*Olive v Litchfield Trading Co. Pty Limited and Anor* [2015] NTSC 2

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| PARTIES: | OLIVE, Scott Douglas<br><br>v<br><br>LITCHFIELD TRADING CO. PTY LIMITED (ACN 000 321 282)<br><br>and<br><br>FORSTER, Janelle Gloria |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | No. 120 of 2014 (21459070) |
| DELIVERED: | 20 January 2015 |
| HEARING DATES: | 30 December 2014 and 8 January 2015 |
| JUDGMENT OF: | HILEY J |

CATCHWORDS: Company Law – Winding up – Liquidators – Application by one director for appointment of provisional liquidator – consented to by other director – no other directors or shareholders – court will not appoint provisional liquidator merely because company appears to be insolvent – must be utility in making appointment

*Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732; *Re South Downs Packers Pty Ltd* (1984) 2 ACLC 541; *Re T & L Trading (Aust) Pty Ltd* (1986) 10 ACLR 388 - applied.

*Constantinidis and others v JGL Trading Pty Ltd (1995) 17 ACSR 625; Deputy Commissioner of Taxation v Status Constructions Pty Ltd (1987) 12 ACLR 689; Re Club Mediterranean Pty Ltd [1975] 11 SASR 481; Re Lockyer Valley Fresh Foods Cooperative Association Ltd (1980) 5 ACLR 282; Re Property Corporate Services (2004) 48 ACSR 508; Re Tsakirios & Kelly Pty Ltd (1992) 110 FLR 202 – referred to.*

*Corporations Act 2001* (Cth) ss 436A, 459A, 459P(2), 461(1)(k), 472(2)

*Corporations Law Rules 2000* (NT) r 2.7(2)

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Mr Cureton |
| First Defendant: | No Appearance |
| Second Defendant: | Mr Lipp |

*Solicitors:*

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| Applicant: | Squire Patton Boggs |
| First Defendant: | No Appearance |
| Second Defendant: | Carrolls Lawyers |

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| Judgment category classification: | B |
| Judgment ID Number: | Hil1501 |
| Number of pages: | 20 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Olive v Litchfield Trading Co. Pty Limited and Forster* [2015] NTSC 2
No. 120 of 2014 (21459070)

BETWEEN:

**SCOTT DOUGLAS OLIVE**
Plaintiff

AND:

**LITCHFIELD TRADING CO. PTY LIMITED (ACN 000 321 282)**
First Defendant

AND:

**JANELLE GLORIA FORSTER**
Second Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 20 January 2015)

[1] On 8 January 2015 I made orders appointing Stuart Reid and George Divitkos as provisional liquidators of the defendant company. These are my reasons.

**Introduction**

[2] On 23 December 2014 the plaintiff filed an Originating Process under ss 459A, 459P(1), 459P(2) and 461(1)(k) of the *Corporations Act 2001* (Cth) seeking orders for the winding up of the defendant, and an Interlocutory Process under s 472(2) of the *Corporations Act 2001* (Cth) seeking the appointment of Kathleen Vouris and Blair Pleash of Hall Chadwick as provisional liquidators of the defendant. The winding up application was to be heard by the Master on 29 January 2015.

[3] The application for the appointment of provisional liquidators was said to be urgent and was set down to be heard before me on 30 December 2014. After hearing detailed submissions from counsel for the plaintiff I refused to appoint provisional liquidators at that time and I adjourned the application to 8 January 2015. I made orders requiring notification to the defendant, Janelle Gloria Forster (Ms Forster) and to the National Australia Bank of the proceedings and of their deferral to 8 January.

[4] Copies of the Originating Process and Interlocutory Process and supporting affidavits were served on the defendant and posted to Ms Forster and emailed to her solicitors during the afternoon of 24 December 2014. Reg 2.7(2) of the *Corporations Law Rules* (NT) requires an interlocutory process and supporting affidavits to be served at least 3 days before the date fixed for hearing, and reg 1.9(4) provides that time does not run between 25 December and 1 January of

the following year. Counsel for the plaintiff sought an abridgment of time and indicated that he wished to proceed with the application on an ex-parte basis. In the event, I did not consider that the circumstances were such as to justify proceeding in that way, particularly without giving the defendant and others with a particular interest in the matter some opportunity, albeit brief, to seek legal advice and appear or seek leave to appear on 8 January 2015.

