IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO. 110 OF 2022 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF NORTH SOUND PHARMACEUTICALS INC. (IN OFFICIAL LIQUIDATION)

Before:	The Hon. Justice Parker
Appearances:	Mark Russell and Matthew Harders of KSG, on behalf of the Appellant
	Adam Crane and Nia Statham of Baker and Partners (Cayman) Limited, on behalf of the Joint Official Liquidators
Heard:	11 December 2023
Date of Decision:	12 February 2024
Draft judgment circulated:	13 February 2024
Judgment delivered:	21 February 2024

HEADNOTE

Proof of debt appeal-validity of employment contract-de novo hearing-burden and standard of proof-breach of fiduciary duty-Labour Act-voidable preference-s.145 Companies Act (2023 Revision)-s.99 Companies Act

JUDGMENT

Introduction

1. This Judgment follows a *de novo* hearing of the adjudication of the proof of debt submitted by David Lickrish (Appellant) on 24 August 2022 (POD) to Martin Trott and Christopher Smith, the Joint Official Liquidators (JOLs) of North Sound Pharmaceuticals Inc. (in Official Liquidation) (the Company).

The POD

2. In his POD, the Appellant claimed:

    • Total Out of Pocket Expenses: US$264,488.56
    • Unpaid wages and pension: US$242,765.75
    • Amount owed under severance: US$6,458,765.75
    Total: US$6,615,254.21

3. The Appellant subsequently revised his claim to US$6,786,407.12 on 25 April 2023. The revised claim was broken down as follows:

    • Total Out of Pocket Expenses: US$343,690.68
    • Unpaid wages and pension: US$213,466.44
    • Amount owed under severance: US$6,108,000.00
    • Services provided to JOLs during OL US$121,250.00
    Total: US$6,786,407.12

4. The Appellant was, at all material times, the Company's sole director.

The rejection

5. On 10 May 2023, the JOLs issued a notice of rejection of proof of debt which admitted a portion of the Appellant's POD, in the amount of US$152,335.91, and rejected the remaining portion of the Appellant's claims amounting to US$6,634,071.21 (Notice of Rejection).

The summons

6. On 30 May 2023, the Appellant served the JOLs with a summons seeking an order for the following relief (the Appeal):

(a) Setting aside the Notice of Rejection;

(b) Admitting to proof the Appellant's claim in the sum of US$6,460,101.40 together with the other amounts already admitted by the JOLs in their Notice of Rejection;

(c) Recognising the sum of US$6,208,587.67 of the Appellant's claim as a preferential debt under section 141 of the Companies Act (2023 Revision) (the Companies Act), which comprises of:

i. US$8,902.74 being the pro-rata amount of unpaid pension obligations, calculated at 5% of his unpaid annual salary mentioned above;
ii. US$108,000 being the amount purportedly payable under the Employment Agreement for health insurance premiums for 24-months post termination of the Appellant's employment with the Company;
iii. US$6 million being the severance payment purportedly payable under the Employment Agreement; and
iv. unpaid salary amounting to US$91,684.93.

(d) Costs of and incidental to the Appeal from the JOLs personally, or that the Appellant's costs be paid out of the assets of the Company, as an expense of the liquidation, to be taxed if not agreed with the JOLs.

The issues

7. The Appellant argues that his employment agreement with the Company is valid and enforceable and was entered into to formalise the relationship, to protect the Company's

intellectual property rights, and to provide continuity of services from the Appellant on commercially reasonable terms.

8. The JOLs contend that on the eve of an inevitable winding up order the Appellant caused the Company to enter into an arrangement that was entirely self-serving and invalid.

9. The matter was heard on 11 December 2023. Mr Mark Russell appeared for the Appellant and Mr Adam Crane appeared for the JOLs.

10. The essential issues for determination are:

(a) Whether the Appellant had a valid employment contract with the Company; and

(b) Whether any portion of the Appellant's claim qualifies as a preferential debt under section 141 of the Companies Act.

Background

11. The Company's corporate history is comprehensively set out in Lickrish-1[1]. It is not materially challenged.

12. A summary is as follows. The Appellant founded Highland Therapeutics Inc (Highland) (an Ontario company) in 2008 and incorporated Ironshore Pharmaceuticals & Development Inc. (Ironshore) (a Cayman Islands company) as a wholly owned subsidiary of Highland on or around 2009, for the purpose of conducting pharmaceutical research and development.

