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Cite as: [2014] EWCA Civ 1575, [2014] WLR(D) 527, [2014] WLR(D) 536, [2015] CH 589, [2015] 1 Ch 589, [2015] BPIR 399, [2015] BCC 306, [2015] 3 WLR 491, [2015] 1 CH 589

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Neutral Citation Number: [2014] EWCA Civ 1575
Case No: A2/2014/0743

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
HIS HONOUR JUDGE BIRD (MANCHESTER DISTRICT REGISTRY)
2141 OF 2014

Royal Courts of Justice
Strand, London, WC2A 2LL
8th December 2014

B e f o r e :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LONGMORE
and
LORD JUSTICE KITCHIN

Between:

SALFORD ESTATES (NO.2) LIMITED	**Appellant**
- and -	
ALTOMART LIMITED	**Respondent**

Lesley Anderson QC (instructed by Woodcocks Haworth & Nuttall) for the Appellant
Peter Knox QC (instructed by Vyman Solicitors) for the Respondent
Hearing dates : 11th November 2014

HTML VERSION OF JUDGMENT

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The Chancellor (Sir Terence Etherton) :

Introduction

1. The issue on this appeal is whether, and if so in what way, the stay provisions in section 9 of the Arbitration Act 1996 ("the 1996 Act") apply to a petition to wind up a company on the ground of its inability to pay its debts where the debt on which the petition is based arises out of contract containing an arbitration agreement.

2. The appeal is by Salford Estates (No 2) Limited ("Salford Estates") from the order dated 4 February 2014 of His Honour Judge Nigel Bird, sitting as a High Court judge, by which he ordered that the winding up petition presented by Salford Estates against the respondent, Altomart Limited ("Altomart"), on 3 February 2013 be stayed.

The 1996 Act

3. The following provisions of the 1996 Act are relevant to this appeal:

> "1 General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."
>
> "9 Stay of legal proceedings.
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) …
>
> (3) …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."
>
> "82 Minor definitions.
>
> (1) In this Part—

> …
>
> "dispute" includes any difference;
>
> …
>
> "legal proceedings" means civil proceedings in the High Court or a county court; …"

The background

4. The background facts can be shortly stated.

5. Salford Estates and Altomart are the current lessor and lessee respectively under an underlease dated 29 April 1974 for a term of 125 years from 29 September 1971 ("the Lease"). The Lease is of commercial premises at 53-55 Fitzgerald Way, Salford, M6 5JA ("the Premises"). They form part of the Salford shopping centre ("the shopping centre"), of which Salford Estates is the owner.

6. By clause 2(3) of the Lease the tenant covenanted to pay by way of an annual service charge "a due proportion … of the expenses … reasonably and properly incurred by the Lessor" in the preceding year in connection with the works and services set out in the third schedule to the Lease ("the services").

7. By clause 3(2) of the Lease the landlord covenanted to insure the Premises in the joint names of the landlord and the tenant with an insurer approved by the tenant, such approval not to be unreasonably withheld.

8. By clause 3(3) of the Lease the landlord covenanted at all times throughout the term to the best of its ability and in accordance with the principles of good estate management to carry out, provide, manage and operate the services in an efficient and economical manner.

9. The Lease provides that an amount equal to the insurance premium is payable by the tenant by way of rent. The Lease further provides that the rent and insurance rent are payable without deduction.

10. Clause 4(4) of the Lease ("the arbitration clause") contains the following wide and comprehensive arbitration agreement:

> "Any dispute or difference arising between the Lessor and the Lessee as to their respective rights duties or obligations or as to any other matter arising out of or in connection with this Underlease shall be referred to a single arbitrator provided the parties are able to agree on one or otherwise to two arbitrators one to be appointed by each party or their umpire in accordance with and subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force"

11. In July 2012 Salford Estates and Altomart referred to arbitration a number of disputes about Altomart's obligation to pay the service charge and insurance rent. The sole arbitrator was Mr Timothy Fancourt QC. The issues about the service charge concerned the proper interpretation of the service charge provisions of the Lease. Mr Fancourt refused a late application by Altomart to bring within the arbitration the issue of the reasonableness of Salford Estates' expenditure on management fees and marketing fees and the correctness of the due proportion based on rateable values. The dispute over the insurance rent was whether Altomart was liable to pay it since, contrary to the terms of the landlord's covenant, the insurance was neither in joint names nor with a company which Altomart had been asked to approve. It was included in a block policy for the shopping centre.

