectives" but notes that there will be a significant impact on air quality generally, whereas it is desirable to keep air pollution at as low a level as possible (particularly in relation to a vulnerable population).

39. Having set out the facts which are relevant to questions of liability, and which may have a bearing upon questions of relief I can turn to examine the legal issues which arise on the Applications.

40. The applications are brought under section 168(5) the of the 1986 Act. This provides: -

> "If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the actual decision complained of and make such order in the case as it thinks just."

There was no challenge to the standing of any of the Applicants to bring the Applications. It was accepted for the purpose of the Applications that each Applicant fell within the narrow class of persons directly affected by the exercise of a power given to the Official Receiver who would not otherwise have the right to challenge that exercise: see Mahomed v Morris (No.2) [2001] BCC 233 at [26]. The issues were thus: -

(a) whether all or any could establish that they were "aggrieved":

(b) if so, what order was "just".

41. It is generally accepted that for the purposes of section 168(5) a person or entity with standing is "aggrieved" if they are subjected to an act or decision of the liquidator that is either (i) undertaken or made in bad faith or (ii) is "so utterly unreasonable and absurd that no reasonable man would have done it": Re Edennote Ltd [1996] BCC 718 at 722. The cases as formulated and presented originally sought to establish that this "perversity test" was satisfied. The word "perverse" occurs over two dozen times in the evidence of the Applicants. The skeleton arguments of both the Welsh Government and of Welsh Water, the Council and Sofidel for the first hearing of the Applications asserted that no reasonable Official Receiver who was in possession of all the facts would act in

the way proposed and the decision to terminate the Connection was a perverse one. Such a case always faced the difficulty that what was being sought was a continuation of supply by the Official Receiver to the Applicants and others for an undefined period without any proposal as to how the costs incurred by and losses suffered by him were to be covered. "I have a duty: you will perform it: he will pay" is not a compelling conjugation. It is unsurprising, and entirely reasonable, that the Official Receiver was not persuaded.

42. But in the Applicants' skeleton argument for the hearing before me and in oral argument a different approach was adopted. In essence what was now argued was that the decision of the Official Receiver in October and November 2021 to terminate the Connection and his refusal to review that decision in December 2021 was "irrational" because the Official Receiver had taken a mistaken view of his powers: his decision was based upon a belief that he had no power to continue supply, and that belief was erroneous.

43. The springboard for this line of argument was Re Buckingham International plc [1998] BCC 943. Two judgment creditors of Buckingham International ("Buckingham") sought to garnish some debts owed to Buckingham by a debtor in Florida. If they succeeded this would disrupt *pari passu* distribution in England because as unsecured creditors they would take for themselves the garnished debts and deprive other unsecured creditors of a participation. And Buckingham's liquidators took steps in Florida to frustrate the garnishee proceedings. The two judgment creditors were "aggrieved" by this decision and applied under s.168(5) of the 1986 Act for the Court to reverse the decision. The judge at first instance applied "the perversity test" and dismissed the

application. On appeal Counsel argued that the judge had been wrong so to do, because Re Edennote (*supra*) was concerned with a practical decision by a liquidator about the realisation of assets, a practical or commercial question, whereas the instant case was about judging between different creditors' competing claims to assets, an essentially legal question. The Court of Appeal accepted the submission, saying (at 961A): -

> "When liquidators are exercising their administrative powers to realise assets, the court will be very slow to substitute its judgment for the liquidators on what is essentially a businessman's decision…. In this case, by contrast, when the provisional liquidators launched their [Florida proceedings] they did so for the same purpose as they might… have sought an anti-suit (or anti-execution) injunction from the English court. That is eminently a matter for the Companies Court. It is not a matter for the liquidators to decide at their own discretion in the way which they might make decisions as to the disposal of their company's assets."

The case thus establishes that the "perversity test" does not apply to all decisions made by a liquidator and that there are non-commercial, probably legal, questions (such as whether the *pari passu* distribution principle should be upheld) which may be reviewed by the court without applying the filter of "perversity".

