Neutral Citation Number: [2018] EWHC 901 (Ch)

**Claim No CR-2017-007339**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS (CHD)**

Royal Court of Justice
Strand, London, WC2A 2LL
Date: 24 April 2018

**Before:**

**MR. WILLIAM TROWER QC**
**(sitting as a Deputy Judge of the High Court)**

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**IN THE MATTER OF ONE BLACKFRIARS LIMITED**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Between:**

**(1) ADRIAN CHARLES HYDE**
**(2) KEVIN ANTHONY MURPHY**
**(AS JOINT LIQUIDATORS OF ONE BLACKFRIARS LIMITED)**
**Applicants**

**-and-**

**(1) JAMES JOSPEH BANNON**
**(2) SARAH MEGAN RAYMENT**
**(AS FORMER JOINT ADMINISTRATORS OF ONE BLACKFRIARS LIMITED)**
**Respondents**

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**Mr Simon Davenport QC and Mr Tom Poole** (instructed by Humphries Kerstetter LLP) for the Applicants

**Mr David Turner QC and Mr Ben Smiley** (instructed by Mayer Brown International LLP) for the Respondents

Hearing date: 13 April 2018

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**Approved Judgment**

I direct that pursuant to CPD PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mr William Trower QC

**Mr William Trower QC:**

1. This is an application under paragraph 75(6) of Schedule B1 to the Insolvency Act 1986 ("the Act") by the joint liquidators ("the Liquidators") of One Blackfriars Ltd ("the Company") who were appointed on 30 March 2016. Paragraph 75(6) requires the applicant (including a liquidator) to obtain the permission of the court for an application under paragraph 75(2) in respect of a former administrator who has been discharged from liability under paragraph 98 of Schedule B1. Paragraph 75 as a whole provides a summary procedure for the commencement and pursuit of misfeasance and breach of duty claims against administrators and former administrators.

2. The respondents to the application are the Company's former joint administrators ("the Administrators"). They had been appointed pursuant to paragraph 14 of Schedule B1 to the Act on 14 October 2010 by the Royal Bank of Scotland plc as the holder of a qualifying floating charge and as Security Agent on behalf of the members of a syndicate of banks ("the Syndicate") which had provided the Company with finance for the development of a site at 1-16 Blackfriars Road London SE1 ("the Site"). The members of the Syndicate were together owed some £69 million.

3. The sole statutory purpose for which the administration was conducted (anyway subsequent to the date of the Administrators' proposals dated 7 December 2010) was the objective of realising property in order to make a distribution to one or more secured or preferential creditors: see paragraph 3(1)(c) of Schedule B1. The fact that this was the sole objective for which the administration was then being pursued is one of the complaints made in these proceedings.

4. On 19 October 2011 the Administrators procured a sale of the Site to St George South London Limited ("St George") for a purchase price of £77.4 million. The sale completed on 16 December 2011. In October 2012 the administration came to an end, and the company was struck off and dissolved at the beginning of 2013. At the time the Administrators ceased to be in office, they were discharged from liability pursuant to paragraph 98 of Schedule B1, which I understand occurred on 10 October 2012.

5. My attention has not been drawn to anything else relevant that occurred until March 2016 when the company was restored to the register, a winding up order was made, and the Liquidators were appointed as such by the Secretary of State. The application to restore and wind up was made by Formby 2010 Ltd ("Formby"), a secured creditor of the Company with security ranking behind that of the Syndicate, and which claimed to be owed approximately £20 million. The price achieved on sale of the Site had not been sufficient to discharge the debt due to Formby. I understand that the Company also has a number of unsecured creditors, although the amounts owed were not in the evidence to which my attention was drawn.

6. On 4 May 2017, just over a year after the Liquidators' appointment, and after they had been supplied with a substantial amount of material relating to the marketing and sale of the Site, their solicitors, Humphries Kerstetter, sent a letter of claim to the Administrators' firm, BDO LLP, which was expressed to be in compliance with the pre-action protocol. The letter alleged 24 respects in which the Administrators had acted negligently, by reason of which the Site was sold at an undervalue, and the Company suffered loss. Towards the end of the letter it was said that "*the precise amount of such loss will be determined by reference to expert evidence, but we provisionally estimate that it will be in the region of £58 million, being the difference between the value of the Site as at October 2011 and the sale price actually achieved.*"

7. It is apparent from both the body of the letter itself and a schedule attached to the letter that the Liquidators had analysed a considerable volume of contemporaneous documentation in formulating their claim. However, a subsequent exchange of correspondence clarified that they had not obtained an expert opinion or expert advice in respect of the allegations made in it.