12. Mr Fancourt issued a lengthy and detailed final award (save as to costs) dated 28 November 2013 ("the Award"). He found on some issues for Salford Estates and on others for Altomart. One of the matters on which he found for Salford Estates was in respect of Altomart's liability to pay the insurance rent. He concluded that strict performance of clause 3(2) of the Lease was not a condition precedent to the tenant's

obligation to pay the insurance rent. He held that the total arrears due to Salford Estates for the 3 years from 1 April 2010 to 31 March 2013 were £64,431.79 (including VAT), comprising £51,383.22 in respect of service charges and £13,048.46 in respect of insurance rent. On 9 January 2014 Mr Fancourt issued a further award on costs ("the Costs Award"), by which he determined that Altomart should pay 50 per cent of Salford Estates' costs in the arbitration.

13. Altomart did not immediately pay the sums due under the Award. Salford Estates threatened to issue winding up proceedings unless both the £64,431.79 award and some further sums claimed for the year ending 31 March 2014 were paid by 5 pm on 31 January 2014. Those further sums were said necessarily to follow from the Award or the reasoning contained in it. Altomart did not accept that it was liable for those further sums.

14. On 31 January 2014 Altomart sent a cheque for £64,431.79 to Salford Estates. Before the cheque arrived, however, Salford Estates presented a winding up petition against Altomart ("the Petition"). The ground stated in the Petition for seeking a winding up order was that Atlomart was indebted to Salford Estates in the sum of £92,032.33. That sum comprised (1) £64,431.79 due under the Award, and (2) sums due for the year ending 31 March 2014, consisting of £22,747.22 for the service charge and £4,853.12 for insurance rent.

15. Altomart, by its solicitors, objected to the Petition on the ground that, apart from the £64,431.79 due under the Award, the other sums were disputed and that dispute had to be referred to arbitration pursuant to the arbitration clause. In the light of Altomart's threat to apply for an immediate stay, Salford Estates agreed not to advertise the Petition before 27 February 2014.

16. By an application dated 7 February 2014 Altomart applied to strike out or stay the Petition on one or more of several grounds, namely (1) it constituted an abuse of the court's process; (2) Altomart was not unable to pay its debts; (3) the debt which was the subject of the Petition was subject to a genuine dispute; (4) the Petition was liable to be stayed in any event pursuant to section 9 of the 1996 Act.

17. The application was supported by a witness statement from Mr Raj Soni, a director of Altomart. He said that, although Mr Fancourt had declined Altomart's request for determination of whether each item of expenditure claimed by Salford Estates had been reasonably and properly incurred, it was a relevant issue for the service charge in the year ending 31 March 2014 and for the years prior to 31 March 2011. He said that Altomart had instructed a specialist service charge consultant to provide an expert report on the issue and Altomart was "awaiting further progress in this respect". So far as concerned the demand in respect of insurance rent, Mr Soni said that the insurance had (still) not been procured in joint names or with insurers approved by Altomart and that, although the Arbitrator had ruled that those were not pre-conditions of the tenant's obligation to pay the insurance rent, he believed that in respect of the current year Altomart could have obtained a cheaper premium and so it had been overcharged and had suffered loss. He also said that Altomart was solvent on both a cash flow basis and on a balance sheet basis. In that connection he referred to draft accounts for the year ended 31 March 2013. He said that the accounts "will be finalised in more or less the same form". Finally, he said that he believed that all those matters were in any event academic in view of the arbitration clause and the fact that a dispute had arisen as to the alleged liability on which the Petition was based.

18. A witness statement dated 13 February 2014 was made on behalf of Salford Estates by Ms Debbie Illingworth, a chartered surveyor and a director of Praxis Real Estate Management Limited, which was responsible for managing the shopping centre. She explained why the challenges by Mr Soni were misconceived. She said that on any footing Altomart had not shown that the entire debt mentioned in the Petition would be extinguished or reduced to below £750. She concluded that Mr Soni's evidence did not disclose any real or bona fide dispute or that there was a dispute or difference which was capable of being referred to arbitration.