44. The Applicants also relied on the decision of Sales J (as he then was) in Hellard v Michael [2010] BPIR 418 at [8]-[9], a case concerning section 303(1) of the 1986 Act applicable in bankruptcy proceedings, where the judge held: -

> "The basic approach is that the court should be very slow to second-guess commercial decisions made by a trustee in bankruptcy in exercise of the statutory discretion conferred on him… In my view, however, the test in Re Edennote Limited does not exhaustively state the grounds for intervention by the court. As is clear from the provisions of the Insolvency Act 1986, the court retains a general supervisory jurisdiction in respect of trustees in bankruptcy to ensure they behave properly

> and fairly as between persons affected by their decision. That wider jurisdiction is in issue on the facts of this case."

This case confirms that the "perversity test" does not necessarily have to be applied in relation to decisions that are not commercial judgments or businessmen's decisions.

45. I accept this analysis.

46. The next stage in the argument is to identify the ground for the decision to terminate the Connection and to cease supply. The Official Receiver has taken his stand upon the advice of Leading Counsel (to which I have referred above) that he has no power to continue to supply electricity to anyone once he no longer needs a supply of electricity for the precise purpose of closing down the Baglan Plant. The Official Receiver rests entirely upon the matter of *vires*. The scope of the powers of the Official Receiver is a matter of law not a matter of commercial judgment and as such the "perversity test" is inapplicable. It would have been otherwise if the Official Receiver had said in correspondence or in evidence "Even if I have the power to continue supply, as a matter of commercial judgment I cannot continue it". It is therefore necessary to examine the powers of the Official Receiver to continue to trade in this case.

47. Section 143 of the 1986 Act says that the functions of a liquidator of a company which is being wound up by the court are "to secure that the assets of the company are got in, realised and distributed to the company's creditors, and, if there is a surplus, to the persons entitled to it". Section 167(1) of the 1986 Act confers powers to enable the liquidator to discharge that function. It is only creditors and contributories who may apply to the Court under s.167(4) of the 1986 Act in relation to any exercise of those powers. But it has long been

recognised that s.143 of the 1986 Act is not a complete statement of all the functions of the Official Receiver as liquidator: see Re Pantmaenog Timber Co Limited [2004] 1 AC 158 per Lord Millett at [63]-[64]. Indeed, in that case Lord Walker noted (at [78]) the change over time in what could be called "the public protection aspects" of the Official Receiver's role.

48. Paragraph 5 of Schedule 4 to the 1986 Act confers

> "Power to carry on the business of the company so far as may be necessary for its beneficial winding up."

There are three points to note about that.

49. First, the exercise of the power to carry on the business must have as its ultimate object the winding up of the company. It is not permissible to carry on the company's business for any other purpose.

50. In Re Wreck Recovery and Salvage Company (1880) 15 ChD 353 a shareholder who wished to resuscitate the company in liquidation asked the liquidator for permission to use some of the company assets to test the experimental salvage process which the company had been incorporated to exploit, and to do so entirely at his own expense and on the footing that, if the process were successful, the profit would be paid to the liquidator and the business sold as a going concern. The majority of the creditors were in favour of the scheme: but two dissentient creditors applied to restrain its implementation. The Court of Appeal, whilst allowing that the power to continue to trade the business must be construed in a liberal sense (the word "necessary" connoting a "mercantile necessity" or something which would be "highly expedient" for the beneficial winding up) nonetheless held that what was proposed was not the winding up

of the company for the benefit of its creditors but rather its continuance for the benefit of its shareholders. There is a similar statement of principle by David Richards J (as he then was) *in* MF Global UK Ltd [2013] 1 WLR 903 at [32].

51. Likewise, in Re Batey (1881) 17 ChD 35 the Court of Appeal held in a bankruptcy case that there was no power to continue the profitable trade of the bankrupt for the purpose of making a profit, and that it was only for the purposes of administration and distribution and with a view to a beneficial winding up that the power to carry on the business was given.

52. The second point concerns the role that the word "beneficial" plays in the phrase "its [sc. the Company's] beneficial winding up". It is plainly not confined to "benefit" assessed in purely financial terms. In my judgment it means "of advantage to the persons in whose interests the liquidation process is being undertaken".