8. On 8 September 2017, Mayer Brown, solicitors for the Administrators, sent a detailed letter of response which went into great detail in addressing each of the allegations made against the Administrators. They concluded by contending that it would be irresponsible for the Liquidators to pursue the claim any further in the absence of fully considered expert evidence and summarised the claim as "*little more than a complaint that the Site was sold by the Former Administrators for less than the market value figures optimistically, and erroneously, predicted by Montagu Evans and Savills*". They expressed an assumption that the allegation of loss was based on a valuation of the Site produced by Montagu Evans in December 2010, which they described as flawed and highly optimistic.

9. On 3 October 2017, just under one month after receipt of the letter of response and mindful of the imminent expiry of a limitation period, the Liquidators commenced these proceedings. The application notice was issued with a first return date of 31 January 2018. On 9 November 2017, the Administrators issued a cross application for early service of the application notice and any evidence to be relied on by the Liquidators. Deputy Registrar Garwood dismissed that application on 5 December 2017.

10. In these circumstances, neither the application notice itself nor the evidence in support was served on the Administrators until 15 January 2018, when a short witness statement made by one of the Liquidators, Mr Adrian Hyde, exhibiting draft Particulars of Claim, was filed and served. The witness statement contains no detailed evidence. The substantive evidence was limited to the following two paragraphs:

> *"5. Exhibited hereto marked AH1 appear Particulars of Claim that have been prepared in respect of the Applicants' claims against the Respondents pursuant to paragraph 75 of Schedule B1 of Insolvency Act 1986. I have reviewed the Particulars*

*of Claim and can confirm that, so far as I am aware, the contents of the same are true and accurate, based upon the information available to me from my and my staff's investigations into the Company's affairs.*

*6. The Applicants believe that the claims have excellent prospects of success, and anyway for present purposes, at the very least a reasonable prospect of success."*

11. The draft Particulars of Claim exhibited by Mr Hyde pleaded the case against the Administrators in greater detail. I can summarise the alleged breaches as follows:

11.1. A negligent failure to obtain a valuation of the Site, either before the marketing process began or thereafter. The consequence of this is said to be that the Administrators were then unable to develop a proper marketing and sales strategy or assess the reasonableness of the offers that they received. The Administrators are also said to have disregarded the pre-administration valuations of the Site provide to the Company by Savills and a post-administration valuation of the Site provided to the Company's directors by Montagu Evans.

11.2. A negligent conclusion by the Administrators that they should limit the exercise of their duties towards achieving the objective in paragraph 3(1)(c) of Schedule B1, despite the fact that they had not first obtained a valuation of the Site. The consequence of this is said to be that they over-concentrated on effecting a sale that achieved a recovery for the Syndicate without regard to the interest of the unsecured creditors.

11.3. A negligent appointment of CBRE as sole agents for the marketing and sale of the Site, even though CBRE were not independent, and had produced an earlier valuation which was significantly below other valuations. It was also alleged that CBRE's fee structure was a disincentive to the achievement of value for creditors other than the Syndicate. This allegation has now been supplemented with a further complaint that CBRE had also been instructed by the eventual purchasers of the Site (St George).

11.4. A negligent failure to obtain a revised (and enhanced) planning consent which would have resulted in improved offers for the Site. This allegation has also now been supplemented, this time by a complaint that it was negligent for the Administrators not to include a provision for overage in any sale.

11.5. A negligent failure to supervise the marketing of the Site and/or to insist on a wider marketing of the Site than was in fact carried out. In particular there is a complaint that proper marketing outside the United Kingdom should have been but was not carried out.

11.6. A negligent failure to implement a proper bidding process amongst interested parties, and negligently proceeding with the sale when it was apparent that final offers had fallen substantially below the market value of the Site.

12. As to loss, the draft Particulars of Claim allege that the breaches of duty by the Administrators resulted in the Site being sold for a price substantially less than the best price reasonable obtainable, which the Liquidators contended to have been at least £115 million, i.e. some £37.6 million in excess of the price actually achieved. It can be seen that this figure is some £20 million less than the amount referred to in the Humphries Kerstetter letter of 4 May 2017.