The judgment of Judge Bird

19. The Judge heard the stay application on 14 February 2014. He gave an immediate judgment granting the application and staying the Petition. He said that Altomart had been given an appropriate and sensible opportunity prior to the presentation of the Petition to pay the debts alleged to be due and that in all the circumstances Salford Estates' conduct in presenting the Petition when it did was not objectionable. He said that the evidence tended to suggest that Altomart was a solvent company but that it was long established that, if a company failed to pay a debt in respect of which there is no genuine dispute, it would be deemed by the court to be unable to pay its debts as and when they fall due.

20. The Judge referred to *Rusant Limited v Traxys Far East Limited* [2013] EWHC 4083 (Ch) and *Halki Shipping v Sopex Oils* [1997] EWCA Civ 3062, [1998] 1 WLR 726. In *Rusant* Warren J made an order restraining the presentation of a winding up petition based on a statutory demand for payment of a loan and interest pursuant to a contract containing an arbitration agreement. He did so because, even though there was no bona fide defence to the alleged debt, the arbitration agreement and section 9 trumped the decision he would otherwise have made to dismiss the application to restrain the presentation of the petition.

21. *Halki Shipping* concerned a claim for demurrage under a charterparty, which contained an arbitration agreement. The defendant, which did not admit liability, applied for a stay pursuant to section 9 of the 1996 Act. The Court of Appeal dismissed an appeal from an order of Clarke J granting the defendant's application. The majority, Henry and Swinton Thomas LJJ (Hirst LJ dissenting), held that there is a "dispute" for the purposes of the 1996 Act when a claim is not admitted as due and payable. Accordingly, unless the arbitration agreement is null and void, inoperative or incapable of being performed within section 9(4) of the 1996 Act, the mandatory stay provisions in section 9(1) and (4) are engaged, even if, absent an arbitration agreement and section 9, the claimant could have obtained summary judgment. In the present case, the Judge referred to Henry LJ's approval of the statement of Clarke J in *Halki Shipping* that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration.

22. The Judge decided that although, absent *Rusant* and *Halki*, he would have come to a different conclusion, he was bound by those cases to order a stay of the Petition. He said that the effect of those decisions was the mere raising of a defence or of a dispute is sufficient to bring into play the arbitration provision. He said that, had he not been bound by those decisions, he would have dismissed the stay application on the ground that there was not a bona fide and substantial dispute as to the Petition debt.

The appeal

23. Salford Estates issued a notice of appeal on six grounds. They can be summarised generally as being that the Judge, having concluded that Altomart had failed to raise a substantial dispute in good faith and on substantial grounds, ought not to have stayed the Petition since section 9 of the 1996 Act had no application and he ought not to have followed the decision of Warren J in *Rusant*.

24. Following the issue of the notice of appeal Altomart's solicitors sent a letter dated 17 March 2014 to Salford Estates' solicitors in which, without prejudice to all the arguments Altomart ran before the Judge and wished to run on Salford Estates' appeal, Altomart offered to pay the amount demanded for insurance and the amount demanded on account of the service charge. There was also attached to the letter a copy of an insurance quote from AXA for £1,704.34, which was said to support Altomart's case that Altomart was able to secure insurance "at a fraction of the cost [Salford Estates] is charging".

25. Ms Lesley Anderson QC appeared for Salford Estates on the hearing of the appeal as she had below. In the broadest outline, her central contention was that a winding up petition based on an unpaid debt should not be stayed pursuant to an arbitration agreement unless the debt is bona fide disputed on substantial grounds and that, insofar as *Rusant* decided otherwise, it was incorrect. She said that, unlike an ordinary money claim where the proceedings are for payment of what is due, a winding up petition is not a claim for payment. She said that it is in the nature of a class action in the public interest: it brings into operation the statutory regime for realising and distributing the assets of the company for the benefit of its body of

creditors. An arbitrator has no power to wind up a company. She submitted that a winding up petition is, accordingly, not "arbitrable" and not a "claim" within section 9 of the 1996 Act. On that basis, she contended that, in accordance with long established jurisprudence, the Court should only stay or dismiss a petition based on an unpaid debt if the debt is bona fide disputed on substantial grounds. She said that in the present case the petition debt was not less than £750 on any footing.