53. Willis v Association of Universities of the British Commonwealth [1965] 1 QB 140 illustrates the point. A limited company entered a members' voluntary liquidation for the purpose of transferring its assets to a new chartered company incorporated for the same purposes. Shortly before doing so, it had sought to recover premises from its tenant on the ground that it wished to occupy them for the purpose of its own business. The tenant said that this could not be a valid ground because the company could not continue its business in liquidation since that was not necessary for its beneficial winding-up. The Court of Appeal held that "beneficial" was not confined to financial benefit and that it had to be assessed in the light of the purpose of the winding -up. The purpose in that case was reconstruction by way of transfer to a new entity and the business could be

carried on to facilitate that transfer. The case, of course, concerned voluntary liquidation. But in my judgment the approach holds good in the case of a compulsory liquidation where, *generally*, the purpose will be the getting in, realisation and distribution of assets to creditors (but in exceptional cases may be different).

54. The third point to note is that even if realisation and distribution be the ultimate purpose, the way in which that purpose is achieved may nonetheless involve the exercise of the power to continue a business. The liquidator of a residential care home may think it a "mercantile necessity" to avoid immediately terminating contracts and evicting elderly residents and to continue to trade until re-housing arrangements were in hand. Such a strategy would not be *ultra vires* but would be a means of achieving vacant possession in a fair, principled and honourable way consistent with the principles recognised in Ex Parte James [1874] LR 9 Ch App 609 and described by David Richards LJ in Lehman Brothers Australia Limited v MacNamara [2020] EWCA Civ 321 at [35] as "the standards which right-thinking people…would think should govern the Court or its officers".

55. The next stage is to apply these principles to the facts of this case and thereby identify the scope of the Official Receiver's powers in relation to the Company. Although the Official Receiver was appointed formally to gather in, realise and distribute the assets (for that is the function of a liquidator) he was not appointed for that purpose alone. The assets were such that they were to be disclaimed, not realised. The Official Receiver was appointed (as the BEIS Indemnity makes clear) so that health and safety and environmental concerns relating to the Baglan Plant could be addressed, not for the financial benefit of the creditors

(for immediate disclaimers would have achieved that) but for the benefit and well-being of those in the locality exposed to those hazards. These hazards principally arose from toxic materials and hazardous structures on the site of the Baglan Plant itself, in respect of which the Company might be held civilly or criminally liable. But they did extend further. That is why the Pipeline was purged and depressurised rather than simply being capped on-site. It is why the Connection is being dismantled, so as to avoid any accidental re-energising of the PWN. Further, the beneficial winding up of the Company undoubtedly requires the avoidance of liability of the Company and of the Official Receiver once the assets are disclaimed.

56. What is a very difficult question is whether the beneficial winding up of the Company also requires that environmental detriment arising from the closure of the Baglan Plant for which the Company could *not* be held liable (serious flooding or the absence of street lighting caused by disabling important infrastructure, for example) be addressed. I regard it as plain that it was no part of the duties of the Official Receiver in this case to conduct (probably at the expense of the BEIS Indemnity and to the prejudice of a speedy liquidation) a wide-ranging environmental survey to see whether the risk of such detriment existed. But some risks were drawn to his attention by statutory authorities charged with specific environmental oversight relating to flood risk, albeit not backed by the data deployed in these Applications. In my judgment the Official Receiver had the power to take into account, in the exercise of his power to continue or to discontinue the relevant part of the business of the Company, the concerns which they expressed (with which he had, in fact, great sympathy). It would I think make no sense if the Official Receiver charged with the task of

mitigating chemical, gas and fire hazards on the site of the Baglan Plant itself were to do so in a manner which created equal or greater flooding hazards in the locality. The creation of such environmental risk would not, I think, accord with the standards of right-thinking people whether or not a legal liability was created. Where a key part of the liquidation is the avoidance of environmental damage, and where the Official Receiver has been appointed to oversee the performance of that task, the Official Receiver's powers extend to (and may be exercised in a manner consonant with) the achievement of that purpose.