13. In support of the allegations that the best price reasonably obtainable was a figure of at least £115 million, the Liquidators referred to valuations provided by Savills and Montagu Evans prior to the sale, and to the fact that, post-sale, St George obtained planning consent to vary the scheme for the development of the Site, followed by offers at or in excess of £150 million. It now appears that the figure of £115 million was also based on the views of an expert, Mr Peter Clarke FRICS of Avison Young ("Mr Clarke"), who had been instructed in November 2017 to produce a preliminary valuation as of October 2010 to enable the Liquidators to plead a preliminary quantification of loss in the draft Particulars of Claim.

14. There was then further correspondence in which Mayer Brown sought disclosure of the expert evidence which the Liquidators had obtained to support their clients' case. Humphries Kerstetter declined to produce it but, in his witness statement of 24 January 2018, Mr Adam Polonsky confirmed that the figure of £115 million was based on draft expert evidence which was both confidential to the Liquidators and privileged. This evidence went a little further than the Particulars of Claim, where it had simply been asserted that, in addition to the facts I have referred to in paragraph 12 above, the Liquidators "*will adduce expert valuation evidence in support of the value of the Site.*"

15. When the matter came before the court on the first return date (31 January 2018), there was insufficient time for it to be dealt with, and it was adjourned by Deputy Registrar Kyriakides to a longer appointment. The order she made recorded that the parties had agreed that the evidence on the application is complete. Mr Simon Davenport QC for the Liquidators submitted that this agreement was recorded on the face of the order to facilitate listing and does not itself amount to a restriction on the Liquidators' ability to adduce further evidence on the application under paragraph 75(6). Having been shown the transcript of the hearing, I think that he is right in making that submission, although I also consider that the Liquidators require permission to adduce further evidence; an application which falls to be decided on normal principles.

16. Subsequently, the Liquidators served a draft expert's report dated 15 March 2018 from Mr Clarke, and a draft expert's report dated 29 March 2018 from a chartered accountant and licensed insolvency practitioner, Mr Chris Laughton of M&H Corporate Finance Limited

("Mr Laughton"). They are both sought to be relied on by the Liquidators in support of this permission application, although Mr Davenport contends that the Liquidators would be entitled to the permission that they seek even if this material had not been made available. However, he said that it was only when the Liquidators had had a proper opportunity to give mature consideration to the Administrators' position as disclosed in their January skeleton argument, that they decided it would be safer to serve at least draft expert evidence before the adjourned return date. I was told that both of the experts consented to their reports being adduced in evidence on this application even though they remained in draft.

17. Mr David Turner QC for the Administrators accepted that it was appropriate for me to look at these reports, without prejudice to his continuing contention that they should not be admitted in evidence in the light of the parties' agreement on 31 January 2018 that the evidence on this application was complete. He did not take me to any parts of the reports to show that they did not substantiate the case which is made against the Administrators in the draft Particulars of Claim, but he did submit that, although Mr Clarke's report addressed deficiencies in the marketing process and sales strategy, he was only a valuer and did not have sufficient expertise to give admissible expert evidence on that aspect of the case.

18. Mr Turner was not, however, able to identify any particular prejudice to the Administrators if I were to allow them in evidence. Furthermore, Mr Davenport confirmed on instructions that it was the Liquidators' intention to call Mr Clarke as their expert valuer at trial. It seems to me that both draft reports are clearly relevant to the issues I have to decide on this application, and, in all the circumstances I think that I should have regard to them in order to deal with these proceedings justly in accordance with the overriding objective. In my view, the objections made by Mr Turner are only really capable of going to the weight of Mr Clarke's report. I cannot decide on this application that this part of the Liquidators' case is not capable of being supported by this evidence, and it seems to me that it is perfectly possible that it can.

