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

Rolls Building

Tuesday, 10 December 2019

Before

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE FRITH

IN THE MATTERS OF

DIRECT AFFINITY EVENTS LIMITED

BRIAN MEE ASSOCIATES LIMITED

LESGO EXPRESS IMPORT AND EXPORT LIMITED

AND IN THE MATTER OF **THE INSOLVENCY ACT 1986**

BETWEEN

HM Revenue and Customs — Petitioners

- and –

(1) Direct Affinity Events Limited — Respondents

(2) Brian Mee Associates Limited

(3) Lesgo Express Import and Export Limited

(4) The Official Receiver

MR RAJ ARUMUGAM **(**instructed by HM Revenue and Customs) appeared on behalf of the Petitioners

MS ISABEL PETRIE **(**instructed by the Government Legal Department) appeared on behalf of the Fourth Respondent

The First, Second and Third Respondents did not appear and were not represented

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JUDGMENT

Deputy ICC Judge Frith:

1 I have before me three winding up petitions in respect of which winding up orders were made apparently in error. Each of those orders have already been rescinded pursuant to the Court's powers under the provisions of Rule 12.59(1) of the Insolvency (England and Wales) Rules 2016 (the "Rules"). The only issue that remains to be resolved relates to a dispute as to costs that have arisen between the Official Receiver (the "OR") and Her Majesty's Revenue and Customs ("HMRC"), who are the petitioners in each case.

2 They have been listed together because they raise an important matter of principle relating to the terms and effect of the Insolvency Proceedings (Fees) Order 2016 (the "2016 Order"). The OR asserts that under its interpretation of the 2016 Order, on the making of the order, it is entitled first to the official receiver's administration fee which pursuant to the schedule to the 2016 Order amounts to £5,000 and second it is also entitled to claim the official receiver's general fee which amounts to a further £6,000. It seeks to collect both these fees from HMRC as the petitioner in each of the three matters before me. Whilst HMRC accepts that it is responsible for the costs of the OR, under its interpretation of the 2016 Order, it submits that only those costs that were reasonably incurred can be claimed.

3 Whilst at first, it would appear that this is a dispute between two public bodies, the matter of principle it involves will also apply to all petitions brought by creditors regardless of their identity. Since each of the cases turn on the resolution of this issue, the three cases were listed together for the hearing before me.

The Facts

4 The first case involves a company known as Direct Affinity Events Limited ("Direct Affinity"). It owed some £330,000 in Crown debts to HMRC. As a result, on 13 December 2018, a petition was presented by HMRC for its compulsory winding up. The first hearing of the petition was listed to take place on 6 February 2019, but following the presentation of the petition, the Directors took the appropriate steps to place Direct Affinity into Creditors' Voluntary Liquidation ("CVL"). A dialogue commenced between the solicitors acting for Direct Affinity, the Insolvency Practitioners instructed to deal with the formalities of the CVL and HMRC.

5 On or about 30 January 2019, the appropriate documents were prepared for the purpose of putting into effect the decision to place the company into CVL and the Insolvency

Practitioners distributed them to its creditors. They included a Notice of Decision by Deemed Consent indicating that, unless 10% of the Creditors objected, the decision to place the Company into CVL would be deemed as automatically approved on 15 February 2019 (some 9 days after the date that had been fixed for the first hearing of the petition).

6 At the first hearing of the petition on 6 February 2019, it was adjourned and a second date was fixed for 27 February 2019. By 15 February 2019, in accordance with the CVL proposal documents and the deemed consent procedure, Direct Affinity was placed into CVL. On 20 February 2019, the then duly appointed Liquidators wrote to HMRC's Insolvency Claims Handling Unit notifying them of the appointment. It appears that this notice was delivered to a different division of HMRC from that which had been conducting the dialogue that had hitherto taken place. The appointment was also advertised in the London Gazette on 28 February 2019. However, due to a miscommunication between the relevant teams within HMRC, the fact of the commencement of the CVL coupled with a request that the petition be dismissed, was not drawn to the Court's attention. As a consequence, a winding up order was made.