57. I find some support for affording significance to environmental concerns in the exercise of insolvency powers in Re-Rhondda Waste Disposal Ltd 2001 Ch 57. The case concerned an administration (not a liquidation) and raised the question whether leave should be given for the prosecution of the company for breaches of the Environmental Protection Act 1990. If a fine were imposed in those proceedings its payment would deplete the assets available to the creditors. The Court of Appeal held that leave should be given because, as is summarised in the headnote, it would be wrong to treat the interests of the company's creditors as overriding all other considerations and so fail to pay sufficient regard to the fact that the company was accused of having polluted the environment and caused serious detriment to the amenities of the locality over a long period. The company's responsibility for environmental damage had to be acknowledged and addressed.

58. Environmental concerns were likewise given prominence in the exercise of statutory powers by a liquidator in Re Mineral Resources Ltd [1999] BCC 422. The case concerned the possible disclaimer by a liquidator of a waste disposal

licence granted under the Environmental Protection Act 1990, and which required the performance of certain obligations and exposed the holder to penalties for breach of those obligations. Disclaimer would bring an end to those obligations. Neuberger J (as he then was) held at 431: -

> "There is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as "the polluter must pay". It is the view which prevails both in the popular perception and in the legislative system in this country and, indeed, in most of the developed world….while I accept that the provisions of the 1986 Act relating to winding up and disclaimer are not merely for the benefit of individual shareholders, creditors, debtors and liquidators of companies, but also for the good administration of business and commerce, it appears to me that those interests are of a less wide-ranging and important nature …. than the concerns embodied in the 1990 Act."

The case is directed to the exercise of powers, not the scope of powers. But it would be surprising if in the exercise of powers environmental impacts were recognised as a significant consideration but in ascertaining the scope of such powers in a case such as this they were not.

59. I consider that, having regard to the circumstances of his appointment and to its apparent purpose, in the instant case the Official Receiver was entitled, in response to requests from the relevant statutory authorities, to take into account the potential detriment to the locality - the Company's "beneficial" winding up being one conducted to the advantage of those in whose interest it was being undertaken (who were not exclusively the creditors). I confine my holding to the facts of this case.

60. Because the Official Receiver, entirely in accord with orthodox views as to the scope of his powers in ordinary cases, did not appreciate the full extent of his powers in *this* case, the door is open for me to modify his decision, and to do so

having regard to the circumstances as they exist at the date of the hearing (which are different from the circumstances which obtained at the time when the Official Receiver had to make his decisions). Section 168(5) enables me to make such order as is "just". This requires a "fair" balance to be struck between competing interests in the particular circumstances of this case.

61. The principal relevant considerations are these: -

(a) The Official Receiver is in office to wind up the Company in a safe manner;

(b) There is a public interest in having the Company wound up, and in having that process conducted expeditiously;

(c) Whilst the Connection remains in place there is a fire risk and a health and safety risk arising from the presence of high voltage electricity on the site (a risk which is mitigated by the retention of a skeleton staff who are trained and familiar with the site);

(d) The Official Receiver has with the benefit of expert advice formulated a closure plan and scheduled the works necessary for its implementation;

(e) Key disconnection and remedial works have been scheduled for some time in April and if that slot is

lost the work may have to be postponed until November, though actual disconnection may take place over a shorter period (albeit leaving the remaining infrastructure in a potentially dangerous state);

(f) A severance of the Connection and a cessation of supply to pumping stations in the ownership or control of Welsh Water or the Council would increase the risk of severe flooding and the consequential discharge of untreated waste into the locality at times of excess rainfall, particularly where such coincides with high tides;

(g) The Welsh Government, Welsh Water and the Council have known of this risk since at the latest March 2021 and have had the opportunity to put in place mitigation measures;

(h) Diesel generators can be substituted at these sites, but their operation will contribute to an overall decline in local air quality, though to an extent far less than the Welsh Government, Welsh Water and the Council originally contended;

(i) If supply ceased then the period for which the generators would have to be available (not necessarily in continuous operation) is dependent

upon the speed at which WPD can install an alternative distribution network, and that is in turn dependent upon obtaining requisite consents;

(j) A "worst case scenario" assessment suggests installation by mid-August, but WPD is confident of earlier delivery (having originally thought that the new supply would be in place by March 2022);

(k) The direct and indirect financial costs of continuing that supply are very substantial and until 20 January 2022 were entirely unprovided for, but since that date the Welsh Government Indemnity offers a state-backed indemnity which (subject to appropriate drafting) is intended to cover all direct or indirect costs, expenses and liabilities incurred by the Official Receiver or to which he is exposed by reason of the temporary maintenance of the Connection;

(l) As well as the financial costs there is a whole range of physical and resourcing risks arising from the maintenance of the Connection which no indemnity can satisfactorily address.