19. The relevant parts of Paragraph 75 of Schedule B1 are in the following terms:

> *"(1) The court may examine the conduct of a person who—*
>
> *...*
>
> *(b) has been ... the administrator of a company.*
>
> *(2) An examination under this paragraph may be held only on the application of—*
>
> *...*
>
> *(c) the liquidator of the company,*
>
> *(d) a creditor of the company, or*
>
> *(e) a contributory of the company.*
>
> *(3) An application under sub-paragraph (2) must allege that the administrator—*
>
> *...*
>
> *(c) has breached a fiduciary or other duty in relation to the company, or*
>
> *(d) has been guilty of misfeasance.*

> *(4) On an examination under this paragraph into a person's conduct the court may order him—*
>
> ...
>
> *(c) to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.*
>
> ...
>
> *(6) An application under sub-paragraph (2) may be made in respect of an administrator who has been discharged under paragraph 98 only with the permission of the court."*

20. Paragraph 75 has a number of similarities to section 212 of the Act, which provides a liquidator, and the creditors and contributories of a company in liquidation, with a summary remedy against (amongst others) its liquidators and former liquidators. For present purposes the most important similarity is that the court's permission is required to make an application both against a former liquidator under section 212 and against a former administrator under paragraph 75 of Schedule B1, where the application is sought to be made after the relevant officeholder has had his release or been discharged as the case may be.

21. Schedule B1 contains no express guidance on the factors to be taken into account when determining an application for permission under paragraph 75(6), nor is there very much case law on the correct approach to an application under that paragraph. However, as the permission required for the making of an application after the discharge of administrators tracks similar provisions where the court's leave is required under section 212(4) of the Act for post-release misfeasance applications against liquidators, some guidance can be gained from the authorities concerned with that section.

22. There is also a similar provision under which the court's leave is required for seeking post-release relief against a trustee in bankruptcy under section 304(2) of the Act. However, some caution has to be adopted when applying the approach derived from the bankruptcy cases where the applicant is the bankrupt himself. As Hart J pointed out in *Brown v. Beat* [2002] BPIR 421, 424D, applications by bankrupts against the trustee have a tendency to be vexatious and therefore it is appropriate for there to be a filter for that reason.

23. The same considerations do not apply where proceedings are sought to be brought by a subsequently appointed officeholder under section 212 of the Act or paragraph 75 of Schedule B1. In such cases, it is apparent from the wording of each provision that the filter is introduced for a different reason. It is required because the former officeholder has received a discharge or release and no longer has the assets of the estate in his possession. He is therefore no longer able to indemnify himself in respect of unmeritorious claims, a point made by Sales J in *Re Hellas Telecommunications (Luxembourg) II SCA* [2011] EWHC 3176 (Ch) (at [96]).

24. It follows that, whether the application is sought to be made under section 212, section 304 or paragraph 75, one of the principal factors that the court is required to take into account is the merits of the proceedings. This has been expressed in slightly different ways in two of the cases which considered the possibility of misfeasance claims against former administrators (although neither was an actual application under paragraph 75(6) of Schedule B1):

24.1. In *Hellas*, Sales J indicated ([2011] EWHC 3176 (Ch) at [96]) that if there was a good arguable case it could proceed. What he meant by that is set in context by what he went on to say (at paragraph 98 of his judgment):

> "*On the other hand, Mr Sudwarts and Mr des Pallieres have made a number of wild and very serious allegations against the Administrators and those acting for them (including Mr Davies QC and Slaughter and May) which Ms Hilliard was unable to justify when pressed on them and which were in my view wholly without merit. I therefore think that it is right that if any actual claim is to be brought against the Administrators for misfeasance or the like, the permission of the court should first be required to be obtained.*"

24.2. In *Re Angel Group Ltd* [2015] EWHC 3624 (Ch) (at [46]), Rose J adopted a test of whether or not the claims sought to be brought had "a proper foundation". She said:

> "*It is precisely in this kind of case, in my judgment, where it is important that some discipline is exercised over the conduct of the nominated liquidators to make sure that matters are investigated promptly and efficiently; that the liquidators conduct their investigation proportionately in terms of cost in time and money and that claims are not brought or threatened which have no proper foundation. The framework provided by paragraphs 98 and 75 of Schedule B1 is precisely the right framework for exercising that kind of control.*"

25. The correct approach to the merits was more specifically considered by the Court of Appeal in *Parkinson Engineering Services plc v. Swan* [2010] Bus LR 857, which was concerned with an application under section 212(4) of the Act to proceed against a former liquidator notwithstanding his release. There is a helpful summary of the law in paragraph 34 of Lloyd LJ's judgment:

> "*The judge started by considering whether it would be appropriate to allow proceedings under section 212. It seems to me that this was the correct starting point. He had seen (as we did) the decision of Hart J in Brown v. Beat [2002] BPIR 421 where the judge, considering the corresponding provision as regards bankruptcy, identified two criteria: whether or not a reasonably meritorious cause of action has been shown, and whether giving permission for its prosecution is reasonably likely to result in a benefit to the estate. Those are not exhaustive, but they are certainly relevant and likely to be among the most important factors.*"