7 An application was duly made seeking the rescission of the winding up order under Rule 12.59(1) of the Insolvency (England & Wales) Rules 2016 which came before the Insolvency and Companies Court Judge Barber on 22 May 2019. The winding up order was duly rescinded. However, at the hearing, HMRC sought to argue that the responsibility for the miscommunication lay not with HMRC, but with the company for failing to give notice of the proposed CVL to the correct team dealing with the matter on its behalf. As a result, HMRC submitted that it should be the Company and not HMRC that should bear responsibility for the costs of the application including those of the OR. The effect of this submission, if it had been accepted by the court, would have been to reduce the amount that would otherwise be available for the creditors of Direct Affinity. The Learned Judge ordered that the issues on costs should be adjourned to a 2 hour hearing which ultimately came before me. However during the course of his submissions before me, Mr Raj Arumugam, Counsel for HMRC, indicated to me that HMRC now accepts responsibility for the payment of these costs subject to the resolution of the remaining issues on these petitions.

8 The second case involves a Company known as Brian Mee Associates Limited which had a petition presented against it by HMRC on 27 March 2019 in respect of a claim for Crown debts amounting to just over £24,000. The petition was due to be heard on 15 May 2019. Prior to the hearing, the Company tendered payment in full of the amount claimed. However, the fact of the payment was not communicated to those representing HMRC prior to the hearing. In consequence, a winding up order was made instead of a request being

made to the court seeking a short adjournment to allow sufficient time for the clearance of the payment. The error was quickly identified and an application to rescind the winding up order was made under Rule 12.59(1).

9 The evidence filed in support of the application revealed an email exchange between the parties where it was initially the position of the OR that no steps had been taken following the winding up order and no costs had been incurred. However, in a subsequent email, their position changed. They indicated that the fees that they were actually claiming amounted to some £11,000 in respect of the OR's administration and general fees under the 2016 Order to which they claimed to be entitled.

10 The matter came before Insolvency and Companies Court Judge Prentis on 12 June 2019. He made an order rescinding the winding up order but adjourned the question of the costs as between the HMRC and the OR to a hearing with a longer time estimate, being the hearing that ultimately took place before me.

11 The third case involves the Company known as Lesgo Express Import and Export Limited. The Crown debt claimed by HMRC amounted to some £2.6 million. A petition was issued on 9 April 2019 and listed to be heard at a first hearing on 5 June 2019.

12 On the day before the hearing, a representative from the Company contacted HMRC to advise that the debt claimed was subject to an appeal in the relevant tax tribunal(s). As a result, a request was made that the hearing be adjourned. HMRC acceded to the request and confirmed that a winding up order would not be sought at the hearing.

13 However, this development was also not effectively communicated to the representative of HMRC prior to the hearing taking place and the winding up order was made. An application to rescind pursuant to Rule 12.59(1) was issued on 7 June 2019 and that application came before Insolvency and Companies Court Judge Prentis on 12 June 2019 in the same list that included the rescission application involving Brian Mee Associates Limited, which the court had dealt with earlier that day. The OR was present at that hearing and when the HMRC requested that only the reasonable costs should be paid, the representative objected, again relying on the provisions of the 2016 Order. Accordingly, the Judge rescinded the winding up order but adjourned the question of the costs of the rescission application as between HMRC and the OR to a hearing with a longer time estimate to be heard with the case of Brian Mee Associates Limited.

The 2016 Order

14 The 2016 Order was made in accordance with the primary legislation set out in s.414 of the Insolvency Act 1986 ("IA 1986") which provides as far as is relevant as follows:

> *"**414.— Fees orders (company insolvency proceedings)**.*
>
> *(1) There shall be paid in respect of—*
>
> *(a) proceedings under any of Parts I to VII of this Act, and*
>
> *(b) the performance by the official receiver or the Secretary of State of functions under those Parts,*
>
> *such fees as the competent authority may with the sanction of the Treasury by order direct.*
>
> *(2) That authority is—*
>
> *(a) in relation to England and Wales, the Lord Chancellor, and*
>
> *(b) in relation to Scotland, the Secretary of State.*
>
> *(3) The Treasury may by order direct by whom and in what manner the fees are to be collected and accounted for.*
>
> *(4) The Lord Chancellor may, with the sanction of the Treasury, by order provide for sums to be deposited, by such persons, in such manner and in such circumstances as may be specified in the order, by way of security for fees payable by virtue of this section."*

15 In exercise of his powers under s.414(4), the Lord Chancellor made the 2016 Order. The relevant key provisions are as follows.