62. I have considered whether I should simply direct the Official Receiver (who has a far more acute knowledge of the precise considerations which fall to be balanced) to reconsider his decision in the light of these observations. I have

decided that I should relieve him of that responsibility and make the decision myself so as to afford him the maximum protection under the BEIS Indemnity and any Welsh Government Indemnity. I would modify the decision of the Official Receiver in this way. Subject to the provision of a satisfactory indemnity by the Welsh Government, which covers the anticipated risks and addresses the issue of funding the continued supply (and if there is dispute about its terms I will, if appropriate arrangements are made, settle them) the Official Receiver should continue supply to the Welsh Water and the Council facilities until 18 April 2022, from which date supply can cease. By that time the risk of excessive rainfall is likely to be reduced, the need for street lighting a "safe school route" will have passed, there ought to have been sufficient time for the Welsh authorities to have given any necessary consents (if the matter is as critical as their evidence suggests) and the Official Receiver will have had the opportunity to hold substantially to the existing closure plan or to negotiate a re-scheduling of any work. Any order giving effect to this direction should contain a liberty to apply.

63. As may be anticipated from the foregoing, I would confirm the decision of the Official Receiver to disconnect Sofidel. Sofidel is not a statutory authority with duties to discharge to residents in the locality. It is simply a commercial customer. The making safe of the Baglan Plant does not entail the protection of Sofidel's commercial interests, and the Official Receiver was not appointed for that purpose. Once a supply of electricity is no longer required for the purposes of the closure and cleansing of the Baglan Plant the Company cannot continue to trade for the purposes of supplying electricity to Sofidel on a commercial basis. Such an activity is not directed to the Company's beneficial winding up.

To undertake it for the benefit of a commercial customer would be to promote the interests of that customer above those of creditors contrary to the general insolvency regime.

64. Moreover, even if there were such a power it would plainly not be appropriate to exercise it since the Welsh Government Indemnity deliberately does not extend to the consequences of supply to Sofidel and Sofidel's contractual indemnity in its Provisional Agreements falls far short of what is required. It is a regrettable feature of insolvency that the collapse of a supplier can occasion real stress to its customers. How Sofidel adapts to such stress is a matter for Sofidel. It will be a matter for the Welsh authorities whether they grant the necessary consents to Sofidel to enable it to operate its generator bank and within what timescale (no doubt according to those decisions the priority they think is deserved). The cumulative air pollution consequences are nowhere near as serious as at first portrayed (even assuming full mitigation measures are not adopted).

65. I can now briefly address a further line of argument that was advanced. In addition to arguing that the Official Receiver had the power granted by paragraph 5 of Schedule 4 to the 1986 Act the Applicants argued that the power conferred by paragraph 13 of Schedule 4 to do what was necessary for the winding up of the Company's "affairs" also enabled the Official Receiver to continue the supply. I do not think that that argument adds anything to the approach I have adopted in relation to the power to continue the business and I am satisfied that focusing on the paragraph 13 power would not lead to any different outcome.

66. However, on 11 February 2022 the solicitors for the Welsh Government advanced a new line of argument centred upon the Human Rights Act 1998 ("HRA") notwithstanding that it itself had no claim under the HRA. The Welsh Government's solicitors contend that in cutting off the supply of electricity to Welsh Water, the Council and Sofidel the Official Receiver is acting in breach of the HRA and his decision violates or threatens to violate the Convention rights of members of the public living and working in the vicinity of the Baglan Energy Park and the wider bay area. No such resident has advanced such a claim: but I must give separate consideration to it.

67. Before doing so I would comment that the decision to introduce this fresh argument late in the day led to the introduction of a vast quantity of new and unrefined material, resulting in a skeleton argument from the Applicants of 100 pages in length, four annexes and two packed lever arch files of authorities. To this material the Official Receiver had little time to respond. These materials were all to be dealt with in an expedited two-day hearing. Despite extending sitting hours the oral argument was rushed.