26. The same merits test was then adopted in the bankruptcy case of *McGuire v. Rose* [2014] BPIR 650 (at [23] to [25]), in which the Court of Appeal stressed that other factors could be taken into account, such as delay, a point which was also made in *Parkinson*. It also considered that another relevant way of looking at the question is whether the material produced on the application is such as would justify a reasonable litigant in pursuing the litigation proposed, i.e. is the case one which a reasonable litigant would commence and pursue? That approach reflected a citation from the judgment of Hart J in *Brown v. Beat* [2002] BPIR 421, 427B citing Blackburn J in *Re Hellyer* [1998] BPIR 695 at 696C.

27. It seems to me that the question of whether a reasonable litigant would pursue the proposed litigation will have particular resonance when the court is considering applications by a bankrupt under section 304(2), more especially where there is doubt as to whether there is likely to be a surplus to which he is entitled. However, I accept Mr Turner's submission to the effect that, if a reasonable litigant would not be justified in bringing litigation, it is difficult to see why permission should be granted by the court under paragraph 75(6) of Schedule B1. Mr Turner also pointed out that, at first instance in *Parkinson*, Floyd J had adopted this test in a passage which was cited with approval by the Court of Appeal ([2010] Bus LR 857 (at [35]).

28. I also consider that, in some instances, the court can take into account the question of whether a claim if brought, would survive either an application to strike out or an application by the respondents for summary judgment. This is something that was discussed by Registrar Derrett in *Katz v. Oldham* [2016] BPIR 83 but, in my view, it does not supply an alternative to the test described by Lloyd LJ in *Parkinson*. The reason for this is that the burden of establishing that a claim has no real prospect of success, or should be struck out as an abuse, rests with the respondents, while the burden of satisfying the court that proceedings under paragraph 75 of Schedule B1 can be pursued lies with the applicants. If the court can clearly see that summary judgment would be given against the applicants, then doubtless it will not give permission under paragraph 75(6), because it would be pointless to do so, but the authorities do not support a proposition that the applicant is required to demonstrate that no application by the respondents to strike out or obtain summary judgment would succeed.

29. I should add that I do not accept another of the submissions made in the skeleton argument for the Administrators (although to be fair it was one which was not really pressed by Mr Turner in his oral submissions); viz. that there is what he called a "high hurdle" to overcome to obtain permission. The submission to that effect was made on the basis of *Borodzicz v. Horton* [2016] BPIR 24 (at [40]). In my view, while there may be a high hurdle to overcome where the discretionary conduct of the administration of an estate by its officeholder is sought to be impugned, I do not consider that the same principle applies where a subsequent officeholder seeks to use the summary misfeasance procedure to challenge a breach of duty of the type in issue in these proceedings.

30. Pulling the threads together, *Parkinson* was a claim under section 212 of the Act, and *Maguire* was a claim under section 304 but, so far as the merits test is concerned, I consider that there is every reason to adopt a similar approach to an application for permission to commence a claim under paragraph 75 of Schedule B1. It follows that, in my judgment, it is incumbent upon the Liquidators to show a reasonably meritorious cause of action which is reasonably likely to result in a benefit to the estate. In most cases this is the same as asking whether a reasonable litigant would commence and pursue the claim. Furthermore, the question of whether the claim sought to be brought has a proper foundation (per Rose J in *Angel Group*) is in substance the same as whether the cause of action is reasonably meritorious. Have the Liquidators satisfied the test?

31. The challenge from Mr Turner is that they have not. His argument has two parts. In the first place he submits that the claim has an insufficient evidential foundation. Secondly, he submits that, whatever the position can now be seen to be, it is clear that the proceedings were an abuse of process when they were first issued at the beginning of October 2017, and it is not now possible for that situation to be rectified.

32. The foundation of these submissions is that these proceedings were only issued in an attempt to avoid the claim becoming statute-barred and that no reasonable litigant would have commenced them on the basis of the material then available to the Liquidators. In particular, it was submitted on behalf of the Administrators that, before a claim is made against a professional alleging a sale at an undervalue following an inadequate sale and marketing process, it is incumbent on the claimant (or applicant) to have obtained appropriate expert evidence addressing and supporting each of the three elements of the cause of action: namely the breach, the inadequate marketing and the undervalue. In support of that submission, the Administrators cited *Pantelli Associates Ltd v. Corporate City Developments Number Two Ltd* [2010] EWHC] 3189 (TCC) (at [16] to [19]).

