ADGM Courts
محاكم أبوظبي العالمي

In the name of
**His Highness Sheikh Mohamed bin Zayed Al Nahyan**
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF APPEAL**
**BETWEEN**

**DR BAVAGUTHU RAGHURAM SHETTY**
Appellant

and

**NMC HEALTHCARE LIMITED**
(in administration) (subject to a deed of company arrangement)
First Respondent

**NMC HOLDING LTD**
(in administration)
Second Respondent

**RICHARD DIXON FLEMING**
(in his capacity as Joint Administrator of the First and Second Respondents)
Third Respondent

**BENJAMIN THOM CAIRNS**
(in his capacity as Joint Administrator of the First and Second Respondents)
Fourth Respondent

**PRASANTH MANGHAT**
Fifth Respondent

**BANK OF BARODA**
Sixth Respondent

**AND**

**COURT OF APPEAL**
**BETWEEN**

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**DR BAVAGUTHU RAGHURAM SHETTY**
Fifth Respondent

**PRASANTH MANGHAT**
Sixth Respondent

# JUDGMENT

Chief Justice, Lord David Hope
Justice Kenneth Hayne
Justice Dame Elizabeth Gloster

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| **Neutral Citation:** | [2024] ADGMCA 0001 |
| **Before:** | Chief Justice, Lord David Hope<br>Justice Kenneth Hayne<br>Justice Dame Elizabeth Gloster |
| **Decision Date:** | 30 December 2024 |
| **Decision:** | **In Case No.: ADGMCA-2024-001**<br>1. Appeal dismissed with costs.<br>**In Case No.: ADGMCA-2024-002**<br>1. Appeal dismissed with costs. |
| **Hearing Dates:** | 8 and 9 December 2024 |
| **Date of Order:** | 30 December 2024 |
| **Catchwords:** | Appeal on determination of preliminary issues. Effect of continuance of a company into the ADGM. Construction of s 251 and s 252 of the Insolvency Regulations 2022. Whether the Court can make orders in respect of the fraudulent or wrongful carrying on of the business of a company before the date on which that company was first continued as a company within the ADGM, or before the provisions took effect. Whether provisions have retrospective effect. Whether construction of the provisions would lead to them being applied oppressively or unreasonably. |
| **Cases Cited:** | Russian and English Bank v Baring Bros [1932] 1 Ch 435, 444<br>Banque International de Commerce de Petrograd v Goukassow [1923] 2 KB 682, 691, 693, 688.<br>The Eskbridge [1931} P 51<br>Gasque v Inland Revenue Commissioners [1940] 2 KB 80<br>R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3<br>Black-Clawson Ltd v Papierwerke AG [1975] AC 591<br>Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553<br>Maxwell v Murphy (1957) 96 CLR 261<br>Re Howard Holdings Inc [1998] BCC 549<br>In re a Solicitors' Clerk [1957] 1 WLR 1219<br>Federal Supreme Court Case No. 493 of 18 (26 October 1997) (Union Supreme Court)<br>Dubai Court of Cassation Case No. 6 of 2016 (7 April 2016)<br>Dubai Court of Cassation Case No. 1118 of 2019 (30 October 2019) |

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| | Re Paramount Airways Ltd (In Administration) [1993] Ch 223<br>Orexim Trading Ltd v Mahivir Port and Terminal Pte Ltd [2018] 1 WLR 4847<br>Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16<br>Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 391 (Comm)<br>Suppipat v Narongdej [2020] EWHC 3191 (Comm)<br>Stichting Shell Pensioenfonds v Krys [2014] UPKPC 41<br>Rubin v Eurofinance SA [2013] 1 AC 236<br>Ex parte Robertson; In re Morton (1875) LR 20 Eq 733 |
| **Legislation and other Authorities Cited:** | Insolvency Regulations 2015<br>Companies Regulations 2015<br>Application of English Law Regulations 2015<br>Interpretation Regulations 2015<br>ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015<br>Companies Regulations 2020<br>Companies (Amendment No. 1) Regulations 2020<br>Insolvency Regulations 2022<br>The Constitution of the United Arab Emirates<br>Dicey Morris and Collins on the Conflict of Laws (16th ed, 2022) Rule 185(1) [30R-001}<br>Bennion, Bailey and Norbury on Statutory Interpretation (8th ed, 2020) [7.13] |
| **Case Numbers:** | ADGMCA-2024-001 and ADGMCA-2024-002 |
| **Parties and Representation:** | **ADGMCA-2024-001**<br>**Appellant (Dr Shetty)**<br>Ruth den Besten KC and Kajetan Wandowicz (Instructed by Farrer & Co LLP)<br>**First – Fourth Respondents (NMC Respondents)**<br>Tom Smith KC and Adam Al-Attar KC (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)<br>**Fifth Respondent (Prasanth Manghat)**<br>Sophia Hurst (Instructed by Kobre & Kim (GCC) LLP<br>**Sixth Respondent (Bank of Baroda)**<br>Harish Salve KC, Sarah Tresman and Maria Kennedy (Instructed by Baker & McKenzie LLP) |

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| | **ADGMCA-2024-002**<br><br>**Appellant (Bank of Baroda)**<br>Harish Salve KC, Georgina Peters and Maria Kennedy (Instructed by Baker & McKenzie LLP)<br><br>**First – Fourth Respondents (NMC Respondents)**<br>Tom Smith KC and Adam Al-Attar KC (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)<br><br>**Fifth Respondent (Dr Shetty)**<br>Ruth den Besten KC and Kajetan Wandowicz (Instructed by Farrer & Co LLP)<br><br>**Sixth Respondent (Mr Manghat)**<br>Sophia Hurst (Instructed by Kobre & Kim (GCC) LLP) |

**JUDGMENT**

1. On 8 July 2024, Justice Sir Andrew Smith (the "**Judge**") delivered his judgment determining five preliminary issues arising in two proceedings brought by NMC Healthcare Ltd ("**NMCH**"), NMC Holding Ltd ("**Holding**") and their Joint Administrators, (Mr Richard Dixon Fleming and Mr Benjamin Thom Cairns (the "**JAs**"): one against Dr Bavaguthu Shetty ("**Dr Shetty**") and Mr Prasanth Manghat "(**Mr Manghat**"), the other against Bank of Baroda ("**Baroda**"). Orders reflecting his determination of those issues were made on 12 August 2024.

2. With the permission of the Judge, Dr Shetty and Baroda appeal against those orders. (Mr Manghat did not appeal.)

3. In our judgment the appeals should be dismissed.

4. In his judgment, the Judge described the background to the proceedings. It is convenient to adopt that description:

> *"2.On 27 September 2020, this Court appointed the JAs to be the administrators of NMCH, Holding and many of NMCH's operating subsidiaries, the Court being satisfied that they were, or were likely to become, unable to pay their debts, as that expression is used in the Insolvency Regulations that were then applicable, the Insolvency Regulations 2015 (the "**IR 2015**"): see sections 7 and 200. The IR 2015 have now been replaced by the Insolvency Regulations 2022 (the "**IR 2022**"), but the changes are not material for present purposes.*
>
> *3.The companies had previously been incorporated variously in Abu Dhabi, Dubai and Sharjah as limited liability companies, and had been registered in the Abu Dhabi Global Market ("**ADGM**") earlier in September 2020. NMCH and Holding are still in administration. The operating subsidiaries came out of administration in March 2022, after they and NMCH had entered into a scheme of interlinked deeds of company arrangement, whereby, as the Claimants maintain, the operating companies and their administrators assigned to NMCH various rights and actual and prospective claims arising out of their insolvencies and events leading to it. The claims of NMCH and the JAs in their capacity as its administrators include claims that are said to have been* assigned to NMCH by the operating subsidiaries. ..."