Discussion

26. Proceedings commenced by a winding up petition are "legal proceedings" within the definition in section 82 of the 1996 Act. I agree with Ms Anderson, however, that section 9(1) of the 1996 Act does not apply to a winding up petition where the ground of the petition is that the company is unable to pay its debts and what is in dispute is that issue generally or, more specifically, whether there is outstanding and due a particular debt mentioned in the petition.

27. Section 122(1) of the Insolvency Act 1986 ("IA 1986") provides that a company may be wound up by the court on one or more of the several grounds mentioned there. The ground stated in section 122(1)(f) is that the company is unable to pay its debts.

28. Section 123 of IA 1986 specifies a number of circumstances in which a company is deemed unable to pay its debts. One situation, stated in section 123(1)(a), is where a creditor, to whom the company is indebted in a sum exceeding £750 then due, has served on the company a written demand in the prescribed form requiring the company to pay the sum so due and the company has for 3 weeks thereafter failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Another situation, stated in section 123(1)(e), is where it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

29. If a debt is due and undisputed, the failure to pay is itself evidence of inability to pay for the purposes of IA 1986 ss. 122(1)(f) and 123(1)(e): see Gore-Browne on Companies para. 55.13B and the cases cited there. Even if there is a substantial dispute as to part of the debt, the winding up petition will not be dismissed if there remains an undisputed debt above the statutory minimum. Neither of those principles was put in issue by either party on this appeal.

30. IA 1986 s. 123(2) provides that a company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. Salford Estates does not rely on that provision.

31. In the present case Salford Estates relies on non-payment of the specific debt mentioned in the Petition as evidence that Altomart is unable to pay its debts as they fall due within IA 1986 s. 123(1)(e) and so the ground for invoking the exercise of the court's jurisdiction to wind up a company unable to pay its debts in IA s.122(1)(f) is satisfied. By contrast with the wording of section 9(1) - "(whether by way of claim or counterclaim)" - the Petition is not a claim for payment of the debt.

32. The making of a winding up order might or might not result in the right to payment of an amount equal to the debt specified in the Petition in the present case. It would depend upon the value of the assets available for distribution in the liquidation to Altomart's body of creditors and the respective priority ranking of the creditors, including Salford Estates, under the statutory framework.

33. Further, by contrast with a "claim" for a debt, it is an abuse to present a winding up petition in order to put pressure on the company to pay a genuinely disputed debt: Palmers Company Law para. 15.217. It was common ground between the parties before us that the court will dismiss a petition based on an alleged debt where the debt is bona fide disputed on substantial grounds: Palmers Company Law para. 15.215.

34. If several alleged debts are stated in the winding up petition as evidence of the company's inability to pay its debts within IA 1986 s. 122(1)(f) and only some arise out of a transaction containing an arbitration

agreement, the concept of a non-discretionary "stay" of the winding up petition pursuant to section 9(1) and (4) of the 1996 Act makes no sense. Plainly, there is no basis for staying the Petition itself; and, if the Petition proceeds, there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proof of debts which supersedes any arbitration agreement.

35. Furthermore, it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts.

36. We were referred to *Fulham Football Club (1987) Limited v Richards* [2011] EWCA Civ 855, [2012] Ch 333, in which the court of appeal dismissed an appeal from an order of Vos J, made pursuant to section 9 of the 1996 Act, staying an unfair prejudice petition presented pursuant to section 994 of the Companies Act 2006. In the briefest outline, the proceedings related to the affairs of the Football Association Premier League Limited ("the FAPL") and, in particular, the conduct of its chairman, Sir David Richards. The allegation of unfair prejudice in the petition was that Sir David had acted as an unauthorised agent in breach of the FA Football Agents Regulations when in July 2009 he was asked by the chief executive of one football club to approach the chairman of another football club in order to facilitate the transfer to the former of one of the latter's players. The relevant arbitration agreements were contained in rules made by the FAPL pursuant to its articles of association and in rules of the Football Association. In dismissing the appeal the Court of Appeal preferred the decision of Rimer J in *Re Vocam Europe Ltd* [1998] BCC 396 (staying an unfair prejudice petition under section 9 where a shareholders' agreement provided for all matters in dispute to be referred to arbitration) to that of His Honour Judge Weeks QC (sitting as a High Court judge) in *Exeter City Association Football Club Ltd v Football Conference Ltd* [2003] EWHC 2790 (Ch), [2004] 1 WLR 2910 (declining to stay an unfair prejudice petition).