33. The Administrators also cited another part of the judgment of Hart J in *Brown v. Beat* [2002] BPIR 421, 424H-425G and submitted that it is fundamentally unsatisfactory to bring an application in relation to an allegation that a property has been sold at an undervalue in the absence of expert evidence to that effect. They also relied on those parts of Hart J's judgment in which he said that it would be negligent for a lawyer to allow his client to proceed with a claim without the benefit of expert advice on the value which ought to have been realised, and the appropriateness of the marketing strategy adopted by the agents concerned.

34. I was also shown a passage in the judgment of Laws LJ in *McGuire v. Rose* [2014] BPIR 650 (at [32]), which was said to support the proposition set out in the Administrators' skeleton argument that: ""*Any claim that a property has been sold at an undervalue must be established by more than mere assertion of the claimant to that effect*" and the failure to produce expert evidence will be fatal to an application for permission to advance such a claim".

35. In support of their contention that it was not necessary for them to have obtained expert evidence before the commencement of the present proceedings, the Liquidators relied on *ACD (Landscape Architects) Ltd v. Overall* [2012] EWHC 100 (TCC) (at [17]), in which Akenhead J, having analysed *Pantelli*, concluded that it did not express or lay down an immutable rule of practice that no pleading can be put forward which pleads professional negligence unless the party pleading it has supporting expert evidence. He gave a number of reasons why that was so, depending on context, but for present purposes the most important was that a statement of truth verifying the pleading is capable of being sufficient without expert evidence having yet been obtained, so long as there is sufficient available material for the maker of the statement to make it. In my view, one of the factors which is relevant to an assessment of the weight to be attributed to evidence which does no more than verify a pleading (whether by statement of truth or otherwise), is the identity and expertise of the maker.

36. I was also shown another decision of Akenhead J, *Whessoe Oil & Gas Ltd v. Dale* [2012] EWHC 1788 (TCC), in which he concluded that, where a claim is made against a director for breach of duty, the allegations of breach are likely to be founded on failures to comply with matters of company law, and any contract which the director may have with the company; they are much less likely to be founded on (or require establishment by) a body of professional opinion. In my judgment similar considerations apply to insolvency practitioners. While it may be that the court is assisted by expert evidence on breaches of the character and quality alleged in these proceedings, I am not satisfied that that is necessarily the case, particularly in relation to those of the alleged breaches which derive directly from duties that are formulated by the terms of the insolvency legislation.

37. In my view the Administrators' submissions based on *Pantelli* overstate the position, and I agree with the approach reflected in the judgment of Akenhead J in *ACD*. The allegations with which Coulson J was concerned in *Pantelli* were allegations of poor performance by quantity surveyors advanced by way of counterclaim in proceedings for unpaid fees. The pleading was generalised and generic in form and did not comply with the requirements of CPR Part 16.4(1)(a). Furthermore, the stage at which the issue arose was some way into the proceedings in the context of a failure to comply with an unless order and the defendants making the allegations had no particular expertise of their own in quantity surveying.

38. As to the parts of the judgment in *Brown v. Beat* relied on by the Administrators, I do not consider that they support the propositions for which they were cited. In particular:

    38.1. Hart J made clear (at p.424H) that the discussion on which he was about to embark was "*In the present case*", i.e. he does not seem to have considered that he was laying down any statements of general principle on when expert evidence is required. In that case, not only was the applicant a bankrupt, he was also one of whom it could properly be said that "*applications by bankrupts against their*

*trustees may well have a tendency to be vexatious*" as he was also subject to a *Grepe v Loam* order.

38.2. It is clear that Hart J's reference to it being negligent of a solicitor to advise that proceedings could be brought without the benefit of expert evidence on value and marketing strategy were expressly referable to claims by "*a private client*" against "*an agent*". In my view, Hart J was simply not contemplating claims by an existing insolvency practitioner against a former insolvency practitioner arising out of his management of the affairs and property of the insolvent estate.