> 4. *The insolvencies are said to have resulted from a fraud against NMCH, Holding and their associated companies (the "**NMC Group**"), including NMC Health PLC ("**NMC PLC**"), the NMC Group's parent company incorporated in England. The Claimants' case is that the fraud was carried out from 2012, if not earlier, until it came to light after a report in December 2019 by Muddy Waters Capital LLC, an American investment firm. The value of the claims in these proceedings is put at "at least" US$5 billion. ...*
>
> *The Claimants allege that the fraud was "perpetrated by certain of the former management of [NMCH] ...with the knowledge and collusion of [Baroda]". The managers involved in the wrongdoing are said to include Dr Shetty, the founder of the NMC Group, a major shareholder in NMC PLC, the Chief Executive Officer ("**CEO**") of NMC PLC from about July 2011 until about March 2017 and thereafter its Non-Executive Vice-Chairman until about February 2020; and Mr Manghat, who was the Chief Financial Officer of the NMC Group from about 2011 until December 2014, its Deputy CEO from January 2015 until about March 2017 and its CEO thereafter until February 2020. They are said to have been involved in wrongdoing since April 2012 at the latest. Baroda, a State Bank incorporated in India, which had many branches in the United Arab Emirates ("**UAE**") and was regulated by the Central Bank of the UAE, but which had no presence in the ADGM, provided banking facilities to the NMC Group throughout the relevant period. It is alleged to have been party to the fraud from around April 2012.*
>
> *The claims against each of the Defendants fall into two categories, which have been labelled the "Civil Claims" and the "Insolvency Claims". The Civil Claims are brought by the corporate Claimants under the law of the UAE. The Civil Claims against Dr Shetty and Mr Manghat include claims in tort for fraudulent conduct and for failing to act with proper care (under articles 282 and 285 of Federal Law No 5 of 1985 on the Civil Transactions Law of No.5 of the United Arab Emirates (the "**Civil Code**"); in breach of duties as a director or manager of NMC Group companies (under various articles of Federal Law No 8/1984 and Federal Law No 2/2015 on Commercial Companies); in extortion (under article 304 of the Civil Code); and, against Dr Shetty, in unjust enrichment (under articles 318-319 of the Civil Code). The civil claims against Baroda allege that it acted fraudulently or without proper care, and they are made in contract (under article 246 of the Civil Code) and in tort (under articles 282 and 285 of the Civil Code). The Insolvency Claims are made by the JAs in fraudulent trading under section 251 of the IR 2022 against Dr Shetty, Mr Manghat and Baroda, and in wrongful trading under section 252 of the IR 2022 against Dr Shetty and Mr Manghat."*

5. The preliminary issues which the Judge determined concern the Insolvency Claims. The issues were re-framed in the course of argument before the Judge, but nothing is now said to turn on those changes and it is not necessary to say more about them. As finally framed, the issues and the answers which the Judge gave at paragraph 121 of his judgment were:

> *"**Issue 1**: Can an order be made under sections 251 and 253 of the [IR 2022] in respect of the fraudulent carrying on of the business of a company prior to the time at which that company was continued in the ADGM? **Yes**.*

***Issue 2**: Can an order be made under section 252 of the [IR 2022] in respect of the wrongful carrying on of the business of a company prior to the time at which that company was continued in the ADGM? **Yes**.*

***Issue 3**: Can a claim be brought under section 251 and/or section 252 in respect of the fraudulent and/or wrongful carrying on of business before the date when sections 251 and section 252 first came into effect in the ADGM ( pursuant to the [IR 2015], which was the predecessor of the [IR 2022])? **Yes**.*

***Issue 4**: Can a claim successfully be brought under section 251 and/or section 252 absent a sufficient connection between the defendant and the ADGM? **Yes**; and*

*If not, assuming (for present purposes only) the facts pleaded by the Claimants, including in their proposed Re-Re-Amended Particulars of Claim, to be true, would there be a sufficient connection between the relevant Defendant and the ADGM? This does not arise, but if it did, I would answer, **Yes**."*

6. Dr Shetty and Baroda both allege that the insolvency claims made by the JAs must fail, either entirely, or at least in part. They argue that neither s 251 nor s 252 of the IR 2022 permits the Court to make orders in respect of the fraudulent or wrongful carrying on of the business of any of the relevant NMC companies before the date on which that company was first continued as a company within the ADGM or, if that is not right, before the provisions which are now s 251 or s 252 (as the case may be) first came into effect in the ADGM by operation of the IR 2015.

7. The two dates mentioned (the date of continuance of the relevant companies within the ADGM, and the date on which the first ADGM legislative predecessors of what are now s 251 and s 252 of the IR 2022 came into effect) are continuation dates between 15 and 17 September 2020 [Chronology at Bundle 593] and the date of commencement of the IR 2015, 14 June 2015 [Chronology at Bundle 592]

8. As noted in the statement of the background to this litigation which is set out above, the JAs allege that Dr Shetty and Mr Manghat were involved in relevant wrongdoing from at least April 2012 and allege that Baroda was party to the fraud from around April 2012. The insolvency claims against Dr Shetty and Mr Manghat are brought under both s 251 and s 252. The insolvency claims against Baroda are brought under s 251.

**The Grounds of Appeal**

9. Dr Shetty's stated grounds of appeal were no more particular than assertions that the Judge was wrong to reach the conclusions he did in respect of each of the five issues.

10. In its grounds of appeal, Baroda not only challenged each of the conclusions which the Judge reached about the construction and application of s 251, but it also advanced *"[a]s an overarching ground, the Judge's conclusions … taken as a whole, … would lead to section 251 of the* [IR 2022*] being applied oppressively and unreasonably*".

11. As developed in Baroda's written and oral submissions, the unfairness was said to lie in one or both of two considerations – first, construing the provision to apply in respect of what was alleged to be fraudulent trading when the company concerned was neither incorporated nor registered under ADGM law and had no assets or creditors in the ADGM, and as the transactions in question "*all took place outside the ADGM and none of the transactions was governed by ADGM law*" [Baroda Argument [7]]; and second, construing it to apply to such

trading at a time before the legislative predecessor of s 251 of the IR 2022 was first enacted. Construing the section to have these operations was said to give it "*retrospective*" application.