37. I do not consider that we are assisted on this appeal by the decision in the *Fulham Football Club* case. The relief sought by the section 994 petition in that case was an injunction restraining Sir David from acting as an unauthorised agent or from participating in any way in negotiations regarding the transfer of players; in the alternative, an order that Sir David should cease to be chairman of the FAPL and such other relief as the court thought fit. No order was sought to wind up the FAPL. Furthermore, that case, typical of the usual section 994 petition, was essentially a private dispute in relation to the affairs of a solvent company which, therefore, neither engaged any public policy objective of protecting the public where a company continues to trade despite being unable to pay its debts nor involved a class remedy for the company's creditors. These distinctions reflect the following comments of Patten LJ in the *Fulham Football Club* case:

> "58. This kind of dispute, taking place as it must do in the context of a solvent company, will not therefore ordinarily involve the creditors and is intended to avoid causing damage to the value of the company which is not in the interests of any of its members. For that reason, advertisement of the petition is exceptional. The residual power of the court under s.122(1)(g) to order winding-up where no other remedy would be appropriate or available does not therefore support the characterisation of a petition for s.994 relief as a class remedy. It is designed to resolve issues of unfair prejudice without the winding-up of the company. These are essentially internal disputes about alleged breaches of the terms or understandings upon which the parties were intended to co-exist as members of the company."
>
> "77. The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA Rules would have the power to grant the specific relief sought by Fulham in its s.994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the determination of issues of this kind call for some kind of state

> intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL Rules in relation to the transfer of a Premier League player.
>
> 78. Judge Weeks was therefore wrong in my view to extend the reasoning of Warren J in *A Best Floor Sanding Party Ltd* to a petition under what was then s.459. The statutory provisions about unfair prejudice contained in s.994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding-up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted."

38. For all those reasons, at least in respect of an alleged due but unpaid debt, I do not agree with the view expressed by Warren J in *Rusant* at paragraph [19] that an issue on a winding up petition which is essential to the foundation of the petition becomes a claim and falls within section 9. That section has no application to the Petition in the present case.

39. My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. IA 1986 s. 122(1) confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in paragraph [19] of *Rusant*.

40. Henry and Swinton Thomas LJJ considered in *Halki Shipping* that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the companies' court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic - to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.

41. There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in *Halki Shipping*, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under IA 1986 s. 122(1)(f), it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.

42. The Judge stayed the Petition because, contrary to my conclusion, he thought that the mandatory stay provisions in section 9 were engaged. I consider that it would have been better to have dismissed the

Petition rather than to stay it in the absence of any evidence that there was another creditor of Altomart who was willing to be substituted as the petitioner. That is not, however, a point taken by Salford Estates on this appeal.

The respondent's notice

43. Altomart has served a respondent's notice in which, if we were to hold that the Judge was wrong in his reasoning, Altomart seeks an order striking out or dismissing the winding up petition on the grounds that (1) there is a bona fide and substantial dispute in relation to the whole of the debt on which the petition is based, which dispute has to go to arbitration; alternatively (2) this is in any event not an appropriate case to wind up the company as Altomart is plainly not insolvent. Both sides have served further skeleton arguments and seek to rely on new evidence in relation to those issues.

44. In the circumstances, it is not necessary to address those further grounds or that evidence.

Conclusion

45. For the reasons I have given above, I would dismiss this appeal.

Lord Justice Longmore

46. I agree.

Lord Justice Kitchin

47. I also agree.

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