39. Likewise, it is my view that the Administrators' reliance on the passage from *McGuire v Rose* (at [32]) referred to above is misplaced. The passage was not dealing with the state of the evidence, or the advice given to the applicant, at the commencement of proceedings. It was dealing with what it would be necessary for that particular claimant to adduce by way of evidence in order to prove his case, he having been warned "*many times*" that he would need such evidence in order to support his application.

40. So far as the alleged breaches are concerned, the present case is very different from the type of case in which a claimant is making no more than mere assertions of the type under consideration in *McGuire v. Rose*. The claim is by liquidators who are insolvency practitioners and officers of the court against former administrators who are also insolvency practitioners. The allegations of breach all relate to acts or omissions by the Administrators while carrying out functions in their capacity as such. They do not, on the face of it, require an understanding of what it is that a reasonably competent insolvency practitioner can be expected to do which is any greater than that which the Liquidators can be expected to have.

41. Accordingly, I consider that it was open to the Liquidators to reach their own conclusions based on what they have established occurred, and (subject to questions of causation and loss), to commence proceedings if, acting *bona fide*, they reach the conclusion that what did occur was negligent conduct by the Administrators. It may of course be the case that the Liquidators' own evidence on this point would not carry any weight at trial in the absence of corroborating evidence from an independent expert, but so long as the circumstances were such that it was open to them to conclude that this would be available (itself corroborated by Mr Hyde's verification on oath of the Draft Particulars of Claim), I think that it was open to them to commence the proceedings that they did, anyway as to questions of breach.

42. For the avoidance of doubt, I should add that I have been shown nothing to indicate that, by the time the proceedings were issued, the Liquidators had not reached a *bona fide* view, based on the materials available to them and with the benefit of their own expertise, that an arguable case of breach was established. It seems that a draft pleading had not then been settled, but the letter of 4 May 2017 made clear that, in the view of the Liquidators, the Administrators had a case to answer, and explained why. Indeed, with

the exception of the complaint about the lack of expert evidence, Mr Turner did not seek to persuade me that he could show that the Mayer Brown response provided a complete answer on the merits, and I can see why he did not embark on that course. It would have amounted to a mini-trial on the merits which would not have been appropriate on an application of this sort.

43. On this aspect of the case, the Administrators submitted that the commencement of the present proceedings were an abuse of process, because at the time of issue, there was no known basis for the claim and the Liquidators had no intention to prosecute it. They relied in support of this submission on the decision of Cooke J in *Nomura v. Granada* [2008] Bus LR 1 at [37]. In my judgment there is no substance in this submission. It is clear from the passage relied on by the Administrators that Cook J had in mind the type of case in which a claimant "*cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way*". In such a case "*a claimant has no business to issue a claim form at all "in the hope that something may turn up"*."

44. In my view this case is very far removed from that type of situation. The Liquidators had already formulated the outline of their case in their May 2017 letter in a manner which demonstrated a clear intention to proceed and which formulated what appeared to be a respectable claim. There is no evidence that the Mayer Brown letter of response or anything else had satisfied the Liquidators that the claim they had advanced was misconceived. They had shown a basis for the claim, albeit one with which the Administrators strongly and vigorously disagreed, and they had shown every intention to proceed with it.

45. Nor does it seem to me that it makes any difference that the Liquidators' evidence in support of this application indicated that they were proceeding when they did, because of the imminent expiry of the limitation period. All that this demonstrates is that the timing of the issue of process was dictated by limitation issues when, in the absence of such constraints, they may have done more preparatory work before issuing their application. That does not demonstrate that additional preparatory work was absolutely necessary in order to render it proper (in the sense of not being an abuse) to issue the application when they did.

46. Turning to the time of the original hearing before Deputy Registrar Kyriakides, the draft pleading had been verified on oath by one of the Liquidators who has apparent expertise in his own right. That verification had taken place by the stage at which the rules require evidence to be adduced. By the time of the hearing before me, the case was further bolstered by the draft reports prepared by Mr Laughton and Mr Clarke. This seems to me to a go a long way towards establishing the fact that there was indeed substance in the Liquidators' belief at the time the proceedings were issued that the case had at least a reasonable prospect of success on the question of breach. It follows that the original issue of the proceedings would appear to be supported by the verified pleas of breach that are now made.

47. The Administrators' challenge also focussed on the allegations in relation to loss, and as to whether that loss was caused by any of the alleged breaches relied on by the Liquidators.