12. Dr Shetty's written and oral submissions made generally similar points.

**Sections 251 and 252**

13. Section 251 of the IR 2022 is headed "*Fraudulent trading*". It provides:

> *"(1) If in the course of the winding-up of a Company or while it is in administration it appears that any business of the Company has been carried on with intent to defraud creditors of the Company or creditors of any other person, or for any fraudulent purpose, subsection (2) applies.*
>
> *(2) The Court, on the application of the liquidator or the administrator, as the case may be, may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned are liable to make such contributions (if any) to the Company's assets as the Court thinks proper."*

14. Section 252 is headed "*Wrongful trading*". It provides:

> *"(1) Subject to subsection (3) below, if in the course of the winding-up of a Company or while it is in administration it appears that subsection (2) applies in relation to any person being a past or present Director of the Company, the Court, on the application of the relevant Office-holder, may declare that person is to be liable to make such contribution (if any) to the Company's assets as the Court thinks fit.*
>
> *(2) This subsection (2) applies If —*
>
> *(a) the Company has gone into an insolvent liquidation or has entered insolvent administration;*
>
> *(b) at some time before the commencement of the winding-up of the Company or before the Company entered administration, as the case may be, the person knew or ought to have concluded that there was no reasonable prospect of the Company avoiding going into insolvent liquidation or entering insolvent administration; and*
>
> *(c) the person was a Director of the Company at that time.*
>
> *(3) Subsection (1) shall not apply to any person if the Court is satisfied that after the Director first knew or ought to have concluded that there was no reasonable prospect of the Company avoiding going into insolvent liquidation, he took every step with a view to minimising the potential loss to the Company's creditors as (on the assumption that the person had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken.*
>
> *(4) For the purposes of this Section, the facts which a Director of the Company ought to know, the conclusions which he ought to reach and the steps which he ought to take are those which would be known, or reached or taken, by a reasonably diligent person having both—*

> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that Director in relation to the Company (including functions which he does not carry out but which have been entrusted to him); and*
>
> *(b) the general knowledge, skill and experience that Director has.*
>
> *(5) This Section is without prejudice to Section 251 (Fraudulent trading).*
>
> *(6) In this Section, Director includes a shadow director."*

15. Section 253 provides:

> *"Where the Court makes a declaration under either Section 251 (Fraudulent trading) or Section 252 (Wrongful trading) it has wide powers to give such further directions as it thinks proper for giving effect to the declaration."*

16. Section 298 of the IR 2022 provides that "*Company" has the meaning given in section 1 (Companies) of the Companies Regulations 2020." "Company" is defined there as "a company formed or registered under [the Companies Regulations 2020] (whether or not it was incorporated under these Regulations).*"

17. The NMC companies were not formed under the Companies Regulations of the ADGM and were not originally incorporated under ADGM Law. Each became "*a company formed or registered under*" the Companies Regulations 2020 (and thus a "**Company**" within the definition of that term in s 1 of those regulations) when the Registrar issued a certificate of continuance within the ADGM.

18. It is necessary to say more about the provisions governing continuance.

**Continuance of a company within the ADGM**

19. Chapter 2 of Part 7 of the Companies Regulations 2015 (ss 100-116) provided for the continuance within the ADGM of a company incorporated elsewhere and (conversely) for a company formed or registered in the ADGM to seek continuance in another jurisdiction.

20. As enacted, s 101 provided that an application for continuance within the ADGM may not be made by (among others) a company that is insolvent or in administration. And s 102 provided that an application by a body corporate incorporated outside the ADGM for continuance as a company formed or registered under the Companies Regulations be accompanied by a statement of solvency – a statement by the directors of the body corporate that the directors reasonably believed that it would be able to discharge its liabilities as they fall due (s 114(1)(a)) and would be able to continue to carry on its business and discharge its liabilities as they fall due until the expiry of 12 months after the date on which the directors signed the statement (s 114(1)(b)).

21. Section 107 prescribed the effect of the issue of a certificate of continuance. Two effects should be noted. First, upon the Registrar issuing a certificate of continuance, the body corporate "*becomes a company registered under [the Companies Regulations]*". Second, as s 107(2) provided:

> *"When a body corporate is continued as a company formed or registered under these Regulations–*
>
> *(a) all property and rights to which the body corporate was entitled immediately before the certificate of continuance is issued are the property and rights of the company,*
>
> *(b) the company is subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which the body corporate was subject immediately before the certificate of continuance is issued, and*
>
> *(c) all actions and other legal proceedings which, immediately before the issue of the certificate of continuance, were pending by or against the body corporate may be continued by or against the company."*

22. As the word "*continuance*" suggests, the provisions for continuance do not create a new or different legal person. What was a body corporate (and thus a legal person) created under the law of a jurisdiction other than the ADGM is continued as a legal person in the ADGM by the processes prescribed by the Companies Regulations. And by continuation, the body corporate becomes a company "*formed or registered under*" the Companies Regulations. That is, the body corporate that was created and existed under the law of a jurisdiction other than the ADGM is not dissolved and does not cease to exist. The continuance provisions do not have that effect and it was not suggested that the law of the place where the entity was first incorporated had any effect of that kind.[1] Rather, under the law of the ADGM, the body corporate is continued as a body corporate and becomes a company formed or registered under the Companies Regulations[2].

23. In her oral submissions in reply, counsel for Dr Shetty emphasised that until the issue of a certificate of continuance, the entity in question was what the Companies Regulations refer to as a "*body corporate*" and was not yet a "*Company*". But, contrary to her submission, it by no means follows that upon the issue of a certificate of continuance, "*there is a change in the legal entity [*where*] the entity in jurisdiction A ceases to exist [*and*] becomes an entity in jurisdiction B*". [TS Day 2 48-49] The whole point of the continuance provisions is that the entity which seeks continuance continues as the same legal entity.

24. And this is why the process of continuation is not aptly described as, or as leading to, any "*re-incorporation*" of the company (as some written submissions did). There is no reason to use a term other than the statutory expression "*continuance*" to describe the effect of that process. But if another word is to be used, it is better to adopt the usage of authors writing about the conflict of laws and speak of the domicile of a corporation[3]. Continuance under Chapter 2 of Part 7 of the Corporations Regulations effects a change in the domicile of the company. That is all that it does; there is no "*re-incorporation*"; the entity does not cease to exist; no new entity is created. In some jurisdictions the words used to describe the process is "*re-domestication*".

25. In 2020, the continuance provisions of the Companies Regulations were amended to permit the Registrar to disapply some of those provisions (including ss 101 and 102) "*where, in the*

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1 cf Russian and English Bank v Baring Bros [1932] 1 Ch 435, 444; Banque International de Commerce de Petrograd v Goukassow [1923] 2 KB 682, 691, 693, 688.

2 The Eskbridge [1931} P 51; Gasque v Inland Revenue Commissioners [1940]2 KB 80;

3 See eg Dicey Morris and Collins on the Conflict of Laws (16th ed, 2022) Rule 185(1) [30R-001}

*reasonable discretion of the Registrar, public policy grounds exist*"[4]. But the provisions could be disapplied only if the applicant provided "*the Registrar with satisfactory evidence acceptable to the Registrar which is issued from the relevant governmental authority of the jurisdiction under which that person is incorporated and permits that person to submit an application to the Registrar for continuance [within the ADGM*]"[5]. Thus the amendments permitted the Registrar to disapply so much of the continuance provisions as precluded an insolvent company or a company in administration seeking continuance in the ADGM but to do that if, and only if, the relevant governmental authority of the jurisdiction within which the entity was incorporated permitted the entity to apply for continuance within ADGM.