[5] At the hearing on 8 January 2015, counsel appeared for Ms Forster and she was added as a second defendant. Counsel indicated that Ms Forster consented to the appointment of provisional liquidators. Agreement was also reached that Stuart Reid and George Divitkos be appointed as the provisional liquidators and as to their functions and reporting obligations.

**Relevant background**

[6] The plaintiff, Scott Douglas Olive, and Ms Forster (the plaintiff's mother) are and have been the directors and shareholders of the defendant company for over 10 years. Ms Forster holds 2501 of the 5000 issued shares in the defendant and the plaintiff holds the other 2499 shares. The defendant company owns a number of properties on which it operates a number of businesses including the Litchfield Pub and bottle shop, the Litchfield Supermarket, camping grounds and other hospitality facilities (the **Majestic Complex**). The properties and

the businesses that comprise the Majestic Complex are the primary assets of the defendant company.

[7] According to a draft financial report for the year ended 30 June 2014 the defendant had accumulated losses of $5,080,397 at the end of that financial year, and $5,035,274 at the end of the previous financial year (30 June 2013). The loss before income tax for the year ended 30 June 2014 was $45,124, and the loss before income tax for the year ended 30 June 2013 was $1,087,390. The draft identifies a number of loans to the defendant including a loan of $5,045,167 by the plaintiff, a loan of $1,779,240 by Oceanview Pty Ltd, a company in which the plaintiff is a director and shareholder, a loan of $235,536 by Vince Cassaniti, and a loan of $1,350,000 by the National Australia Bank (**NAB**). The draft also refers to property plant and equipment valued at $4,557,731 (after depreciation of more than $2 million).

[8] A draft profit and loss statement for the quarter ended 30 September 2014 shows that for that quarter the Litchfield Pub derived a profit before income tax of $126,654 and the Litchfield Supermarket a profit before income tax of $53,434. However the defendant company made a loss before income tax of $34,411.

[9] These proceedings and their apparent urgency appear to stem mainly from a Notice of Exercise of Power of Sale issued by NAB on 4 December 2014 (the **NAB Notice**) advising that NAB as mortgagee of

the properties and as holder of a fixed and floating charge may proceed to exercise its rights under the mortgages and the *Law of Property Act*, unless the defendant remedies its default specified in a notice dated 27 November 2014, by repaying $1,391,716.26 within 31 days after service of the Notice. The Notice states that NAB will commence enforcement proceedings in relation to the default and or secure possession of and sell the properties that secure the loan. I understand this may include the bringing of legal proceedings against the defendant company for repayment of the loan monies and or exercising its powers to sell one or more of the properties.

[10] It is apparent that there has been continuing conflict between the plaintiff and Ms Forster about the financial situation of the defendant and its ongoing business management for a long time. As long ago as 5 March 2014, at a directors meeting, the plaintiff stated that unless Ms Forster provided a guarantee of funds by 7 March he would have "no alternative but to put the company into voluntary administration", "the company could not continue to trade if it could not repay its current debt obligations", "the directors could be held personally liable for the debts of the company if they did not act on the current operating position of the company" and that without a commitment by Ms Forster to make a further contribution of about $582,000 he "would be forced to put the company into voluntary administration."

[11] Although it does seem that some monies were advanced by Ms Forster in June 2014 and subject of a loan agreement and mortgage, correspondence then and subsequently reveals continuing disagreement between her and the plaintiff and continuing concern about the financial situation of the defendant company including the indebtedness to NAB. This included discussions about the sale of one or more of the properties. Both directors would have been well aware of the continuing obligations of the company to NAB and other creditors, and to provide for contingencies such as an obligation to pay a poker machine jackpot.