> In regulation 2, certain definitions are provided. They include:
>
> *"deposit" means—*
>
> *(a) on the making of a bankruptcy application, the sum of £550,*
>
> *(b) on the presentation of a bankruptcy petition, the sum of £990,*
>
> *(c) on the presentation of a winding up petition, other than a petition presented under section 124A(c) of the Act, the sum of £1,600,"*

"chargeable receipts" means the sums which are paid into the Insolvency Services Account after deducting any amounts which are paid out to secured creditors or paid out in carrying on the business of the bankrupt or the company;"

"official receiver's administration fee" means the fee payable to the official receiver on the making of a bankruptcy or winding up order out of the chargeable receipts of the estate of the bankrupt or, as the case may be, the assets of the insolvent company for the performance of the official receiver's functions under the Act"

Regulation 3 is the operative provision introducing the fees listed in Schedule 1 which includes the OR's administration fee and the general fee that lie at the heart of this dispute.

Regulation 4 deals with the provisions relating to the deposit defined in regulation 2. They include:

"(2) On the presentation of a bankruptcy petition or a winding-up petition, the petitioner will pay a deposit to the court as security for the payment of the official receiver's administration fee.

(3) Where a deposit is paid to the court, the court will transmit the deposit paid to the official receiver attached to the court.

(4) The deposit will be used to discharge the official receiver's administration fee to the extent that the assets comprised in the estate of the bankrupt or, as the case may be, the assets of the company are insufficient to discharge the official receiver's administration fee.

(5) Where a bankruptcy order or a winding up order is made (including any case where a bankruptcy order or a winding up is subsequently annulled, rescinded or recalled), the deposit will be returned to the person who paid it save to the extent that the assets comprised in the estate of the bankrupt or, as the case may be, the assets of the company are insufficient to discharge the official receiver's administration fee.

(9) Where—

(a) a deposit was paid by the petitioner to the court, and

(b) the petition is withdrawn or dismissed by the court

that deposit, less an administration fee of £50, will be repaid to the petitioner."

16 Schedule 1 introduces a table of fees payable in insolvency proceedings. The relevant fees claimed by the OR in each of the cases are as follows:

Description of fee and circumstances in which it is charged	*Amount of fee or applicable %*
Winding up by the court other than a winding up on a petition presented under section 124A – official receiver's administration fee On the making of a winding-up order, other than on a petition presented under section 124A, for the performance of the official receiver's duties as official receiver, including the duty to investigate and report on the affairs of bodies in liquidation, the fee of—	£5,000
Official receiver's general fee On the making of a bankruptcy order or the making of a winding up order by the court for the costs not recovered out of the official receiver's administration fee of administering— (a) bankruptcy orders, (b) winding up orders made by the court the fee of—	£6,000

The relevant authorities

17 For the court to rescind a winding up order, whilst the factors may vary from one case to another, one of the factors it should consider is whether the costs of the OR can be paid, see the judgment of Mr Philip Marshall QC, sitting as a Deputy High Court Judge in *Metrocab Limited* [2010] EWHC 1317 at paragraph 36. Ms Isabel Petrie, Counsel for the OR also relied upon the decision of Nugee J in *Amin v London Borough of Redbridge* [2018] EWHC 3100 (Ch), following the reasoning of Morritt C in *Redbridge LBC v Mustafa* [2010 EWHC 1105 (Ch). She derived two principles from those cases. First, the Court considers that the OR's costs follow the making of a bankruptcy order "as a matter of course". Second, she

submitted that had there been cause to criticise the conduct of the petitioner, then it would be open to the Court to make a different order (i.e. to order that the petitioner, rather than the debtor, pays those costs). However, following the concession made during the course of oral submissions by Mr Arumugam in the Direct Affinity case, there is now no dispute that it is HMRC that should pay them subject to the determination of the issues that remain.