26. As will later be explained, this last condition is important. Consent, by the jurisdiction in which the entity is incorporated, to the entity's continuance within the ADGM points firmly against the suggestion which underpinned much of the arguments advanced by the appellants that engaging the provisions for continuance within the ADGM of an insolvent company would entail an exorbitant application of s 251 and s 252 unless the application of those provisions was confined to business done by the entity after continuance.

27. In April 2020, the English High Court placed NMC Health PLC in administration. In July 2020, soon after the amendments permitting disapplication of s 101 and s 102 of the Companies Regulations came into force, the Joint Administrators of NMC Health PLC applied for the continuance in the ADGM of 35 companies in the NMC group. The Registrar concluded that there were public policy grounds to permit continuance and certificates of continuance were issued between 15 and 17 September 2020. On 27 September 2020, by order of this Court, the continued companies entered administration, and the JAs were appointed as administrators.

28. About a year later, deeds of company arrangement were made in respect of each of the companies other than NMCH and Holding. Claims held by the other companies were assigned to NMCH.

**Issues 1 and 2**

29. The Judge dealt together with Issues 1 and 2 (concerning whether orders may be made under s 251 with respect to fraudulent trading and under s 252 with respect to wrongful trading). It is convenient to follow the same course. It may be noted, however, that much of what is said about Issues 1 and 2 also bears upon Issue 3 (concerning whether orders under those sections may be made in respect of business done before the IR 2015 came into operation).

**Construing the sections**

30. As the Judge rightly held, consideration of all of the issues to be decided must begin by construing the relevant statutory provisions. No party disputed that the Judge was correct to hold that the fundamental question presented is what is the objective meaning of the sections. Then, as Dr Shetty's written submissions rightly said, "*if the words [of the sections], read in their statutory context 'are clear and unambiguous and … do not produce absurdity'*[6] *they must be*

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4 Companies Regulations s 1070 (6) as inserted by Companies (Regulations (Amendment No 1) 2020, s 1

5 Companies Regulations s 1070 (8) as inserted by Companies (Regulations (Amendment No 1) 2020, s 1

6 R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3 [30] and quoted more fully by the Judge at [2024] ADGMCFI 7, [40]

*implemented*"[7]. To adopt and adapt what Lord Reid said, nearly 50 years ago, we must give effect to "*the true meaning*" of what the legislating authority said[8].

31. It is convenient to deal separately with the construction of the two sections (s 251 and s 252).

Section 251

32. Counsel for Dr Shetty submitted that "*the clear and unambiguous meaning of [s 251] is that insolvency officeholders of a continued company may bring a claim in fraudulent trading in respect of the business of that continued company after the point of continuance (when it becomes a company currently registered in the ADGM) but not in respect of business conducted in the prior pre-continuance period when it was not a company*"[9]. This, the submission continued, "*is because a claim under s 251 … lies only in relation to the business of a company [and] a company which has been continued was not a company within the relevant definition before continuance*".

33. This construction of s 251(1) does not accord with its text.

34. The natural and ordinary meaning of the provision is that the words "*the Company*" when used in the phrase "*any business of the Company*" are no more than a reference back to the "*Company*" that is first mentioned in the subsection – the Company that is in the course of winding up or is in administration. The use of the word "*the Company*" in the phrase "*any business of the Company*" does not impose any temporal limit on the otherwise general expression "*any business*".

35. Thus the construction urged by counsel for Dr Shetty (and adopted by counsel for Baroda) is a construction which asserts (without textual foundation) that the section applies only in respect of fraudulent trading which occurred when the entity was a Company registered in the ADGM. That is, the submission seeks to read s 251(1) in a way that gives the phrase "*any business of the Company*" a temporal limitation – by limiting its application to business the entity did while it was a company "*formed or registered*" under the Companies Regulations.

36. In oral argument, counsel for Dr Shetty submitted that this understanding of the section could be seen to follow if the text of the definition of "*Company*" is substituted for the word "*Company*" wherever appearing in s 251(1). That is, counsel submitted that s 251(1) is to be read as providing:

> *"If in the course of the winding-up of a Company [*formed or registered under these Regulations (whether or not it was incorporated under these Regulations)*] or while it is in administration it appears that any business of the Company [*formed or registered under these Regulations (whether or not it was incorporated under these Regulations)*] has been carried on with intent to defraud creditors of the Company [*formed or registered under these Regulations (whether or not it was incorporated under these Regulations)*] or creditors of any other person, or for any fraudulent purpose, subsection (2) applies."*

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7 Shetty Written Argument [14]

8 Black-Clawson Ltd v Papierwerke AG [1975] AC 591, 613

9 Shetty Written Argument [15]

37. Incorporating the definition of "*Company*" into the text of the provision does not have the effect asserted – that the section applies only in respect of business the entity did while it was a company "*formed or registered*" under the Companies Regulations.

38. Three steps show why that is so. First, the opening words of s 251(1) speak of a Company that at the time of winding up or administration is a Company as defined. Second, what must appear to the Court is that any business of that company (the Company that is in the course of winding up or is in administration) has been carried on with intent to defraud creditors of that Company or any other person, or for any fraudulent purpose. Third, the Company in question may not have been incorporated under ADGM law when the business of the Company was being carried on. Taking these three considerations together it follows that s 251(1) applies to any business of the Company now in the course of winding up or in administration regardless of whether, at the time of transacting that business the entity was formed or registered under ADGM law.

39. Dr Shetty's written submissions sought to put the point on another basis that was to the same effect, but took a different form – by substituting the expression "*any business of a Company*" for the statutory words "*it appears that any business of the Company*". But, by using the indefinite rather than the definite article the submission injected a temporal requirement that is not found in the text of the provision.

40. That Dr Shetty's written submission depended on treating the statutory phrase "*the business of the Company*" as if it read "*the business of a Company*" was made plain when it was said that:

> *"Dr Shetty's argument is not that the purpose of the phrase "the business of a Company" simply serves to impose a temporal requirement. Rather, on its plain language, the phrase imposes a category requirement: it relates to the kind of business being carried on, viz. some business of an ADGM company. The fact that such a category requirement necessarily carries with it an inherent temporal restriction is simply an incidence of the fact that the category in question is described by reference to a status (viz. being a company registered in the ADGM) which necessarily has a commencement date. The substantive purpose of the provision is to deal with business of a particular ADGM entity.*[10] "

41. By using the phrase "*the business of the Company*" s 251(1) does not impose any "*category requirement*" beyond identifying the business as the business of the Company which is in the course of liquidation or is in administration.

42. Once it is recognised that, as explained earlier, continuance of a body corporate as a Company continues the existence of the body corporate that is continued, there is no difficulty in identifying the business of that Company as including business which it conducted before continuance. The business which the entity conducted before continuance was as much the business of the entity as any it engaged in after continuance.