[12] By notice dated 18 November 2014 addressed to the defendant and copied to the plaintiff and Ms Forster in their capacity as guarantors NAB advised that the loan facility had expired and demanded repayment of $1,380,966.52. Following this there was much correspondence between the respective solicitors of the plaintiff and Ms Forster. This included a demand by the plaintiff on 27 November that Ms Forster pay the balance owing on the NAB loan by noon the following day, otherwise steps would be taken "to appoint an administrator to manage the company's affairs and wind up the company, as it would be preferable to a receiver being appointed by NAB." The solicitors for Ms Forster requested financial information from the plaintiff, partly in order to negotiate with NAB and partly to

enable her to decide whether she should provide any additional funds to the defendant.

[13] Subsequent to the receipt of the Notice of Exercise of Power of Sale the solicitors for Ms Forster indicated that she was still considering whether she should voluntarily pay some or all of the NAB debt and that she would be meeting with NAB to discuss that. On 16 December 2014 the plaintiff made an offer to purchase some of the company's assets in order to cover the debt owed to NAB.

[14] By letter dated 18 December 2014 Ms Forster's solicitors rejected that proposal and sought the plaintiff's consent to NAB appointing a receiver manager of the company, or to the appointment of a mutually acceptable voluntary administrator or liquidator. That letter also stated:

> As your letter acknowledges, the company is deadlocked and the relationship between the shareholders / directors has deteriorated to the point where communication takes place only by the parties' respective legal representative. There is no prospect of the company being able to continue to operate in those circumstances particularly given that the company is presently in default of its arrangements with NAB. In this regard if your client was expecting that our client would advance further funds to the company to resolve the present situation with the Bank then we are instructed to advise that that will not be occurring. She has received, as presumably has your client, a demand letter from the Bank and it is her present intention to inform the Bank, in her capacity as guarantor, that she does not consent to any further advances to the company being made.

The letter also foreshadowed the possibility of Ms Forster applying to the Court for the appointment of a provisional liquidator.

[15] By letter emailed to Ms Forster's solicitors at about 4pm on Friday 19 December 2014 the plaintiff's solicitors:

- agreed that "the company is deadlocked in its management and there is no prospect of its continuing to trade";
- noted "the refusal of your client to provide (earlier promised) support to the Company confirmed in your letter. Accordingly our client considers that the Company may be trading whilst insolvent or that it will be doing so in the future";
- asserted that the appointment of a receiver by NAB "would not be in the best interests of the company or our clients, as the receiver will only be charged to look to the interests of the secured creditor (that is the NAB) and will not provide the company protection from its creditors, nor our clients as directors from the consequences of the company trading insolvently, even after a receiver may be appointed by the bank";
- stated that "the only available step that our clients can agree upon to reduce their risk as directors of the Company is for them to resolve to appoint administrators";

- attached a proposed resolution for the directors to make, appointing Blair Pleash and Kathleen Vouris as Joint and Several Voluntary Administrators under s 436A of the *Corporations Act 2001*(Cth); and

- requested that Ms Forster agree to this by midday the following Monday, 22 December 2014.

[16] By email of 22 December 2014 Ms Forster's solicitors:

- referred to "your email of Friday evening last which the writer accessed this morning" and complained that "the timeframe that you have proposed is simply unrealistic";

- stated that "our client's preference is for the appointment of a provisional liquidator as it appears that the consensus between our respective clients is that the Company is deadlocked in its management and will therefore have to be wound up. There is no reason why the added cost that would come from the voluntary administration process should be foisted onto the company when even if the company was returned to solvency via administration or a deed of company arrangement … the company would thereafter remained deadlocked and unable to function."

- added that "further, given that the current deadlock has existed for weeks if not months there is no apparent reason why an

appointment has to be made today. If there is some real urgency we invite you to explain those details so that we might take instructions from our client."

- objected to the appointment of Mr Pleash either as voluntary administrator or as provisional liquidator, on account of recent adverse comment about him and another partner of Hall Chadwick;

- advised that they were "seeking to make contact with different practitioners with a view to identifying two or three who might be able to accept an appointment as liquidator" and suggesting that the plaintiff's solicitors do the same in the hope that a common name would emerge and a joint approach made;

- noted that Ms Forster "has communicated with the Bank the fact of these exchanges".