18 I was referred to two decisions in which the 2016 Order was apparently relevant. The first was *Diamond Hangar Limited v Abacus Lighting Limited* [2019] EWHC 224 (Ch) in which HHJ Worster made an order providing for the payment of the sum a £11,000 in respect of the OR's costs on the making of a rescission order. This sum appears to represent the total sum due for payment in respect of both the OR's administration fee and the general fee set out in the schedule of the 2016 Order. However, as is clear from paragraph 5 of the judgment, those costs had been agreed prior to the hearing. The terms and effect of the 2016 Order were therefore not the subject of any submissions or argument conducted before the court.

19 The second case is an unreported decision of the Newcastle Upon Tyne County Court in the case of *Newton v The Official Receiver*. The case involved an application for an annulment of a bankruptcy order under section 282(1)(b) IA 1986. On such applications, it is also necessary for the court to be satisfied that the costs of the OR are provided for. Whilst there was initially a dispute as to the liability of the applicant for such costs in circumstances where the point was taken that there were no chargeable receipts as defined in the 2016 Order from which the fee could be taken, the point was apparently not pushed with any vigour by the representative of the debtor. The judge found that the general fee was payable in all cases and it was not for the court to assess whether the OR has been adequately compensated for the work undertaken by the administration fee. In support of this finding, the judge relied upon an update given by the OR to the Money Advice Liaison Group in July 2017 in which it was stated *inter alia* that the new fee structure does not allow the discretion to apply anything other than the full administration fee and the full general fee when a bankruptcy order is annulled on the basis that his debts and expenses have been paid in full. That position is however not accepted by HMRC in this case and the point was taken by Mr Arumugam that both fees can only be payable from chargeable receipts derived from the realisation of the Company's assets; the same point that was taken, but not pursued with vigour in the *Newton* case, albeit in a case involving personal insolvency.

The submissions

20 The OR relies on a plain reading of the provisions of the 2016 Order. Ms Petrie submitted that the OR's administration fee (£5,000) is charged "on the making of a winding up order" and likewise the OR's general fee (£6,000) is also charged "on the making of a winding up

order". In consequence, the making of the winding up order acts as a trigger, giving rise to the OR's entitlement to costs and it matters not what occurs subsequently. The fact that a winding up order is later rescinded does not have the retrospective effect enabling the party that would otherwise be paying them to avoid liability altogether.

21 In support of this submission, she prayed in aid the decision of the Court of Appeal in *Yang v Official Receiver* [2017] EWCA Civ 1465 in which at paragraph 54 of her judgment, Gloster LJ stated that:

> *"[54] Finally, in considering the interaction between the powers to rescind and to annul a bankruptcy, it is also appropriate to understand why the difference might matter to the bankrupt. In essence, rescission terminates the bankruptcy whereas annulment treats the BO as having never been made."*

22 In consequence, the OR submits that a true construction of the 2016 Order rescission simply terminates the liquidation from the date on which the order to rescind is made. The authorities support the view that the OR is entitled to their costs once a winding up order (or bankruptcy order) has been made, even though it was later rescinded. However, what they do not provide is guidance as to the basis upon which those costs are assessed, having regard to the terms and effect of the 2016 Order.

23 So what was the true effect of the rescission orders? Did they make the winding up orders nullities *ab intitio* or did they still have legal consequences; specifically creating the unassailable right to the two fees that the OR claims? Understandably, in light of the orders they both made, neither Insolvency and Companies Court Judges Barber nor Prentis were invited to consider this point when they rescinded the winding up orders. These issues fell to be determined by me.

24 Ms Petrie submitted that neither Direct Affinity nor indeed the other two cases were on all fours by any means with the facts in Re *Calmex Limited* (1988) 4 BCC 761, a case that came before Hoffmann J (as he then was) that involved a clear case involving the mistaken identity in relation to the alleged debtor company that rendered the entire proceedings a nullity. She also drew my attention to the support that the Learned Judge cited in support of his conclusion from the judgment of Lord Greene, M.R, in *Craig v Hansen* [1943] K.B. at paragraph 256 at p. 262 where he found:

> *"…a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside… Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has no notification of any intention to apply for it has never been adopted in this*

country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not something which is affected by a fundamental vice."