43. This understanding of the operation of the provision is not denied, as Dr Shetty argued[11], by observing first, that unregistered companies can be wound up under and in accordance with ss 265 and 266 of the IR 2022, and second, that s 266 expressly applies s 251 and s 252 to those

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10 Shetty Written Argument [17.1]

11 Shetty Written Argument [20.2]

windings up. Applying s 251 in the winding-up of an unregistered corporation may be said to require that the expression used in the opening words of the section "*in the course of the winding-up of a Company*" is read in a way which extends the application of the word "*Company*" to the relevant unregistered company. But it does not entail that the phrase – "*any business of the Company*" – when it is used in s 251 must be read differently from the way in which it is to be read when the Company being wound up is a Company originally registered (or continued) in the ADGM.

44. Nor is this understanding of the operation of the provision denied by reference to s 857 of the Companies Regulations which creates an offence of fraudulent trading. Section 857 is framed in terms different from s 251(1). Section 857 states the condition for its engagement as "*If any business of a company is carried on with intent to defraud…"* That phrase may require that the impugned business be conducted while the entity is a company formed or registered under the Companies Regulations. The different wording of s 251(1) does not have that effect.

45. The phrase "*any business of the Company*" in s 251(1) is to be read in its context as having its natural meaning, and thus, as referring to any business of the entity which is being wound up or is in administration.

46. Accordingly, Dr Shetty's submissions about the construction of s 251 must be rejected.

Section 252

47. There being no claim against Baroda under s 252, only Dr Shetty made submissions about the construction of s 252.

48. Chief attention was given in argument to subsections (2) and (3) of s 252 and, in particular, the expression in sub-sec (2)(a) – "*the person knew or ought to have concluded that there was no reasonable prospect of the Company avoiding going into insolvent liquidation or entering insolvent administration*". Counsel for Dr Shetty submitted that the expressions "*insolvent liquidation*" and "*insolvent administration*" were to be understood as liquidation or administration "*under ADGM law*", and that it followed that, until the companies had been continued within ADGM, the test would not and could not have been applied by a director of the relevant company. And, the submission continued, at the time when it was said that the person knew or ought to have concluded that there was no reasonable prospect of the entity avoiding insolvent liquidation or insolvent administration, the Company had not been continued within ADGM and that it followed that the person was not, for the purposes of sub-sec (2)(c), a Director of a "*Company*" formed or registered under ADGM law.

49. The Judge accepted, and on appeal counsel for the JAs did not dispute, that the references in sub-sec 2 to going into insolvent liquidation or insolvent administration should be understood as liquidation or administration under ADGM law. It follows that it is very unlikely indeed that it could be shown that a director of an entity not then formed or registered within ADGM actually knew that there was no reasonable prospect of avoiding insolvent liquidation or administration under ADGM law. But, contrary to the submission of counsel for Dr Shetty, it does not follow that the second limb of s 252(2) (the person "*ought to have concluded*" that there was no reasonable prospect of avoiding insolvent liquidation or administration) cannot be applied.

50. Counsel rightly accepted that the second limb of the provision prescribes an objective test. In a case such as the present (where it is alleged that there was wrongful trading before the company concerned was continued within ADGM) the second limb is to be applied by reference

to the factual inquiry which would underpin the making of an order by the ADGM Court for an insolvent liquidation or insolvent administration. That is, at the risk of undue abbreviation the inquiry would be whether the person ought to have concluded that there was no reasonable prospect of the Company being and remaining unable to pay its debts as they fall due (as that standard is understood and applied under ADGM law). In a particular case this may be a factually difficult inquiry but the standard which is to be applied is clear. Because the standard to be applied is clear it presents no legal issue that precludes the section's application in respect of a continued company's wrongful trading before continuance.

51. As for the point about the application of sub-sec(2)(c)'s requirement that "*the person was a Director of the Company*" at the time of the wrongful trading, there are four related observations to be made. First, s 252(1) applies in relation to "***any** person being a **past** or present Director of the Company*" (emphasis added). Second, as noted earlier, "*Company*" is defined as "*a company formed or registered under* [the Companies Regulations 2020] ***(whether or not it was incorporated under these Regulations**)*" (emphasis added). Third, s 252(6) provides that in s 252, "*Director includes a shadow director*". Fourth, s 146 of the Companies Regulations provides that in those regulations "*director*" includes "*any person occupying the position of a director, by whatever name called*" and s 147 defines "*shadow director*" as "*a person in accordance with whose directions or instructions the directors of the company are accustomed to act*".

52. Together these observations require the conclusion that a person who was shown to have been a director or shadow director of the body corporate at the time of the alleged wrongful trading (before continuance within ADGM) is a person in respect of whom a wrongful trading order can be made under s 252. That person was a director of a Company that was not incorporated under ADGM law but by continuance became a Company formed or registered under ADGM law.

53. Accordingly, we reject Dr Shetty's submissions in relation to the construction of s 252.

**Retrospective?**

54. A central element of the argument of both appellants was that reading s 251 (or s 252) as applying in respect of business done before continuance or as applying in respect of business done before the IR 2015 first came into effect would give the provisions retrospective effect. But what exactly was the retrospective effect of the law was not further identified. That is, the observation that some of the transactions on which the claimant JAs relied had occurred before the IR 2015 came into effect, or before continuance, was treated as concluding the inquiry.

55. It is often said that it is presumed that a statute does not have retrospective effect. In *Yew Bon Tew v Kenderaan Bas Mara*, Lord Brightman described the presumption as "*a prima facie rule of construction that a statute should not be interpreted retrospectively **so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past***" (emphasis added)[12]. And as noted earlier, the appellants allege that to construe s 251 or s 252 as permitting the Court to exercise the powers given by

[12] Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553. See also, Maxwell v Murphy (1957) 96 CLR 261 where Dixon CJ said that "*The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred, **in such** **a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events**.*" (emphasis added)

those provisions on the basis of business transactions of an entity that were made before provisions to the effect of those sections were first enacted in ADGM (or before continuance of the entity as a Company) would be to give the provisions retrospective operation.

56. Neither provision alters or impairs any right or duty which a person against whom a claim is made had at the time of a transaction (or series of transactions) that is alleged to enliven the provision. The making of the transaction created no right in the person to whom it is now alleged that s 251 or s 252 may be applied. Any duty the person had at the time of the transaction not to participate in fraudulent or wrongful trading is not altered. As the Judge rightly said, the sections "*do not provide for a cause of action that accrues at the time of the impugned conduct or resultant damage, but on the commencement of the winding-up or administration*".[13] That is, both provisions operate only in the conduct of a compulsory administration of the Company (either in winding-up or administration).

57. Neither provision provides that at the time of an impugned transaction, any person (whether a party to the transaction or not) is to be taken to have owed any new or different duty. To whom would the person be said to have owed such a duty? Each section allows a liquidator or administrator to seek the remedies for which it provides but, at the time of the transaction, no liquidator or administrator had been appointed. The remedies which may be allowed under the provisions go into the assets of the Company for the benefit of its creditors. And because the provisions do not create, vary or terminate any right or duty that existed at the time of the impugned transaction, the provisions did not retrospectively create any disability for the Company, or for any persons associated with the Company or its past transactions (whenever those occurred).