68. The first step in the argument is to establish the proposition that the Official Receiver is a "public authority" within the meaning of section 6(3)(b) of the HRA (i.e., a person certain of whose functions are functions of a public nature) and so subject to a duty to act compatibly with Convention rights under s.6(1) HRA. Whatever arguments had been advanced in correspondence or in written submissions, at the hearing it was acknowledged that the Official Receiver was such. I shall proceed upon that concession.

69. Mr Rogers QC sought to establish that as such a "public authority" the Official Receiver was a "core" authority. He did so because a "core public authority" is bound by s.6(1) of the HRA in respect of every one of its acts whatever the nature of the act concerned (so obviating any enquiry as to whether the act was of a public or private nature). Counsel's approach was to characterise the Official Receiver as a civil servant belonging to an executive agency (the Insolvency Service) of a government department (BEIS) who was simply an arm of that department and whose role as liquidator of last resort meant that he ensured that the insolvency system as a whole worked.

70. I reject this characterisation. It entirely overlooks the independence of the Official Receiver from the control of BEIS, the fact that he is responsible to (and his actions may be constrained by) the creditors rather than being democratically accountable, the degree to which he is doing precisely what a private liquidator would do dealing with the private rights of creditors and contributories, and the fact that he is remunerated in the same way as any private liquidator (out of the realised assets) although his fees are regulated by statutory instrument. Lord Hope said in Aston Cantlow v Wallbank [2003] UKHL 37 at [41] that care needs to be taken to limit the category of "core authority" to cases where such treatment is clearly appropriate. If that caution is exercised, it is plain that the Official Receiver is not simply carrying out a governmental function.

71. On the other hand, it is clear the Council is a "core public authority" and as such can itself advance no claim under s.7 of the HRA. The HRA arguments are therefore potentially available to Welsh Water and Sofidel. Welsh Water did not

advance any Convention claim. Very late in the day Sofidel did. It is its position I shall therefore address. (There is one further submission on this aspect with which I must deal hereafter).

72. Counsel for the Official Receiver conceded at the hearing that the Official Receiver was "a hybrid authority". For the purposes of this judgment I will accept that as correct. If so, it becomes necessary to identify whether cessation of supply is (for the purposes of s. 6(5) of the HRA) an act that is "private". If it is, then the Official Receiver is not a "public authority" in relation to it.

73. Little written or oral argument was addressed to this question. I incline to the view that the decision to discontinue the supply (or perhaps more accurately, not to renew the expired provisional agreements) was a "private" act, being of a type that would be made by any liquidator and concerning the relationship between the Company and individual customers. It is difficult to go beyond stating that a decision to bring to an end a terminable contract (or not to enter a new contract) between two private commercial companies is essentially a private act: and the fact that it is undertaken by an actor who in some respects acts as a public authority does not alter the nature of the act itself. The Official Receiver is only doing what the directors would otherwise be doing, had the 1986 Act not divested them of their management powers. But I will proceed on the footing that in making the decision the Official Receiver was acting as a public authority so that Convention rights are engaged.

74. The principal Convention right in relation to Sofidel is Article 1 to the First Protocol. As is well known, this provides that every legal or natural person is entitled to the peaceful enjoyment of his possessions. I accept that "possessions"

is the equivalent of "assets". It plainly includes the site of the factory. Mr Rogers QC submitted (and for present purposes I accept) that it includes "goodwill". Three points were made.

75. First, if the factory floods, then the peaceful enjoyment of it by Sofidel will be interfered with. That may be so. But such an event will not be caused by the Official Receiver. It will occur because the Welsh Government and the Council, whose statutory responsibility it is to manage the flood risk around the factory, will have failed (either by acquiring the relevant assets or creating an alternative) to provide an adequate means of flood management, although the need for such has been apparent since March 2021 at the latest (and arguably by August 2020). My modification of the original decision of the Official Receiver is intended carefully to balance the competing interests and risks and to put in place as safe a flood management plan as the circumstances admit. Sofidel cannot claim via the HRA that its interests override those of everybody else. (Indeed, it is one of the ironies of this case that by the relief sought in the Applications the Welsh Government, Welsh Water, the Council and Sofidel seek a substantial interference with the Company's A1P1 rights in relation to the Baglan Plant and also by imposing a positive duty to supply electricity because of occupation of the site).