25 The judge went on to consider the way the court should approach the question as to whether the order was a nullity or not. As Hoffmann J put it:

"Is the registrar under a duty to retain in his records a copy of the winding up order which the court has rescinded on the grounds that the company was never served and the entire proceedings were a mistake? In Craig v Kansen, Lord Greene MR described an order made in such circumstances as a nullity. As I said in Re Intermain Properties Ltd, the word "nullity" can be rather slippery and Lord Greene's reference to the order being "set aside" makes it difficult to know whether he regarded the order as incapable of having any legal consequences whatever. But I do not need to explore the meaning of nullity at this level of generality: the relevant question here is whether the order is a nullity for the purposes of sec. 130(1) of the Insolvency Act. In my judgment it is. The present question could not have arisen before the Insolvency Rules 1986 because the order could not have been rescinded after it had been drawn up and registered. But now it can be, I think that justice requires sec. 130(1) to be construed to give effect to the principle stated by Lord Greene."

26 Ms Petrie submitted that Direct Affinity was clearly insolvent and unable to pay its debts on 27 February 2019 when the compulsory winding up order was made. S.124(5) IA 1986, in any event, envisages that a winding up order by the Court may be made at a time when a company is already in CVL. The section makes it clear that the ability to present a winding up petition is unaffected by the decision to enter CVL albeit the court has to be satisfied that the voluntary winding up cannot be continued with due regard to the interests of creditors or contributories. In the cases of the other two companies, they did not involve an issue of manifest unfairness in relation to the veracity of the original petition other than the miscommunications that took place immediately before the hearings that made the orders that were ultimately rescinded by the court with the support of the petitioner.

27 Accordingly, she submitted that the slightly unusual facts of the Direct Affinity case did not result in the 2016 Order becoming irrelevant. This would be contrary to the theme running through the authorities that the OR is entitled to his or her costs regardless of what errors have occurred.

28 In relation to the quantum of the fees to which the OR was entitled, Ms Petrie submitted that it follows from the 2016 Order that on the making of a winding up order, the amount to which the OR is entitled are those figures within the Table in Schedule 1. She drew my attention to the legislation that the 2016 Order replaced. This was the Insolvency Proceedings (Fees) Order 2004 (the "2004 Order"). Under the original provisions, there was an administration fee for the performance of the general duties of the OR on the making of a winding up order, including his duty to investigate and report on the affairs of bodies in liquidation, of £2,235. There then followed a sliding scale each dependent upon the chargeable receipts relating to the Company at the rate of:

- 0% on the first £2,500;
- 100% of the next £1,700;
- 75% of the next £1,500;
- 15% of the next £396,000; and
- 1% of the remainder subject to a maximum of £80,000.

29 Under the new provisions, there is the general fee, the administration fee and a further 15% on any realisations made thereafter.

30 Ms Petrie submitted that the full amount of £11,000 is payable following the 2016 Order. This is supported by the decision in *Diamond Hangar* (where the full flat rate of the OR's administration fee and the OR's general fee appears to have been agreed) and to a degree the findings made in *Newton v The Official Receiver*. She submitted that HMRC's request to pay only the "reasonable costs" of the OR does not seem to acknowledge the existence or the effect of the 2016 Order.

31 Mr Arumugam noted that the case involved two key points. The first was that the OR is wrong to suggest that there is an entitlement under the 2016 Order to payment from the petitioning creditor of the £5,000 OR's administration fee and the £6,000 OR's general fee in circumstances where a winding up order is subsequently rescinded. Under the 2016 Order, he submitted that the OR is entitled to only the payment of a £50 administration fee, as provided for under regulation 4(9).

32 He challenged the reliance Ms Petrie placed on the decision of the Newcastle Upon Tyne County Court in *Newton v. Official Receiver*, a bankruptcy annulment application under s.282(1)(b), IA 1986 because he submitted that the procedure of seeking an annulment under that section (i.e. debts, costs and fees have been paid in full) is different to a rescission of a

winding up order. He submitted that rescission orders in the present cases are more closely analogous to an annulment under s.282(1)(a) (i.e. the winding up orders that gave rise to them ought to be considered as never having been made).