13. The Appellant was the Chairman and Chief Executive Officer of both companies until 2022. The Appellant invented the Company's intellectual property and is the founder. He is an experienced inventor and business executive in the pharmaceutical industry.

14. The Appellant successfully developed a proprietary drug delivery platform called Delexis and assigned the intellectual property to Ironshore. Delexis has a delayed and controlled release formulation for the purpose of delivering certain pharmaceutical ingredients into the human body. As a result of developing this technology, Ironshore successfully brought a

[1] §§8 to 18.3

pharmaceutical product called JORNAY PM to market which treats attention deficit hyperactivity disorder (ADHD).

Reorganisation

15. On 12 September, 2016, the Company was incorporated as part of a corporate reorganisation of Highland and Ironshore. At that time, JORNAY PM was still being developed and researched, going through approval processes, and finance was being obtained.

16. The purpose of this reorganisation was to enable Ironshore to concentrate on JORNAY PM related activities and for the Company to develop non-JORNAY PM related products. The purpose was also to separate JORNAY PM from other pipeline assets in order that it could be an attractive financing or investment option. Investors would be interested in a product that was closer to market.

17. The Company was incorporated as a 100% subsidiary of Ironshore.

18. The Appellant was appointed the Company's sole director and Ironshore was initially the Company's sole shareholder, until shortly afterwards a License and Assignment Agreement was entered into between Ironshore and the Company on 30 September 2016 (the Assignment Agreement).

19. The Company's shares were transferred from Ironshore to Highland, and then to Highland's shareholders. The result was that the equity structure of Highland (and indirectly Ironshore) and the Company was the same.

20. As part of these restructuring activities, Ironshore also:

    (a) Assigned to the Company all intellectual property rights and know-how related to Delexis except JORNAY PM;

    (b) Entered into a Management Services Agreement with the Company on 30 September 2016 (the MSA)[2] Under the MSA, Ironshore agreed to provide various managerial, executive, administrative, research and development services in respect of the Company. In consideration for those services, the Company was

[2] *see pages 72 to 83 of Exhibit DL-1*

required to pay a fee equal to the cost of providing the services plus 5%, under clause 5.1 of the MSA[3] together with other expenses. Clause 4.6 of the MSA[4] provided that any person employed under contract with Ironshore shall be employees or contractors of Ironshore and not North Sound (the Company), and all costs relating to their employment, contract, termination or severance shall be the sole responsibility of Ironshore.

21. The MSA had an initial term of five years to 29 September 2021 which could be renewed by agreement and required one year notice period prior to termination.

22. In January 2017 Ironshore completed a US$200 million private placement of Senior Notes, under which the Company granted a security interest in all its assets to secure the Guarantee Obligations[5].

The Ironshore Employment Agreement

23. In February 2018 the Appellant and Ironshore entered into an Amended and Restated Executive Employment Agreement (the Ironshore Employment Agreement). Under the Ironshore Employment Agreement,[6] the Appellant received the following benefits whilst employed by Ironshore:

(a) a salary of US $485,000 which would increase annually by no less than 10% plus the annual reported inflation rate for the prior year, under clauses 4.1 and 4.2 (page 91);
(b) health insurance and pension, under clauses 4.4 and 4.5 (page 92); and

(c) a severance payment of US $12,500,000 plus certain other payments related to unpaid compensation and continuation of health insurance (pages 94-95).

24. The Ironshore Employment Agreement also provides at clause 2.5 (page 91) that the Appellant agrees to provide his services exclusively to Ironshore under that agreement; provided, however that he be permitted to perform his duties under the MSA and to the Company (North Sound).

[3] *see page 77 of Exhibit DL-1*
[4] *see page 77 of Exhibit DL-1*
[5] *as defined in Lickrish-1*
[6] *see pages 86 to 100 of Exhibit DL-1*

The Ironshore Employment Agreement provides at clause 2.7 that the Appellant's usual place of work is Grand Cayman in the Cayman Islands.

25. The Ironshore Employment Agreement had been approved by a duly elected compensation committee and recommended to and approved by an independent board of directors who had the benefit of external legal advice.