58. Instead, the sections provide that "*what happened in the past is* [or under these sections may be] *the cause or reason for the making of the order, but the order has no retrospective effect*".[14]

59. In other words, neither provision effects any "*backwards adjustment*" of the law that applied at the time of the impugned transactions.[15] Neither provision gives the Court any power to set aside or modify the impugned transactions; the transactions stand wholly unaffected. Instead, where it is shown that there has been business or there have been transactions of the kind specified in the section the provisions permit the Court to order a relevant person to "*make such contributions ... to the Company's assets as the Court thinks proper*".

60. When the impugned transactions occurred, compulsory winding up or administration was an event that might but did not need to occur at some future time. Orders for compulsory winding up or administration of the Company might have been made in the jurisdiction that constituted the entity or (depending on the breadth of the powers in another jurisdiction in respect of unregistered companies) might have been made in that other jurisdiction. But these were contingencies that had not come to pass when the transactions occurred. The rights and duties of persons connected with the Company or its transactions on the happening of that contingency were not vested or accrued rights or duties – they were contingent and would become fixed only once the contingency had happened.

61. The presumption against retrospective application of a statute was not engaged.

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13 Judgment at [17]; See also Re Howard Holdings Inc [1998] BCC 549, 554

14 In re a Solicitor's Clerk [1957] 1 WLR 1219, 1222

15 Bennion, Bailey and Norbury on Statutory Interpretation (8th ed, 2020) [7.13]

62. It remains necessary to deal with three further arguments that were advanced under the general heading of "*retrospectivity*". All three points were directed primarily in support of the appellants' arguments about Issue 3 (whether s 251 or s 252 could apply in respect of transactions or events occurring before the IR 2015 came into operation in July 2015). But both in the hearing before the Judge and on the hearing of these appeals, at least Dr Shetty's counsel suggested that these further arguments supported the construction of s 251 and s 252 which she urged the Court to adopt. All three arguments turn on the application of other statutory or constitutional provisions – s 25 of the Interpretation Regulations 2015, reg 230 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "**Courts Regulations**") and article 112 of the Constitution of the United Arab Emirates.

**Interpretation Regulations s 25**

63. Section 25 has the heading "Commencement of subordinate legislation" and provides:

> *"(1) Subordinate legislation made under the ADGM Founding Law or under any enactment or other lawful authority shall –*
>
> *(a) be published, and*
>
> *(b) unless it is otherwise provided in the subordinate legislation, take effect and come into operation on the date of its publication.*
>
> *(2) Any such subordinate legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the enactment or the establishment of the authority by or under which the subordinate legislation is made."*

64. The appellants submitted that this provision supported their argument that neither s 251 nor s 252 should be read as applying in relation to business or transactions which took place before the IR 2015 came into force in 2015.

65. The short answer to this submission is that s 25 regulates when subordinate legislation (such as the IR 2015) commences operation. The section says nothing about the content, construction or application of the provisions of subordinate legislation. For the reasons that have been given above, neither s 251 nor s 252 operates retrospectively (by creating, abolishing or altering rights or duties in respect of events or transactions which are alleged to have occurred before the companies in question went into insolvent administration. As noted earlier the sections provide that "*what happened in the past is* [or under these sections may be] *the cause or reason for the making of the order, but the order has no retrospective effect*"[16] . Section 25 neither requires nor permits any different conclusion.

**The Courts Regulations, reg 230**

66. Regulation 230 of the Courts Regulations provides for the short title, extent and commencement of those regulations as well as providing for certain savings.

67. In oral argument of the appeals, reference was made to reg 230(3) and (4) which provide:

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[16] In re a Solicitor's Clerk [1957] 1 WLR 1219, 1222

> *"(3) These Regulations shall come into force on the date of their publication (the "**Commencement Date**"). The Board may by rules make any transitional, transitory, consequential, saving, incidental or supplementary provision in relation to the commencement of these Regulations as the Board thinks fit after consulting with the Chief Justice.*
>
> *(4) Subject to subsection (6), nothing in these Regulations shall have retrospective effect."*

68. Subsection (6)(a) dealt with acts and omissions occurring in ADGM prior to the Commencement Date and with proceedings instituted prior to the Commencement Date but neither of these qualifications to subsection (4) is relevant. The transactions and events which occurred before continuance did not occur in ADGM and no proceeding was instituted before the Commencement Date of the Courts Regulations. No other aspect of subsection (6) was said to be relevant.

69. Like s 25 of the Interpretation Regulations, reg 230(3) of the Courts Regulations is directed only to the commencement of the regulations. Like s 25 of the Interpretation Regulations, reg 230(4) of the Courts Regulations is directed only to when the Courts Regulations take effect. It says nothing about the construction or application of s 251 or s 252.

**Article 112 of the Constitution of the UAE**

70. Article 112 provides:

> *"The provisions of the laws shall apply only to what occurs after the date on which they become effective, and they shall be deemed to have no effect on what occurred before that date. The law may, however, stipulate the contrary in matters other than criminal matters, if necessity so requires."*

71. As the Judge rightly said, "*sections 251 and 252 are to be given effect and interpreted consistently with the Constitution* ... [T]*he Constitution takes precedence over the IR 2022*".[17]

72. On appeal, argument about the application of art 112 focused upon what was referred to as the "*public order*" qualification or exception to the application of art 112. The appellants did not dispute that there is such a qualification or exception. Nor was there, or could there be, any dispute that at least some questions of insolvency law are matters of public order. Reference was made in that respect to the decision of the Union Supreme Court in Federal Supreme Court Case No 493 of 18[18] where it was said that "*Bankruptcy rules are part of the public order*". But the parties differed about the ambit of the public order qualification or exception in matters of bankruptcy.

73. Counsel for Baroda submitted that the claimant JAs bore the onus of showing that the provisions of s 251 and s 252 fell within the public order qualification to art 112 and that, there being no expert evidence or decided case demonstrating that the particular provisions do fall within that qualification, this Court should hold that, in the words of art 112, the sections "*apply only to what occurs after the date on which they become effective*".

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17 Judgment [74]

18 Judgment delivered on 26 October 1997

74. Framed in that way, much would turn upon what is captured by the expression "*what occurs*". In particular, in the case of s 251 (and s 252) would that expression encompass the past events which are found to enliven the Court's power to make an order for compensation?

75. The Judge was of the view that the expression did have that reach.[19] He referred in that connection to two cases decided by the Dubai Court of Cassation.[20] In the second of those cases it was said that "*It is…well established in the jurisprudence of this Court that laws generally do not have retrospective effect and only apply to events occurring from the date of their entry into force, without impacting past events or legal relationships that arose before its effectiveness or to effects resulting from such past relationship*". As explained earlier in these reasons, however, neither s 251 nor s 252 affects past events or legal relationships. Rights and duties created by those events or relationships remain wholly unaffected. The question at issue under each section is whether a new duty (to contribute to the insolvent estate) should be created.