76. Second, it is argued that if the electricity supply is terminated (or more accurately, if Sofidel's provisional supply agreement is not renewed upon expiry) then Sofidel may have to close (permanently or temporarily) and that will damage its goodwill. But Sofidel has no property right in a supply of electricity from the Company. Sofidel had a contractual right to a supply on

terms: but that contract expired. The refusal to extend supply is justified by the need to cleanse and to close the Baglan Plant and is a proper exercise of the powers which the 1986 Act confers upon the Official Receiver. To enable him to fulfil his statutory function of winding up insolvent companies. In performing that function the Official Receiver can only act within the scope of the powers which the 1986 Act (as supplemented by the common law) has given him. Section 6(2) of the HRA recognises that limitation.

77. Third, reliance was placed on Capital Bank AD v Bulgaria (Application 4929/99). The case concerned the revocation by a central bank of the banking licence of an apparently insolvent bank. It was held by the Court that such revocation was an interference with the bank's Convention rights. It was submitted that the termination of an electricity supply was like the revocation of a banking licence. But the reason the (possibly) insolvent bank's Convention rights were engaged was not because the revocation meant it could not trade: it was because there had been no judicial examination of the essential underlying question of insolvency. I did not find the case helpful. In my judgment Sofidel has no Convention right to the continued supply of electricity by an insolvent company at a loss to that company: and I do not think that Capital Bank suggests otherwise.

78. Mr Rogers QC also advanced arguments based upon an alleged breach by the Official Receiver of Sofidel's rights under Article 8 of the Convention. This Article says that everyone has the right to respect for private and family life: and it is qualified because it may be interfered with according to law and to the extent necessary in a democratic society in the interests (amongst other things)

of public safety. Its applicability to Sofidel was elusive. I believe it was being said that Sofidel's workers and the residents local to the factory would be detrimentally affected by flooding and air pollution. But Sofidel is not a "victim" in that regard and no such victim was before the Court. So the argument goes nowhere.

79. Arguments were also addressed based upon an alleged breach of Article 2 ("the right to life"). These again did not relate to Sofidel but to workers and local residents potentially put at risk by flooding: and the observations made in the preceding paragraph apply with equal force.

80. Written (but not oral) arguments were also addressed to me on the United Nations Convention on the Rights of the Child; and both written and condensed oral argument on the Equality Act 2010. Again, their relevance to Sofidel was not apparent.

81. Invocation of Convention rights does not avail Sofidel. The 1986 Act accords rights to creditors and contributories and carefully balances many competing private and public interests. It does not accord rights to customers. Whilst in relation to public acts of the Official Receiver Convention rights may be relevant, they are unlikely to override that careful balance. It is more likely that the provisions of the 1986 Act, if properly acted upon, pay proper regard to those Convention rights.

82. There is one final submission that I ought briefly to address. I have looked at the Convention rights from the perspective of potential "victims". Mr Rogers QC submitted that it would be wrong so to do and that it was not necessary for potential victims of Convention rights violation to be parties to the Applications.

His submission was that alleged violations by the Official Receiver of Convention rights could be argued in the abstract by (what were in effect) representative parties like the Applicants. The apparent foundation for the argument was the decision in Cornerstone (North East) Adoption and Fostering Service Ltd [2020] EWHC 1679. But I find nothing in the case to support the argument. It is a straightforward case of a hybrid body (a Christian adoption agency) challenging a decision of Ofsted, a core public authority, that the agency had breached the Equality Act 2010 in its selection of potential adopters. As a matter of its expert judgment Ofsted thought the degree of compliance with the HRA was relevant to a decision on the agency's registration and said so in the course of reporting. The case discusses the rights and wrongs of that Ofsted judgment. It does not follow that those who are not victims can nonetheless raise abstract HRA points in order to reverse a decision by which they are affected. The Council cannot say: "I am not a victim: but I would like to argue some HRA points that could be taken by those who are victims to assist me in overturning a decision by which I am affected".

83. In conclusion, save for the modification indicated in paragraph [62] above, I dismiss the Applications.