26. The COVID-19 pandemic and its impact adversely affected the business and eventually Ironshore defaulted on its debts.

The debt restructure

27. This led to a debt restructure where the Senior Secured Creditors became 97.5% majority owners of Highland and therefore indirectly Ironshore.

28. The result of this restructuring is that the holders of the Senior Notes hold the entire economic interest in Ironshore and there was a significant change of control and interests attached to the shareholdings. The Company and Ironshore no longer have the same equity structure.

29. The Appellant now holds around 34% of the Company's shares and the Company is no longer a subsidiary of Ironshore.

30. Immediately following the February 2022 debt restructuring, the holders of the Senior Notes appointed new directors of Highland/Ironshore and terminated the Appellant's employment as Chairman, President and CEO.

31. Ironshore also requested payment for the amounts accrued under the MSA.

32. Ironshore refused to pay the Appellant's contractual severance (US$12.5m). The Appellant's evidence is that he experienced very difficult and vitriolic negotiations to settle that matter.

33. The Appellant and Ironshore ultimately agreed to a severance payment of US$3 million in full and final settlement, which the Appellant describes as a "heavily discounted offer"[7]. Agreement was finalised on 7 March 2022.

[7] *Lickrish-1 at [21]*

34. At all times, the Company's Guarantee Obligations remained in place.

35. The Appellant's evidence is that he then turned his attention to the Company of which he remained the inventor, founder, sole director and a significant shareholder. He still believed that he had a responsibility to the early Ironshore investors who remained shareholders but had seen their equity position effectively 'wiped out'.

36. The day after he accepted the severance payment from Ironshore (8 March 2022) he entered into a handwritten agreement which effectively adopted the terms of the Ironshore Employment Agreement to reflect his ongoing employment terms with the Company as the director and CEO.

The Adopting Agreement

37. This is a one-page document and is handwritten. It contains manuscript text on lined notebook paper, is between the Appellant and the Company, and is made in respect of the termination of the Appellant's employment with Ironshore[8] (the Adopting Agreement).

38. The document purports to be executed between the Company on the one hand (signed by the Appellant as director of the Company) and the Appellant in his personal capacity on the other hand and witnessed by the Appellant's wife[9] .

39. The Appellant's evidence is that he intended the Adopting Agreement to act as a placeholder solution to confirm his position and relationship with the Company pending the drafting and execution of a more formal contract. This, he says, was necessary because he was no longer an employee of Ironshore and so any services he provided from 7 March 2022 onwards could not be provided under the terms of the MSA.

40. In addition, the Company, as a pharmaceutical research and development business, required certain intellectual property protections that could only be secured in a formal employment relationship. Individuals performing work on behalf of such a business needed to acknowledge and agree that any intellectual property developed by the individual belonged to the business and needed to agree to execute any necessary assignments from time to time.

[8] *Lickrish-1 at [23]*
[9] *see page 101 of Exhibit DL-1*

41. Even though the original term of the MSA had expired on 29 September 2021 without a written renewal agreement in place, Ironshore had continued to provide the Company with all of the same services that it had historically provided.

42. The Adopting Agreement states that:

> *"The terms of David Lickrish's employment, as Director and CEO of North Sound Pharmaceuticals Limited shall be identical to those terms outlined in his employment contract with Ironshore Pharmaceuticals and Development, Inc ("Agreement to Amend Amended and Restated Executive Employment Agreement" dated 20th February 2018) and may not be altered or changed without Mr. Lickrish's consent."*

43. The Appellant's evidence is that from the date of the Adopting Agreement he started to work diligently on the Company's behalf to advance its pharmaceutical research programmes, to seek business partnerships and to raise capital[10].

44. The Appellant says that Ironshore then abruptly put a stop to this important work in early April 2022.

The statutory demand

45. A week later on 13 April 2022, Ironshore issued a statutory demand to the Company based on amounts (US$7,440,917) allegedly owed under the MSA. The Appellant's evidence is that there had never been any previous demands for payment. He engaged attorneys to defend the claim.