76. It is not necessary for us, however, to decide whether this conclusion about how the sections operate is itself reason to deny the application of art 112. Rather, it is enough to observe that both s 251 and s 252 are provisions central to the particular form of insolvency administration which is to be applied in ADGM. Each is a provision directly affecting the size of the insolvent estate which is then to be administered and distributed according to law.

77. Determining what is to form part of the insolvent estate is central to all forms of insolvency law. Once it is accepted that, as the Union Supreme Court has said, bankruptcy rules are part of public order, these two provisions fall within that exception or qualification to art 112.

78. Counsel for Baroda suggested that there is no provision in other UAE insolvency laws to the effect of either s 251 or s 252. The correctness of that suggestion need not be explored. Even if it is accepted that the particular content of the insolvency law applicable within ADGM is not identical to insolvency law applicable in other parts of the Union we were taken to no decision which suggested that the public order qualification or exception to art 112 required (or could apply only in cases where) the relevant provisions applied uniformly throughout the Union. Once it is accepted, as the Union Supreme Court said, that bankruptcy rules are part of the public order, it is plain that the particular provisions now in issue fall within the public order qualification or exception to art 112.

79. Article 112 does not support the conclusion asserted by the appellants.

80. One final matter should be considered in connection with the appellants' arguments about issues 1, 2 and 3 – Baroda's overarching ground of appeal.

**Fairness?**

81. As noted earlier, Baroda advanced, as an overarching ground of appeal, that the Judge's conclusions on the preliminary issues "*would lead to section 251 being applied oppressively and unreasonably*". In its written argument, Baroda submitted that, if the Judge's conclusions were right, "*the consequence would, in reality, mean that there is no limit to the territorial or temporal reach of section 251*". And, in further amplification of its argument that applying s

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19 Judgment [76]-[78], especially [77]

20 Case No 6/016 (7April 2016) and Case No 1118/2019 (30 October 2019)

251 in the circumstances of this case would be oppressive or unreasonable Baroda pointed to five considerations which it submitted supported that conclusion:

a. The NMC companies were not ADGM companies when the transactions said to constitute fraudulent trading occurred;

b. All of those transactions occurred outside the ADGM (and prior to continuance) and were not governed by ADGM law;

c. The NMC companies did not carry on business in the ADGM;

d. Before continuance, the NMC companies had no assets or creditors within the ADGM; and

e. Baroda dealt with the NMC companies only when they were UAE companies and Baroda has and continues to have no connection with the ADGM.

*Territorial and Temporal application*

82. As framed, the argument asserts that the Judge's conclusions entail that s 251 has no territorial or temporal limit. That is not right. The opening words of the section – "*If in the course of the winding-up of a Company or while it is in administration*" – provide both an evident territorial and temporal connection with ADGM and thus a temporal and territorial limit on its operation. The section applies to a Company (formed or registered in the ADGM, whether or not it was incorporated elsewhere) and applies if certain matters appear "*in the course of winding-up*" of that Company or "*while it is in administration*".

83. Reading the provision in the way that has been described earlier, as applying in respect of any business of that Company whenever or wherever the transactions occurred, does not deprive the provision of the territorial and temporal limitations that have been identified. Nor, as explained earlier, does applying the provision to the pre-continuance business of a continued Company have the effect asserted by Baroda.

*Lack of connection with ADGM when the transactions occurred*

84. All five considerations which Baroda submitted showed that applying s 251 against Baroda would be "*oppressive and unreasonable*" pointed to there being no connection at the time of the alleged fraudulent trading between the impugned transactions and ADGM, any of the NMC companies and ADGM, or Baroda and ADGM. But those observations do not show why, in a compulsory administration of what is now an ADGM Company, it is either unfair or oppressive to give a Court power to declare that a person who was knowingly a party to the carrying on of the business of the Company with intent to defraud creditors of the Company or any other person or for any fraudulent purpose, is liable to make "*such contributions (if any) to the Company's assets as the Court seems proper*".

85. If the argument is directed to saying that, on its true construction, s 251 does not apply in the circumstances described, it is no more than the restatement of the retrospectivity argument that has been dealt with and rejected earlier. If the argument accepts that on its true construction s 251 may apply in the circumstances described but the discretion to order Baroda to make a contribution to the assets of the Company must be exercised against the JAs and in favour of Baroda, the circumstances described do not compel that conclusion. Of themselves, those circumstances demonstrate neither unfairness or oppression.

86. The territorial reach of the provisions is considered further in relation to Issue 4 (the issue about "*sufficient connection*").

87. The appellants' challenges to the answers given in respect of Issues 1, 2 and 3 all fail.

**Issues 4 and 5**

88. Counsel for Baroda made the principal submissions for the appellants in relation to these grounds. Senior Counsel opened his submissions by submitting that the case [*scil.* against each appellant] sat "*on what one may call a raft of legal fictions*". These were the five considerations identified in Baroda's written submissions, restated as being that:

> *the companies under administration had nothing to do with the ADGM until "bankruptcy proceedings were started in the United Kingdom of the parent company and … those bankruptcy proceedings were handed over to the ADGM Courts";*
>
> *not a single creditor is from the ADGM;*
>
> *not a single debtor is from the ADGM;*
>
> *not a single transaction had any connection with the ADGM; and*
>
> *Baroda had and has no right to carry on business in the ADGM.*

89. These matters, it was said, bore upon whether orders could be made under either s251 or s 252 without there being what issue 4 called "*a sufficient connection between the ADGM and the defendant*" and, so the argument continued, compelled the conclusion that there was no sufficient connection.

*Paramount Airways*

90. The expression "sufficient connection" may be traced to the judgment of Sir Donald Nicholls V-C in *In re Paramount Airways Ltd*[21]. That case arose out of an application to grant leave to serve out of the jurisdiction an originating application seeking orders under s 238 of the Insolvency Act 1986 against a Channel Islands Bank having no place of business in the United Kingdom. The first instance judge (Mervyn Davies J) had set aside the Registrar's order granting leave to serve the process but, on appeal by the administrators who had obtained the order permitting service out, the Court of Appeal (for the reasons given by Sir Donald Nicholls V-C) allowed the appeal and thus permitted service out.

91. Section 238 of the Insolvency Act concerned transactions at an undervalue made when the company was unable to pay its debts. Subsection (2) provided:

> *"Where the company has at a relevant time …entered into a transaction with any person at an undervalue, the* [administrator or liquidator] *may apply to the court for an order under this section."*

92. Section 241(2) enabled the court to make an order under s 238 against "*any person whether or not he is the person with whom the company in question entered into the transaction*". A central issue in the appeal to the Court of Appeal was whether the expression "*any person*"

21 [1993] Ch 223

when used in these and related provisions should be read as subject to some implied territorial limitation. More particularly, how was the expression "*any person*" to be read given the general principle of statutory construction that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, "*United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short time or a long time, have made themselves subject to British jurisdiction*"[22]?