48. As to loss, the evidence shows that prior to the issue of the proceedings the Liquidators considered that the undervalue was approximately £58 million (that being the figure referred to in the Humphries Kerstetter letter of 4 May 2017). I do not know whether that figure was still their best estimate by the time that proceedings were issued, but it is incontestable that the figure for which the Site was in fact sold was very substantially less than the valuations produced by reputable experts as at dates both before and after the date of the sale. These are the valuations and other materials referred to in the Humphries Kerstetter letter of 4 May 2017 and the schedule to that letter. True it is that these were valuations which related to different dates from the actual date of the sale, but some of this material was relatively (and sufficiently) close, and it seems to me that it is capable of evidencing an arguable value, which, even if not precise, would be sufficient to justify the issue of proceedings.

49. In those circumstances I do not consider that there was an absolute obligation on the Liquidators to obtain expert valuation evidence before commencing proceedings. As at that date, the Liquidators had sufficient evidence to support an arguable claim that there had indeed been a material loss sustained by the Company.

50. Shortly thereafter, the evidence on loss available to the Liquidators gained greater substance. At some stage between the time of his original instruction in November 2017 and the time that the draft Particulars of Claim were served on 15 January 2018, Mr Clarke had formed and conveyed the view to the Liquidators that, as at October 2010 (the date of the Administrators' appointment), the Site was worth in the region of £115 million. As the Administrators pointed out in their submissions, this was not the date of the sale, but that does not mean that the evidence was worthless. Taken together with the other information available at the time of issue, I have formed the view that it would have been sufficient to demonstrate an arguable (albeit yet to be particularised) claim to material loss.

51. By the time of the hearing before me, Mr Clarke's draft report dated 15 March 2018 had been served on the Administrators. It expressed the view that as at October 2011 (the date that the sale of the Site was agreed) it was worth £120 million. Although it is plain that there has been movement in the Liquidators' position as to the precise amount of the loss claimed, I do not consider that the differences in amount are of themselves sufficiently significant to affect the question of whether there is a reasonably meritorious claim.

52. The final part of the claim, which the Administrators contend should have been supported by expert evidence prior to the issue of proceedings, is the question of whether the marketing strategy for the sale of the Site was inadequate. This is said to be a necessary

part of the cause of action because, if the marketing strategy was inadequate, the Liquidators will not be able to establish that the sale of the Site for a figure that was substantially less than its true value was caused by any breach of duty by the Administrators. This issue was dealt with in Mr Clarke's report, but Mr Turner submitted that his evidence on this point would be worthless because he is a valuer and not a marketing expert.

53. It is not appropriate for me to decide on this application whether evidence from a marketing expert with skills other than those professed by Mr Clarke (and indeed by Mr Laughton) is something that the Liquidators need to adduce in order to prove their case. In my view it is arguable that they do not, and I am satisfied that no such additional evidence is a necessary pre-requisite to the permission that they seek on this application. There are aspects to the pleaded inadequacy of the marketing strategy which are intimately interconnected with the alleged deficiencies in the way in which the Administrators sought to carry out their own duties. Furthermore, there are aspects of any valuer's task which require the valuer to have regard to the appropriate methods of marketing, and thereby realising value from the asset alleged to have been sold for an undervalue.

54. In my view, evidence of the type which Mr Turner said that the Liquidators should have adduced on this application for the purpose of establishing an arguable case on marketing inadequacy and causation was not required to justify the issue of proceedings. I consider that in the light of the other material available to the Liquidators to which I have referred above, the section 75 application had a proper foundation without it.

55. It follows that, more generally, I consider that the Liquidators had sufficient information and evidence available to them, both at the time the proceedings were issued and at the time that this application was heard, to justify their commencement. I should stress, however, that this conclusion does not of itself mean that the Administrators are shut out from contending that any specific issue is suitable for determination on a summary basis or should be struck out for some other reason. In particular I should record that the Administrators indicated that the allegation as to overage which I refer to in paragraph 11.4 above, was made late and the Liquidators should not be permitted to proceed with it. Nothing that I have said in the judgment prevents them from making an application in relation to that aspect of the case alleged against them if so advised, although my recording of this reservation of rights should not be taken as encouraging them to take that course of action.

56. Accordingly, I propose to grant permission under paragraph 75(6) of Schedule B1 for the Liquidators to make an application in the form of their application notice dated 3 October 2017. I understand that directions for the further conduct of the proceedings have been agreed.