46. As confirmed by the Company's financial statements[11] which were approved by the Appellant in his capacity as Chairman and Director of the Company:[12]

(a) the Company has historically depended on funding from Ironshore, as it does not have any cash of its own;

(b) the Company had not itself generated commercial revenue; and

[10] *Lickrish 1 §24 and Lickrish 2 §16*
[11] *at page 52 and 53 of Exhibit CS-2*
[12] *see page 68 of CS-2*

(c) the Company had funded its operational losses through financing from Ironshore.[13]

The Winding Up Petition

47. On 5 May 2022, following the Company's failure to satisfy the statutory demand, Ironshore presented a petition to wind up the Company (the Petition).

48. Neither the Company nor the Appellant challenged the amounts owed under the statutory demand nor challenged the Petition.

49. A winding up order was made against the Company on 13 July 2022.

The Employment Agreement

50. On 5 May 2022, the same day as the presentation of the Petition, the Appellant and the Company entered into an Executive Employment Agreement. The Appellant signed the agreement in his capacity as director of the Company and countersigned in his personal capacity (the Employment Agreement)[14].

51. The Appellant says this agreement was entered into to have a more formal employment agreement in place than the Adopting Agreement.

52. Amongst other terms, the Employment Agreement states that the Appellant is entitled to:

(a) A base salary of US $485,000, which the Appellant describes[15] as a "reset to the original base salary provided for in the Ironshore Agreement prior to any raises per the automatic escalation clause";
(b) Health insurance and pension plan;
(c) The reimbursement of expenses, which also extended to expenses incurred by the Appellant in relation to his immigration status in the Cayman Islands; and
(d) Severance payment of US $6 million plus certain other payments related to unpaid compensation and continuation of health insurance.

[13] *page 53 of Exhibit CS-2*
[14] *pages 102 to 110 of Exhibit DL-1*
[15] *at [26.2] of Lickrish-1*

53. This Employment Agreement is stated to have an effective date of 12 September 2016 which was the date on which the Company was incorporated. The Appellant says this date was selected so that the indemnity provided for would cover any work he had performed prior to the termination of his Ironshore employment. He says he did not trust that Ironshore would honour any indemnity for any services he provided to the Company under the MSA[16].

LAW

The Test for Proof of Debt Appeals

54. In the *Matter of Midland Acres Limited (in Official Liquidation) (FSD 88 of 2017 (RPJ) (Unreported, 19 January 2022)* the Court said:

> *"37. The principles to be applied by the Court in proof of debt appeals, pursuant to CWR O.16, r.17 to r.19 are addressed in a series of Cayman Islands cases, following a number of English authorities:*
>
> *a. Pursuant to CWR O.16, r.18(5), the appeal of a proof of debt: "shall be treated as a de novo adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of his claim, notwithstanding that he failed to make such evidence available to the official liquidator."*
>
> *b. The burden of proof rests on the Appellants as the putative creditors to provide evidence to satisfy the Court that, on the balance of probabilities, their alleged debts are founded on real debts of the Company and if so, in what amount. It follows that a claim based on tenuous or inadequate proof will not succeed. There is no requirement for the official liquidator to justify his decision to reject the proof of debt.*
>
> *c. Unsurprisingly the starting point for any contractual analysis is the written legal agreements entered into by the parties. As Mr. Justice Leggatt observed in Blue v Ashley [2017] EWHC 1928, at § 49:*
>
> > *"the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may –*

[16] *Lickrish 1 §26.6*

depending on the circumstances – tend to suggest that no contract was in fact concluded"."

55. In the *Matter of Ardon Maroon Asia Master Fund (in Official Liquidation) (FSD 18 of 2015 (RMJ)) (Unreported, 17 July 2018)* Macmillan J held at paragraphs [45] to [53] that:

> "*45. At this point the Court reminds itself that an Appeal against rejection of a proof of debt is to be treated as a de novo adjudication of the creditor's proof, and that the alleging creditor is entitled to rely upon additional evidence in support of its claim.*
>
> *46. The task for the Court on such an Appeal is to examine the evidence placed before it and to come to a view whether, on balance, and taking into account the merits of the claim of the creditor whose proof is being considered, the claim has been established and, if so, in what amount: see McPherson's Law of Company Liquidation, 3rd ed., paragraph 12-064.*
>
> *47. A potential creditor must provide satisfactory proof that the creditor's claim is founded on a real debt. Therefore in the absence of a potential creditor having discharged that burden and duly satisfied the Court upon a balance of probabilities no legal obligation would then arise to admit the proof of debt.*
>
> *48. Putting the matter another way, a claim which is based upon tenuous and/or inadequate proof will not succeed.*
>
> *49. In more general terms as to the issue of the standard of proof required by law in admitting or rejecting proofs of debt, it was held in Home and Colonial Insurance Company, Limited [1930] 1 Ch 102 at page 102 (vi) "that the position of a liquidator examining a proof for admission or rejection in a winding up is the same as that of a trustee in bankruptcy, as decided in Re Van Laun [1907] 2 K.B. 23."*
>
> *50. The headnote of the Van Laun case states that the trustee in bankruptcy has a "right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate"; the trustee is therefore "to require satisfactory evidence that the debt on which the proof is founded is a real debt."*
> ….
>
> *53. In conclusion, the burden is upon the identified potential creditor to satisfy the liquidator and upon appeal the Court, as to the creditor's claim."*

56. The ordinary rules of evidence and the burden of proof apply, and the Appellant is required to establish his claim on the balance of probabilities. Where the JOLs make a positive allegation in regard to any aspect of the disputed claim they will bear the burden of proof on that issue[17].

[17] *Bhatti v Wight 2003 CILR 160 at §§35-41*

Determination

General approach

57. This Appeal is a summary process which examines the affidavit evidence and the documents, without cross examination and disclosure, and is not the proper forum to determine any claims that involve contested factual questions. The JOLs do not challenge much of the Appellant's affidavit evidence.

58. Moreover, to the extent that the Appellant's intention and state of knowledge is challenged or questioned by the JOLs, those matters are principally drawn from by the Appellant's own direct evidence given on affidavit and from inferences drawn from the factual circumstances.

59. In cases where the putative employee is asserting the existence of an employment contract it will be for him to prove it and the mere production of what purports to be a written service agreement may be by itself insufficient to prove the case sought to be made[18]. Where that is challenged, the Court needs to be satisfied that the document is a true reflection of the claimed employment relationship and so it is necessary to know what the parties have done pursuant to that relationship. It would not be enough to simply produce a document, or a minute or memorandum, purporting to record an employment relationship.

60. Mr Crane for the JOLs submitted that the issue on this Appeal boils down to whether the Court will approve Appellant's actions which he argued created a massive liability in his favour against the interests of the Company and the Company's creditors, when the Company was insolvent and on the eve of the Company's insolvent liquidation.

61. It is not a question of the Court approving the Appellant's actions, but whether the Appellant has proved his employment status.

[18] *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld & Anor [2009] EWCA Civ 280 §88*

Validity of the employment contract

Consideration

62. The Court is satisfied, on balance, that the Appellant did provide services to the Company under the various iterations of his employment arrangements. There is no force in the lack of consideration argument put forward on behalf of the JOLs[19]. The Court finds that there was a mutuality of obligation and an irreducible minimum obligation on the part of the employer and employee on the facts as presented on this Appeal.

63. The Court is satisfied, on balance, that both the Adopting Agreement and the Employment Agreement are supported by consideration.

64. The Court is satisfied, on balance, that the Appellant agreed to act, or continue to act, as a director and employee of the Company under both the Adopting Agreement and the Employment Agreement and the Company agreed to employ the Appellant to pay him a salary and provide various benefits including severance.

65. The Court does not accept that by reason of the impending liquidation there was 'no reasonable prospect of the Appellant receiving any salary for the first month' as contended by the JOLs.

66. The requirement for consideration is met by a promise to render a performance under the contract, providing some value had been given for the promise[20]. The Court will not concern itself with the adequacy of the consideration.

67. Even if the Company had no funds to pay salary or other benefits at the time, as promised in the Adopting Agreement or Employment Agreement, the Appellant would have an accrued claim for the services he rendered which would also amount to consideration.

68. The Appellant's evidence is that he was confident that he would be paid in arrears once a financing was completed, which had happened when he founded Ironshore in 2008[21]. His

[19] *Smith 2 §52a*
[20] *Chitty 33rd edition 4-008 and 4-014*
[21] *Lickrish2 §20.4*

evidence is that although he did not receive any payments due to him after entering the Employment Agreement there was substantial interest from institutional investors and he was confident that he would be paid in arrears.