93. Sir Donald Nicholls V-C said that he was unable to discern any satisfactory limitation of the words[23] and held that the expression "*must be left to bear its literal and natural meaning: any person*"[24]. But Sir Donald Nicholls V-C went on to say that the conclusion was "*not so unsatisfactory as it might appear at first sight*" because the statutory scheme provided two safeguards for persons not within the jurisdiction: the requirement to obtain leave to serve proceedings out of the jurisdiction and the provisions giving the court an overall discretion whether to make an order.[25] In a case having some "*foreign element*", "*the court will need to be satisfied that in respect of the relief sought against him the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.*" [26]

94. Although the provisions in issue in *Paramount Airways* concerned transactions at an undervalue all parties treated what was said there as directly relevant to the construction and application of s 251 and s 252.

95. At times, the appellants framed their submissions in terms of "*jurisdiction*" to make orders under s 251 or s 252. But the construction of the provisions in issue in *Paramount Airways* applies with equal force to s 251 and s 252. On their true construction, s 251 and s 252 both empower the Court to make orders against persons who are not resident in or otherwise territorially subject to the jurisdiction of the ADGM Court. When those sections speak of "*any person*" that expression cannot be construed as confined by any territorial limitation. And because it cannot be confined in that way, reference to the Court's "*jurisdiction*" to make an order is apt to mislead by suggesting that the words "*any person*" carry some narrower meaning than they do.

96. Both s 251 and s 252 give the Court a discretion whether to make a declaration that the person concerned is liable to make a contribution to the Company's assets. Must that discretion be exercised against making an order unless it is shown that the defendant has some "*sufficient connection*" with ADGM?

97. As the Judge demonstrated in his judgment, the decision in *Paramount Airways* and later English decisions show that a sufficient connection between the defendant and England and Wales is not a necessary condition for making orders under the English Insolvency Act requiring the defendant to contribute to the estate under administration.[27] In his reasons, the Judge examined *Paramount Airways* and the later cases in detail. We agree with his analysis and we need not repeat it here. The cases show that the situs of property the subject of an impugned

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22 Clark v Oceanic Contractors Inc [1983] 2 AC 130, 145 (Lord Wilberforce)

23 [1993] Ch 223, 237

24 [1993] Ch 223, 239

25 [1993] Ch 223, 239-240

26 [1993] Ch 223, 239-240

27 Judgment [107]-[114]

transaction may provide sufficient connection.[28] So too, the connections between a claim under the Insolvency Act and other proceedings in the jurisdiction may provide sufficient connection. [29]

98. That matters of the kind just mentioned might constitute reason enough to exercise the discretion to make an order under the relevant provisions against a defendant otherwise having no connection with the jurisdiction is unsurprising. No closed list of considerations which may be relevant to the exercise of a discretion to make an order of the kind now in issue can or should be identified *a priori*. The circumstances attending an impugned transaction and those who were parties to that transaction are infinitely various. Likewise, it would be a very large step to say that the absence of connection between the defendant and the jurisdiction would of itself compel the Court to decline to make an order. And that is not what the English cases have decided. Rather, examples of matters that might constitute a sufficient connection were given in *Paramount Airways* and later cases, especially *Jyske Bank*, have found a sufficient connection in circumstances other than the defendant's connection with the jurisdiction.

99. The Judge was therefore right to conclude "*that in English law a connection between the Defendant and the jurisdiction is not **invariably or necessarily** required to establish a claim for fraudulent trading or wrongful trading*".[30]

100. Because Issue 4 was framed as it was – to ask can a claim under the provisions successfully be brought absent a sufficient connection – there may be some risk that, read in isolation, the answer is read as stating a positive proposition rather wider than the essentially negative conclusion just set out. But both the Judge's reasons, and these reasons on appeal, show that it would be wrong to read the answer as stating any wider proposition than that recorded above – in English law, a connection between the defendant and the jurisdiction is not invariably or necessarily required to establish a claim of the kinds now in issue.

101. The appellants' appeals against the answer given in respect of Issue 4 fail.

102. Issue 5 arose for determination only if Issue 4 was determined in the sense urged by the appellants. It is not necessary, therefore, to decide whether the pleaded facts establish a connection between any of the defendants and ADGM which would be sufficient to permit a judge to make an order under either s 251 or s252.

103. Even so, it is desirable to make two further points about sufficiency of connection. It is important to recall that the search for connection between a defendant and the jurisdiction is prompted by the need for judicial restraint in asserting the judicial power of one jurisdiction over persons unconnected with that jurisdiction. That is, the references to sufficient connection are born of the need to avoid territorial overreach in the application of laws.

104. Two features of the present matters bear directly on that underlying concern – the provisions governing continuance of the entities which are in insolvent administration in the ADGM and the fact that both Dr Shetty and Baroda lodged proofs of debt in the administrations.

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[28] Paramount Airways [1993] Ch 223, 240; See also Orexim Trading Ltd v Mahivir Port and Terminal Pte Ltd [2018] 1 WLR 4847, 4854 [28-[30]

[29] Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16; Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 391 (Comm); Suppipat v Narongdej [2020] EWHC 3191 (Comm)

[30] Judgment [113] (emphasis added)

105. As noted earlier in these reasons, the NMC companies were continued within ADGM with the permission of the relevant governmental authority of the jurisdiction under which the company was incorporated.[31] The companies continued within ADGM had been incorporated within UAE (in Abu Dhabi, Dubai or Sharjah). Notions of territorial overreach have at least less force when the application of the relevant law (here s 251 and s 252 of the IR 2020) is a consequence of a process of continuance for which the incorporating jurisdiction has given permission and may have even less force when the incorporating jurisdiction is one element of the federation of which Abu Dhabi is itself an element and the court exercising the powers given by s 251 and s252 is itself a court of the Emirate of Abu Dhabi.

106. The second point to make about any supposed territorial overreach is that Dr Shetty and Baroda have both sought to participate in the benefits of administration by lodging proofs of debt for very substantial sums of money. By submitting proofs, each submitted, unconditionally, to the jurisdiction of the ADGM Court.[32] And by submitting a proof, each submitted to the statutory scheme for the distribution of the insolvent's assets according to the law of the ADGM establishing that scheme.[33] Each of the sections relied on by the claimant JAs in these proceedings is an integral part of that statutory scheme. If sufficient connection must be shown, lodging proofs of debt in the administration provides that connection.

107. The challenges to the answer given to Issue 4 and the challenge to what was said in respect of Issue 5 all fail.

**Conclusion and orders**

108. Each appeal should be dismissed.

109. There is no reason why the costs of the appeals should not follow the event. Accordingly, each appeal will be dismissed with costs.

Issued by:

**Linda Fitz-Alan**
**Registrar, ADGM Courts**
**30 December 2024**

31 Corporations Regulations 2020, s 1070(8)

32 Stichting Shell Pensioenfonds v Krys [2014] UPKPC 41, [29]-[30]; Rubin v Eurofinance SA [2013] 1 AC 236 [165]-[167]. See also Ex parte Robertson; In re Morton (1875) LR 20 Eq 733, 737-738.

33 Stichting Shell Pensioenfonds v Krys [2014] UPKPC 41,[31]