[17] By letter dated 22 December 2014, apparently sent prior to the email summarised above, the plaintiff's solicitors advised that there had been a recent development which has potentially significant ramifications. The letter stated that:

> Our client has just contacted us to advise that the pokie machine jackpot has just been won by a patron. The jackpot was approximately $41,000. The Company does not have the funds available to pay the winner, which we believe to be in contravention of the applicable NT gaming legislation.

> We understand that our clients are both guarantors regarding any gaming obligations, so this development should be concerning to your client given my client's limited financial assets.
>
> Please advise if your client is able to make the funds available urgently to meet the payment obligation.

[18] By email dated 23 December 2014 and apparently sent at 3.38 pm (EDST) Ms Forster's solicitors:

- asserted that Ms Forster had previously loaned substantial funds to the Company and that "a significant amount of that was intended to cover poker machine requirements";
- expressed concern that "despite the company making a purported profit in the last quarter and Ms Forster providing the above funds to it, the company is not complying with its obligations in respect of its poker machines";
- proposed that the "most appropriate solution is the appointment of a provisional liquidator" and asked whether the plaintiff would consent to such an appointment;
- indicated they were having discussions with a number of practitioners but with the Christmas / New Year break imminent they would not be able to submit suitable names until the week commencing 5 January 2015; and

- Ms Forster's initial response to the plaintiff's "request for the payment of $41,000 is negative. However, a final decision will depend on the discussions with the prospective liquidators."

[19] At 3.50 pm (CST) on 23 December 2014 these proceedings were commenced by the filing of the Originating Process and Interlocutory Process and supporting affidavits. As previously noted, those documents were served later the next day.

[20] By email sent at 1.31 pm (CST) on Monday 29 December 2014 the plaintiff's solicitors:

- advised Ms Foster's solicitors that the interlocutory process would be heard at 10.00 am the following day;

- that, "given the present financial circumstances of Litchfield Trading … our client is not prepared to wait until the week commencing 5 January 2015 for your client to propose provisional liquidators"; and

- requested them to provide "the names of the liquidators practising in Darwin your client proposes be provisionally appointed and notice of their consent to be appointed before 9.00 am (CST) tomorrow in order that our client consider your client's proposal before the application is heard."

[21] I was not prepared to make the orders sought on 30 December 2014 mainly because I did not consider that Ms Forster and NAB had had sufficient opportunity to consider the application and to respond, and I was not satisfied that there was any risk of immediate disposition of assets or any other urgency that justified making such orders on an ex-parte basis.

[22] By the time of the hearing on 8 January 2015, NAB had been notified of the proceedings and, as I have said, Ms Forster was able to instruct counsel to appear. I was also informed that some other creditors had come forward following the lodgement of the statutory "notification of court action relating to winding up" (Form 519) with ASIC on 24 December 2014.

**Application of relevant principles**

[23] Section 472(2) of the *Corporations Act 2001* (Cth) enables the Court to "appoint an official liquidator provisionally at any time after the filing of a winding up application and before the making of a winding up order".

[24] Most of the principles were established under earlier versions of the *Corporations Act 2001* (Cth) and are usefully summarised in McPherson, The Law of Company Liquidation, 4th edition and in Australian Corporation Law, LexisNexis from [5.4.0407]. At p 195 of McPherson:

> [The appointment of a provisional liquidator] gives interim control of the company to a liquidator.
>
> The reason for the application is, on most occasions, that there is a perception that the assets and affairs of the company are in jeopardy and that the ultimate effect of leaving the assets in the hands of the company may be that the creditors and all members will be disadvantaged if the company is eventually wound up. The usual concern is that the assets are in jeopardy due to the attitude of the directors and that there is a need to displace them from their positions of authority to deal with the assets. This might occur where a creditor is seeking to wind up the company or where there is a conflict between the directors and the company itself.
>
> …
>
> In considering any application, the court should examine the degree of urgency, the needs established by the applicant and the balance of convenience. The courts must balance the interests of the creditors against that of the company, which, if subject to an order, will be paralysed. In addition, the courts must consider the public interest. …
>
> An order is not a formality; there must be good grounds for it. Before an order can be made there must be before the court a valid application to wind up a company and the application must disclose a good ground for a winding up.[1]

[25] There is also a convenient summary of relevant principles in *In Re Club Mediterranean Pty Ltd*.[2] However that decision, and most other decisions on the topic, concerned an application brought by a creditor that was opposed by the company.