69. Against this evidence there is the assertion from the JOLs that the Appellant knew or ought to have known at the time he executed the Adopting Agreement and the Employment Agreement that the Company was 'hopelessly insolvent and unable to make any payments under either agreement'.

70. Having regard to the Appellant's account, which the Court finds plausible, such an assertion would only be made good by irresistible inference from all the circumstances which placed sufficient doubt on the Appellant's account.

71. The Court finds that there are no irresistible inferences that point to this conclusion and there is no force in the assertion that the Appellant knew or ought to have known that there was no realistic prospect of the Company completing a financing round. The direct evidence from the Appellant is to the contrary. The fact that the Appellant and the Company did not challenge the making of the winding up order does not, in the Court's view alter this position.

Duplicative services

72. The Court is satisfied that there were no duplicative services provided.[22]

73. The JOLs argue that because the MSA was still in place at the time of the Employment Agreement, the Appellant cannot also claim that he was providing the same services to the Company as an employee of the Company, as that would have made 'no commercial sense and seems unlikely'.

74. However, the Appellant's evidence is that Ironshore provided services to the Company under the MSA until at least early April 2022, but he was not an Ironshore employee at the time of the Adopting Agreement (8 March 2022), and therefore he could not provide any services to the Company under the MSA, which was an agreement under which only Ironshore employees provided services to the Company.

[22] *Smith 2 §52 b*

75. The Appellant's evidence is that it was the Adopting Agreement which established and governed the employment relationship between the Company and the Appellant to give the Company the necessary protections.

76. The Court accepts the Appellant's case that there was sense in the Appellant providing services to the Company at the same time as Ironshore because the Company was entitled to rely on the Appellant's services, given his institutional knowledge of the business and its assets. The Appellant's evidence sufficiently explains the work he did on behalf of the Company, that was not being provided by Ironshore under the MSA[23].

Non-compliance with Labour Act

77. The Court does not accept the JOLs case that because the Company did not provide the Appellant with a statement of working conditions under the Adopting Agreement and Employment Agreement, that renders them invalid.

78. The Court takes the view that it does not lie in the mouths of the JOLs, who stand in the shoes of the Company, to rely on any default of the Company to avoid obligations under the agreements.

79. Moreover, the only consequences for failing to comply with the relevant sections of the Labour Act[24] suggest that an offence is committed by an employer who fails to furnish a statement within seven days of being requested to do so in writing by an employee. There is no evidence that the Appellant has made such a request in this case.

Breach of fiduciary duty

80. The JOLs argue that they have 'concerns', which are not particularised, concerning the Appellant's fiduciary duties and his alleged breaches of them.

81. The argument is made that at the time the Employment Agreement was signed the Appellant knew that the Ironshore statutory demand had been served on the Company and that the Company would not be able to settle that liability.

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[23] *Lickrish 1 §24*
[24] *Sections 6 (1) and 6 (3)*

82. It is then said that the Appellant should have had regard to the Company's creditors and was aware or ought to have been aware that the Company may be insolvent and that it would not have been in the best interests of the Company to enter into the Adopting Agreement and later the Employment Agreement[25].

83. The JOLs say that the payment obligation incurred by the Company when the Appellant caused it to enter into the Employment Agreement less than six months before the Company's liquidation, would be deemed to have been made with a view of giving him a preference rendering the payment obligation voidable under section 145 of the Companies Act (2023 Revision).

84. No particularised claim for breach of fiduciary duty has been brought against the Appellant. Were such a claim to be brought it would have to be in a forum which was equipped[26] to resolve the contested factual questions which would arise.

Appellant's account

85. The Appellant's evidence is that at the time of the Adopting Agreement he did not know that Ironshore intended to seek repayment of the amounts allegedly owed to it under the MSA and that prior to the service of the statutory demand, Ironshore had not even issued an invoice to the Company. He says that because Ironshore was continuing to provide services to the Company, he would reasonably have expected that to continue.