33 He relied upon *Re Calmex* to support his contention that the rescission of a winding up order renders it a nullity for all purposes. As a result, he indicated that for the purposes of the 2016 Order, the OR's entitlement to costs upon a rescission is prescribed by regulation 4(5) and (9). The true effect and meaning, and proper interpretation, of the 2016 Order, he submitted is that if a winding up order is rescinded (and the petition is dismissed), there is no entitlement to the OR's administration fee plus the OR's general fee at all. The OR is entitled to the administration fee of £50 only under the provisions of regulation 4(9).

34 The second key point made by Mr Arumugam is that it is well established that the Court, in exercising its discretion to rescind a winding up order, will wish to be satisfied that the costs (meaning actual costs) of the OR have been paid so that the OR is not out of pocket in accordance with the decision of Mr Philip Marshall QC in *Re Metrocab Limited* at [36]. He submitted that the OR, in seeking its statutory fee of £11,000, is confusing these two entirely separate jurisdictions, and the correct order to be made upon the rescission of any winding up order (or at least the orders in these cases) is for HMRC to pay the reasonable (actual) costs of the OR incurred in these cases.

Discussion

35 I am not persuaded that the effect of the court making an order to rescind the winding up orders rendered them a nullity in the sense that the original order has no legal consequences. Upon the making of either a winding up order or now a bankruptcy order, the OR becomes the liquidator or the trustee in bankruptcy immediately and assumes, as a result, certain statutory obligations. The effect of an order for annulment under either limb of s.282 IA 1986 is exactly the same, i.e. it is as if the bankruptcy order was never made. The effect of an annulment on a bankruptcy order is different to the issue of costs that arise from the proceedings leading to the order of bankruptcy and subsequent costs incurred during the course of the bankruptcy. In short, an annulment does not deprive the OR from claiming the right to be paid the costs incurred.

36 It is right to point out that the procedure on a winding up does not permit an annulment of the order in the event that all the debts costs and expenses of the insolvent company are paid in full. The company will remain in liquidation unless and until an order for rescission is made or the winding up is complete and the company is dissolved.

37 If rescission is taken to be a nullity in the literal sense, it does not necessarily follow that the appointment of the OR was itself a nullity. The appointment of a trustee in bankruptcy in relation to a bankruptcy which is annulled does not mean that the appointment was a nullity. The courts have considered the position where there has been a mistaken identity in *Re Calmex*, and found that it retains the jurisdiction to ensure that the costs and expenses of the OR incurred by virtue of the office that the order confers upon him or her be paid. They have no choice other than to accept the appointment that the statutory scheme now imposes upon them under the terms of the relevant order.

38 That the winding up order is engaged even in the case of a rescission is acknowledged in reality, and the position of HMRC is that the 2016 Order retains effect albeit only to the extent of receiving the benefit of the £50 deduction from the deposit as defined in regulation 4(9) of the 2016 Order. I should however add that I have concerns that this provision is not referring to a position where, as in these cases, a winding up order is made. The reference to it applying to cases where "*the petition is withdrawn or dismissed by the court*" seems to me to apply to the common occurrence of a petitioner either having second thoughts about pursuing the petition to a final order or the debtor pays the petition debt before an order is made and so the petition is subsequently withdrawn or dismissed. In these circumstances, the OR is not appointed but holds the deposit which then has to be returned. The 2016 Order simply permits the OR to retain the sum of £50 for facilitating this process. I do not accept that its effect is to constrain the rights of the OR in the manner that HMRC submits on the facts of these cases.

39 What is the effect of the 2016 Order in the context of a winding up order that is ultimately rescinded? This is the central issue that I have to resolve in the cases that have been brought before me. I do see force in the argument put forward by the OR that upon the making of the order certain fees do arise by operation of law. The 2016 Order sets this out in clear and unequivocal terms. However, that is not the end of the matter. The statutory scheme creates many provisions dealing with the remuneration of office holders. It does not however guarantee payment of those funds, but instead it sets out the manner in which remuneration can be calculated and claimed and the right to be paid from the insolvent estate in accordance with the statutory order of priority provided for by the Insolvency (England and Wales) Rules 2016. Put simply, if insufficient funds are available from the realisations to pay remuneration, the right to be paid remuneration is of no value.