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1 McPherson, The Law of Company Liquidation, 4th edition, p 195.

2 *In Re Club Mediterranean Pty Ltd* [1975] 11 SASR 481 at 484. See too *Re Lockyer Valley Fresh Foods Cooperative Association Ltd* (1980) 5 ACLR 282; *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732; *Deputy Commissioner of Taxation v Status Constructions Pty Ltd* (1987) 12 ACLR 689; *Re Tsakirios & Kelly Pty Ltd* (1992) 110 FLR 202; *Constantinidis and others v JGL Trading Pty Ltd* (1995) 17 ACSR 625; *Re Property Corporate Services* (2004) 48 ACSR 508.

[26] Except where the company is the applicant, an order would not normally be made ex-parte. Such an order might be made if there was a real danger of assets being dissipated if prior notice was given to the company. In *Re South Downs Packers Pty Ltd*,[3] McPherson J said that for an application to be made there must be cogent evidence that a delay in serving the company or the fact of notice of the application is likely to defeat the purpose of appointing a provisional liquidator.

[27] In the present matter, I did not consider there was such evidence to justify the making of the orders on an ex-parte basis. Unlike the situation of a trade or other creditor who has no control over the way in which the company is operated, this application has been brought by the person who has all of the practical day-to-day management of the relevant businesses and therefore has control over the preservation of the company's assets until such time as a liquidator is appointed or until and unless the receiver is appointed.

[28] For present purposes, and without having examined all the documentation in detail, it would seem that the application to wind up the company is valid, and that there is a reasonable prospect that a winding up order will ultimately be made.[4] However this is not normally a sufficient reason for appointing a provisional liquidator.

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3 *Re South Downs Packers Pty Ltd* (1984) 2 ACLC 541.

4 McPherson, The Law of Company Liquidation, 4th edition, p 201.

[29] It is normally necessary for the applicant to demonstrate that there is a need for interim control of the company pending its winding up. An important matter for a court to consider is whether the assets will be dissipated in the interim period between the filing of the application to wind up and the winding up order being made.[5]

[30] According to McPherson, at p 201:

> An appointment will usually only be made in cases of urgency or other unusual circumstances, including such matters as danger to assets, obvious insolvency, paralysis of the company because of disputes between shareholders or directors or a conflict of interest that a director has between her or his own personal interest and the company's interest such that the affairs of the company are in jeopardy.

[31] I did not consider that those kind of specific circumstances existed in the present case. As I have already noted, the businesses continue to be operated by the plaintiff, and there is no suggestion that there will be any sudden removal or loss of assets. On the limited information which I have, the trading position of the company does not appear much different to what it was at 30 June 2014, nor for that matter to what it was at 30 June 2013. However, it does appear that the company is still trading at a loss.

[32] A provisional liquidator will not be appointed merely because the company is insolvent.[6] However it may be appropriate to appoint a provisional liquidator where the company is trading at a loss and will

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5 McPherson, The Law of Company Liquidation, 4th edition, p 203.
6 McPherson, The Law of Company Liquidation, 4th edition, p 202.

incur further liabilities, or where there is a paralysis caused by an intra-company dispute or there is substantial conflict between directors.[7] As I understand it, the businesses continue to operate despite the conflict between the two directors and shareholders regarding their funding.

[33] Moreover, I see no reason to believe that there would be much delay between now and the time when the winding up application is heard and dealt with. There being only the two directors and shareholders, and a very limited number of secured creditors, I would not think that the hearing and determination of the winding up application would be very complex or protracted.