86. At the same time the Appellant says he was carrying out valuable work advancing the Company's business interests by entering into discussions with potential partners and seeking new funding from interested qualified investors. The Appellant says there was no basis upon which he would reasonably conclude that the Company's insolvency was imminent or that it was probable that the Company would enter into an insolvent liquidation at the time he executed the Adopting Agreement on 8 March 2022.

87. Contrary to being adverse to the Company's interests or indeed its creditors interests, the Appellant says the Adopting Agreement was essential for the Company's future prospects because it needed to retain him to provide services which he had previously provided to the Company as an Ironshore employee under the MSA. That was the way in which continuity of

[25] *Sequana BTI 2014 Supreme Court and Hunt V Singh [2023] EWHC 1784 Zacaroli J*
[26] *With disclosure of relevant documents, witness evidence, and cross examination.*

his services and institutional knowledge of the Company's intellectual property research and development programmes could be provided.

88. The Appellant further points out that the employment terms adopted by the Adopting Agreement had previously been approved by a compensation committee and recommended and approved by an independent board of directors who had the benefit of legal advice.

89. He says in fact the Adopting Agreement had terms significantly more favourable to the Company than had existed between Ironshore and the Appellant under the Ironshore employment agreement, because his compensation was reset to the 2018 figure.

90. The Appellant also points to the reasonableness of the terms that were agreed for him as inventor and CEO in the context of a pharmaceutical business with proven economic value and intellectual property used in an FDA-approved drug that had generated hundreds of millions of dollars in revenue.

91. Although the Employment Agreement was executed after the service of the statutory demand, it simply confirmed the existing position and was more favourable to the Company than the Adopting Agreement under the original Ironshore Employment Agreement, which the Adopting Agreement purported to adopt.

92. The Appellant's salary was subject to an automatic escalation clause that was removed in the Employment Agreement, and the severance amount is reduced from US$12.5 million (which was the term in the Ironshore Employment Agreement) to US$6 million under the Employment Agreement.

93. The Appellant’s evidence is that a formal employment agreement was necessary to protect the Company's intellectual property rights and to ensure that the ownership of all intellectual property produced or generated by him while working on the Company's behalf would be owned by the Company.

94. The services he provided included discussions and negotiations with capital providers, research and development consultants and potential partner pharmaceutical companies to research and use the Company's drug delivery platform assets.

95. The Court accepts that this is an inherently plausible account and also is a reasonable outcome for the Appellant given his ongoing contribution to the business. The Court rejects the JOLs’

breach of fiduciary duties arguments. The Court also rejects the argument that a preference was created rendering the payment obligation voidable under section 145 of the Companies Act (2023 Revision).

96. The Court is satisfied that the Adopting Agreement and Employment Agreement are prima facie valid contracts which enabled the Appellant to be employed and to receive salary and other benefits. There is no suggestion that they were created falsely or fabricated. The test as to whether the Appellant was an employee under Ready Mix[27], namely that he agreed in consideration of a wage or other remuneration that he would provide his own work and skill in the performance of a service and he agreed expressly or impliedly that in the performance of that service he would be working for the Company and the other provisions of the contract are consistent with it being a contract of service, is clearly established.

97. The Court is satisfied that he was acting as an employee at all material times. There is consideration, services provided to the Company, and the terms of the agreement are consistent with an employment relationship.

98. The fact that the appellant was a director with a significant, but not majority or sole shareholding, does not prevent a claim succeeding against an insolvent company on the basis that he was an employee of that company[28].

99. The Appellant also gives a plausible explanation that he backdated the Employment Agreement to 2016 in order to protect the indemnity position. There is no suggestion that he has attempted to obtain any other benefits by doing so.

Voidable preference

100. As is the case with the breach of fiduciary concerns, similarly this claim has not been particularised by the JOLs and this Appeal is not the forum in which the Court could properly adjudicate such a fact dependent claim.

101. In any case there is a timing point which makes such a claim unlikely to succeed.

102. Section 99 Companies Act provides that:

[27] [1968] 2 QB 497 p 515 C
[28] *Secretary of State v Knight UK EAT 2017 §14*

> *"When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void."*

103. For section 99 to apply to the Employment Agreement, the Employment Agreement must have been entered into "after the commencement of the winding up".

104. Under section 100(2) the Company's winding up is deemed to commence "at the time of the presentation of the petition for winding up".