40 The 2016 Order provides that the fees set out in its schedule in respect of the OR's administration fee is payable to the OR on the making of a bankruptcy or winding up order *out of the chargeable receipts of the Estate of the Bankrupt or, as the case may be, the assets*

of the Insolvent Company for the performance of the Official Receiver's functions under the Act [emphasis added].

The expression "Chargeable Receipts" is also defined in regulation 2, as meaning:

> *"the sums which are paid into the Insolvency Services Account after deducting any amounts which are paid out to Secured Creditors or paid out in carrying on the business of the Bankrupt or the Company."*

41 During the hearing, I posed the question to Ms Petrie that if there were no realisations made into the estate then was it accepted by the OR that the costs incurred in administering the estate would have to be written off. She responded on instructions that this was indeed the case. Therefore it seems to me that it is important for two events to take place before the OR's administration fee becomes payable. The first is the making of a winding up order. This triggers a right to be paid the fee. The second is the payment of chargeable receipts from the realisation of assets within the insolvent estate into the Insolvency Services Account. In circumstances where the trigger to be paid has been pulled but the second event does not occur, the right under the 2016 Order to the administration fee creates an aspiration that never comes to fruition due to the unassailable fact that there are simply no chargeable receipts as defined in the order itself from which they can be paid.

42 This leads me to the general fee and to consider when, if at all, the general fee is payable. Specifically the issue arises as to whether or not this creates a right for the OR to demand payment of the general fee from a petitioner independent of any obligation to look only to the existence of available chargeable receipts for this purpose.

43 According to the 2016 Order, the description of the general fee makes it clear that it is payable:

> *"On the making of a bankruptcy order or the making of a winding up order by the court for the costs not recovered out of the official receiver's administration fee of administering—*
>
> *(a) bankruptcy orders,*
>
> *(b) winding up orders made by the court"*

44 On a basic reading of this provision, it may be said that the provision is symbiotic to the OR's administration fee in the sense that it creates a right for payment that is dependent entirely upon the existence of chargeable receipts to be paid. Alternatively, it may create a

separate and independent right to claim the sum from third parties for payment rather than the right to claim it from the chargeable receipts made in respect of the insolvent estate.

45 In my judgment the first of those analyses represents the correct approach. For both fees to be paid, there needs to be chargeable receipts available to pay them. The 2016 Order does not create statutory rights of recovery of these sums from any source other than chargeable receipts as defined. All that the 2016 Order does is to create a right for the OR to claim the fees without any further assessment. The reason for the creation of the general fee is to create a benefit for the OR to compensate for the obligation to assume responsibility to accept appointments involving insolvent estates with no assets. The general fee is a form of levy on those estates with sufficient chargeable receipts to pay it to compensate the OR for having to administer insolvent estates where there are no assets to be realised, and therefore there is no possibility of creating chargeable receipts. It does no more than that. It does not create a right to fetter the jurisdiction of this court to ensure that the OR is not out of pocket in accordance with the *Metrocab* principles by carrying out an assessment of the fees actually incurred by the OR in performing the statutory duties imposed automatically following the making of the order complained of.

46 In support of this analysis, it is instructive to examine the manner in which the deposit providing for the payment of the OR's administration fee is dealt with. The right of a creditor to present a petition for a bankruptcy order in the case of an individual or for a winding up order in the case of a company is a class remedy. The creditor has taken the decision that rather than issuing proceedings for the payment of the debt that underpins the petition, the better option is to commence a class remedy. This is on the understanding that the best that the petitioner may obtain in the absence of an early payment of the liability, is the right to receive a dividend from the realisations made in the insolvent estate. In most cases, the petitioner will have no knowledge of the extent and value of the estate. Similarly, the OR is in exactly the same position if an order is made and an appointment as trustee in bankruptcy or liquidator is made. To enable the petitioner to limit the potential exposure for the costs of administering the estate, the 2016 Order and its predecessors established the concept of a deposit payable on the presentation of the petition. This is to provide the OR with security for the payment of the costs that will be incurred if an order is made. Regulation 2 provides the figures payable for the OR's deposit in relation to the presentation of petition for either a bankruptcy order or a winding up order. Under regulation 4(4), the deposit is used to discharge the OR's administration fee to the extent that the realisations are insufficient. Significantly regulation 4(5) provides that:

> "Where a bankruptcy order or a winding up order is made *(including any case where a bankruptcy order or a winding up is subsequently annulled, rescinded or recalled)* the deposit will be returned to the person who paid it *save to the extent that the assets* comprised in the estate of the bankrupt or, as the case may be, the assets of the company *are insufficient to discharge the official receiver's administration fee*." [my emphasis]

47 A purposive construction of these Regulations leads me to conclude that not only does the right to the OR's administration fee survive the rescission order in a winding up, but also that the petitioner is entitled to the repayment of the deposit but only if the assets available to the company are insufficient to discharge the administration fee in full. If as in these petitions, the winding up orders have been rescinded, and no chargeable receipts have been made, the deposit will be retained by the OR and applied to the partial payment of the administration fee. The position of the petitioner is that if the winding up order is rescinded and the OR has not made any chargeable receipts, the extent of the petitioner's potential liability for the OR's costs will be confined to the loss of the deposit and nothing more. There will be a balance of £3,400 due on the official receiver's administration fee after the application of the £1,600 deposit, but no chargeable receipts available to discharge it. It will be written off. This assumes that the responsibility for the error that led to the making of the winding up order lies with the petitioner. In this case, HMRC has accepted responsibility for the OR's costs. The consequences for the application of regulation 4(5) in the absence of such a concession therefore did not arise and were not argued before me.

48 I am comforted in this conclusion by the observation that nowhere in the 2016 Order does it establish that in addition to the surrender of the deposit, the petitioner has to make up any balance to ensure that the statutory fees are paid in full. If the actual costs exceed the amount represented by the deposit, in circumstances where there are no chargeable receipts, then, applying the principles in *Metrocab*, the court may make an order for costs. There will have to be an application for the costs under CPR 44 and these will be assessed by the court in the usual way. That is the only remedy available to the OR in these circumstances.

Conclusion

49 I find on the true construction of the 2016 Order, in a winding up, the OR's administration fee and general fee arise on the making of an order in each of the three cases before me. The fees may only be recovered from chargeable receipts that the OR has made. If there are chargeable receipts available to pay them, the fees are payable in full by reference to the 2016 Order, whatever the actual costs incurred in making the realisations that gave rise to those chargeable receipts.

50 The OR is not entitled to claim the balance of the official receiver's administration fee after taking into account the petition deposit, nor the full amount of the general fee from the petitioner. Such fees can only be claimed against chargeable receipts as defined in the 2016 Order. If there are none, they cannot be paid from an alternative source.

51 The making of the rescission orders do have residual legal consequences in relation to the return of the deposit in each case. As the OR's administration fee arose on the making of the order and if there are no chargeable receipts, it follows that the OR can retain the deposit in full in each case in accordance with regulation 4(5). However, by virtue of the fact that those sums are payable by the petitioner and not from the chargeable receipts, the 2016 Order does not fetter the discretion of the court to assess these costs by reference to the actual costs incurred so as to ensure that the OR is not out of pocket. In these circumstances, I conclude that the court has an unfettered jurisdiction to order that the balance of the actual fees incurred (after taking into account the retention of the deposit) should be assessed and if appropriate, to be paid by a third party having regard to the circumstances of each case. Therefore, to the extent that the actual costs incurred by the OR exceed the amount it will receive from the retention of the deposit, those costs will be recoverable to be assessed by the court if not agreed and paid by HMRC, as the petitioner in each case. I should make it clear that this is a case that deals only with the situation which applies in each of the three cases before me, where no chargeable receipts have been made and where the costs incurred by the OR are minimal.

52 I am grateful for the thoughtful and comprehensive submissions made by both Counsel both orally and in writing. I will hear the parties as to the terms of the order.