[34] Accordingly I queried the utility in appointing provisional liquidators and expressed concern about the additional cost to the company that this would involve.[8] I was concerned that there could be a greater loss to the company and its creditors if a provisional liquidator was to move in immediately than there would be if the business was allowed to continue to operate as it has been over the short period between now and whenever a winding up order is made, or a receiver appointed.

[35] The situation changed somewhat once Ms Forster became involved in the proceeding and supported the plaintiff's application. The practical effect of having both directors and shareholders pressing for the

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7 McPherson, The Law of Company Liquidation, 4th edition, p 203.
8 Cf *Re T & L Trading (Aust) Pty Ltd* (1986) 10 ACLR 388 per Young J.

appointment of a provisional liquidator is that the application is being brought by the company.

[36] Per Bright J in *In Re Club Mediterranean Pty Ltd*[9]:

> Where the company itself applies for the appointment of a provisional liquidator the appointment is usually made without query, for such an application implies that the board of directors of the company considers that such an appointment is necessary or would be beneficial.

[37] Although the court has a wide and complete discretion as to whether or not to appoint a provisional liquidator, I do not consider that a company which has made an application to have itself wound-up is entitled, as of right, to have a provisional liquidator appointed. In this regard I respectfully agree with similar sentiments expressed in *Re McLennan Holdings Pty Ltd*[10] and *Re T & L Trading (Aust) Pty Ltd*[11].

[38] In *Re T & L Trading (Aust) Pty Ltd*[12] Young J stated that

> … a precondition to any appointment of a provisional liquidator on the company's own motion is that it be established that the shareholders either have been consulted, or alternatively, that the proposal is obviously in their interest. This point is no barrier in the instant case because the directors and shareholders are, for all intents and purposes, identical.

[39] I also respectfully agree with his Honour that a provisional liquidator should not be appointed unless the court can see some utility in doing so. He said:

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9 *In Re Club Mediterranean Pty Ltd* [1975] 11 SASR 481 at 484.
10 *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732.
11 *Re T & L Trading (Aust) Pty Ltd* (1986) 10 ACLR 388.
12 *Re T & L Trading (Aust) Pty Ltd* (1986) 10 ACLR 388.

> Apart from evidence as to the attitude of the shareholders of the company, the court will need some valid reason why the additional expense of a provisional liquidation should be forced upon the company.

[40] Counsel for the plaintiff had previously referred to the plaintiff's concern about the company trading while insolvent, and the need for the directors to be protected from any liability that might attach to them until a winding up order is made. Even if the appointment of a provisional liquidator could provide such protection, I did not consider that a valid reason for appointing a provisional liquidator.

[41] Following submissions made by counsel for both of the directors / shareholders, I was satisfied that there was utility in making the appointment. This is mainly because of the imminent expiry of the NAB Notice and the consequent need for the company to urgently engage with NAB concerning the debt owed to it and how and when NAB will exercise its rights under its securities. Both directors are keen for the businesses to keep operating, at least until the company's assets can be disposed of in an orderly fashion. I was also informed that it is a requirement of the company's liquor licence and poker machine licence that the relevant businesses continue to operate. It is apparent that the ongoing friction between the two directors is such that it remains difficult for the company to deal with third parties, in particular NAB, other than by means of an independent person such as a provisional liquidator.

[42] Apart from the consequence that any creditor would now need to seek leave of the court if it desires to bring legal proceedings in a court against the company, and of course any additional costs flowing from the appointment of the provisional liquidators, I am not aware of any other disadvantage to creditors. Rather, their positions might be better protected by their ability to deal with the provisional liquidators, rather than separately with each of the directors.

[43] Accordingly I made the orders sought. These included directions requiring the provisional liquidators to provide a report to the Court by 13 February 2015 concerning the management and trading status of the company and their opinion as to whether the company or its assets are capable of being sold as a going concern and whether a final winding up order should be made. Because they required until then to complete that task I also adjourned the hearing of the winding up application to the week commencing 16 February 2015.