105. There is a good argument that although the winding up petition is dated 5 May 2022, it was not presented until 6 May 2022:

> CWR O.3, r.1(1) provides that *"[a] winding up petition shall be presented by filing it in Court…"*. Accordingly, a winding up petition is presented when it is filed.

106. Practice Direction 11 of 2020 (the Practice Direction) determines the effective time of filing on the Court's e-filing platform, the method by which the winding up petition here was filed.

107. Paragraph 11.2 of the Practice Direction provides in relevant part that:

> *"Subject to paragraph 9 above, a document to which an electronic certificate has been applied shall be deemed to be filed on the date and time that the document was submitted to the Platform …."*

108. Paragraph 9.1 of the Practice Direction states that:

> *"Any document submitted through the Platform for filing outside business hours (8:30 am to 5:00 pm Mondays to Fridays) or on a public holiday, Saturday, or Sunday, or any other period during which the Registry is closed, will be deemed filed as soon as the Registry is next open."*

109. Based on the evidence available, it appears that the winding up petition was submitted to the e-filing platform on 5 May 2022 at 5:08pm.[29]

110. The winding up petition itself shows a submitted date of 13 May 2022, but that appears to be the date when the Registry staff uploaded a copy of the winding up petition with the hearing date endorsed on it.

111. The winding up petition itself is stamped as filed on 9 May 2022, consistent with the other documents that would have been submitted alongside it such as the JOLs' consents to act and proof of payment of the filing fee.

112. The platform records a submission time of "05:08:25" on 5 May 2022 for those other documents. It is to be inferred that the winding up petition itself was submitted at the same time as those documents.

113. The Court accepts the Appellant's case that, because the winding up petition was submitted after business hours on 5 May 2022, it is not deemed to be filed under the Practice Direction until the following day, 6 May 2022, at 8:30am. That filing date and time is the time that the winding up petition was presented and accordingly is the time of commencement of the winding up.

114. The Court accepts that there is no basis for the operation of section 99 of the Companies Act to the Employment Agreement.

115. The Appellant also points out that, if the Employment Agreement is void under section 99, then the terms of the Adopting Agreement would govern the employment relationship between the Company and Mr Lickrish, including the higher Severance Amount of US$12,500,000.

116. The evidence before the Court establishes the circumstances in which those agreements were made, and the commercial motivations for having made them. The Court accepts that the Company required Mr Lickrish's continued services after Ironshore terminated his employment. Those services could only be provided under a formal employment relationship to protect the Company, and the employment contracts were made on reasonable terms.

117. Nothing put forward by the JOLs provides a legal basis upon which the Court finds that those agreements are neither valid or enforceable.

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[29] *Exhibit DL-2 [HB/7] includes at page 26 a screenshot of the e-filing portal for this case, showing certain documents and their "Submitted" and "Filed" dates and times.*

118. It follows that when the Employment Agreement was terminated on 13 July 2022, Mr Lickrish became entitled to the employment benefits which he claims. The elements of these claims are: pro-rata amount of unpaid pension obligations, calculated at 5% of his unpaid annual salary; the amount payable under the Employment Agreement for health insurance premiums for 24-months post termination of the Appellant's employment with the Company; the severance payment payable under the Employment Agreement; unpaid salary.[30]

119. The Appeal succeeds and the notice of rejection of proof of debt dated 10 May 2023 is set aside. The precise amounts are to be calculated and agreed by the parties. Although the JOLs put forward a basis for rejection of expense claims the Court does not intend to spend time and resources on the numbers and issues which may be in dispute. The parties are to work together to reach an accommodation which reflects the consequences of the findings on this Appeal and in the absence of agreement the Court will deal with any disputed matters on the basis of short written submissions of no more than 5 pages in length.

120. As to section 141 of the Companies Act (2023 Revision), the debt falls within schedule 2 as a debt due to an employee. The sum which is due to the appellant is a preferential debt under section 141 of the Companies Act (2023 Revision).

121. The Appellant is awarded costs to be paid out of the assets of the Company as an expense of the liquidation to be taxed if not agreed.

THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

[30] *The Appellant now also claims unpaid salary from 8 March to 13 July 2022.The preferential rate is to be applied from 8 March to 6 May 2022.*