[1991–92 Gib LR 74]

IN THE MATTER OF NUEVO CASTILLE LIMITED

SUPREME COURT (Kneller, C.J.): May 17th, 1991

Companies—liquidators—appointment—provisional liquidators—court's discretion to appoint provisional liquidator to be exercised judicially—applicant to show good prima facie case for winding up and appointment justified, but need not prove company insolvent or bound to be wound up or that assets at risk of dissipation

Companies—liquidators—appointment—provisional liquidators—discharge of appointment—power to set aside ex parte order to be used sparingly—appointment discharged if non-disclosure (innocent or otherwise) of matters relevant to appointment and company disputes debt on which winding-up petition based

Compulsory winding up—inability to pay debts—winding-up petition inappropriate if substantial dispute over whether alleged debt in fact owed, or whether immediate, rather than a prospective or contingent liability, unless dispute simply resolved

The applicant company applied for the discharge of the *ex parte* appointment of a provisional liquidator.

A bank petitioned for the winding up of the applicant company, a property development company, on the ground that it was indebted under the terms of a loan and was unable to pay the debt. The bank had advanced £500,000 to the company to finance the construction of properties in Portugal, and was to be repaid from the proceeds of sale or in any event at the end of three years. F Co., a shareholder in the applicant, provided a guarantee for the loan. Under an annual review provision, the bank reviewed the loan after a year and decided not to renew the facility because F Co. had gone into administrative receivership under the terms of another debenture from the bank, by which its shareholding in the company was charged. The bank called in the loan on the ground that its security had been placed in jeopardy and this constituted a breach of the terms of the loan to the applicant company. Furthermore, F Co.'s receivers informed the bank that the manager and controller of the applicant company's only asset, the Portuguese subsidiary company which owned the development land, had been declared bankrupt before the loan was even granted. The applicant company had no other means of meeting its obligations under the loan

save for the sale of the land in Portugal which was already subject to charges.

The court made an *ex parte* order appointing provisional liquidators for the company. The company applied to set it aside. It submitted that (a) neither it nor its subsidiary planned to sell the land in the immediate future, as the development project was at an early stage; (b) the debt was not due for repayment for a further two years, and there was in any event no contract between the company and the bank but only between F Co. and the bank, agreeing the terms of the loan; (c) F Co.'s guarantee was intact; (d) there had been no board meeting to approve the loan; and (e) the court would not have made the order had it been aware of these matters.

The bank submitted in reply that (a) the loan was subject to annual review even though its overall term was three years, and the company had been given an opportunity to find another guarantor to replace F Co. but had failed to do so; (b) the bank was entitled to demand payment under the loan, and if it waited three years, F Co. would probably be stripped of its assets; (c) the company had been aware of the terms of the loan although there had been no board meeting to ratify it; as the company was a holding company, the loan had been approved in management meetings rather than directors' meetings; (d) a good *prima facie* case for winding up had been made and it was right to appoint a provisional liquidator; and (e) a provisional liquidator would be made joint signatory with the subsidiary company's principal, and would not simply dispose of the Portuguese assets immediately.

Held, discharging the order:

(1) An applicant for the appointment of a provisional liquidator had first to establish a good *prima facie* case for the winding up of the company at the hearing of its petition. The court's power to appoint a provisional liquidator derived from the Companies Ordinance, s.171 and r.31 of the Companies Winding-Up Rules 1929. As was confirmed by the English authorities, the court had an unfettered discretion in the matter, but that discretion had to be exercised judicially, regardless of the consequences for the company itself. The power was not restricted to cases in which the company was clearly insolvent, or bound to be wound up or where the company's assets were at risk of dissipation, but the applicant had to show that it was right in all the circumstances to do so. The power to set aside an *ex parte* order for the appointment of a liquidator was to be used sparingly and only in plain cases, *e.g.* if there had been material non-disclosure (paras. 3–6).

(2) Winding-up proceedings were not to be used to determine a genuine dispute as to whether an alleged debt was in fact owed, or whether it was an immediate, rather than a prospective or contingent liability, unless that dispute could be simply resolved. It the debt were disputed in good faith and on substantial grounds, a winding-up petition should not be brought. The question of a company's ability to pay its debts was a factual one for the judge in winding-up proceedings, and if

the petitioner could not establish that a debt was due, the company could not be adjudged unable to pay its debts (para. 7).

(3) It was clear that the court would have directed that the bank's application be heard *inter partes* if it had been made aware of the matters now raised by the company. Among other things, it had not been shown whether the principal of the Portuguese subsidiary company could lawfully hold his directorship under the law in Portugal whilst an undischarged bankrupt under English law. Nor was it clear whether Gibraltar law permitted him to be a director of a Gibraltar company. There was no evidence that he planned to dispose of Portuguese assets which formed the company's only assets, and indeed it would be difficult for him to do so. The non-disclosure that had occurred, albeit from poor judgment rather than deceit, was sufficient to cast doubt on the necessity for the appointment of a provisional liquidator. Furthermore, the alleged debt was disputed. Further affidavit evidence would have to be submitted before the court could say the bank had made out a good *prima facie* case for winding up. The appointment of the provisional liquidator would be discharged (paras. 51–53).

Cases cited:

(1) *Becker* v. *Noel (Practice Note)*, [1971] 1 W.L.R. 803; [1971] 2 All E.R. 1248, applied.
(2) *Bloomfield* v. *Serenyi*, [1945] 2 All E.R. 646; (1945), 173 L.T. 391, applied.
(3) *Cleadon Trust Ltd., In re*, [1939] Ch. 286; [1938] 4 All E.R. 518, referred to.
(4) *Company, Re a*, [1984] 1 W.L.R. 1090; [1984] 3 All E.R. 78, applied.
(5) *Cryne* v. *Barclays Bank PLC*, [1987] BCLC 548, referred to.
(6) *Ellinger* v. *Guinness, Mahon & Co.*, [1939] 4 All E.R. 16; (1939), 83 Sol. Jo. 924, not followed.
(7) *Express Engr. Works Ltd., In re*, [1920] 1 Ch. 466; (1920), 89 L.J. Ch. 379, referred to.
(8) *Hagen, The*, [1908] P. 189; (1908), 77 L.J.P. 124, applied.
(9) *Highfield Commodities Ltd., In re*, [1985] 1 W.L.R. 149; [1984] 3 All E.R. 884, applied.
(10) *Lazard Bros & Co.* v. *Midland Bank Ltd.*, [1933] A.C. 289; (1932), 102 L.J.K.B. 191, applied.
(11) *London & Paris Banking Corp., In re* (1875), L.R. 19 Eq. 444; 23 W.R. 643, applied.
(12) *Lympne Invs. Ltd., In re*, [1972] 1 W.L.R. 523; [1972] 2 All E.R. 385, applied.
(13) *Mann* v. *Goldstein*, [1968] 1 W.L.R. 1091; [1968] 2 All E.R. 769, applied.
(14) *Morris* v. *Kanssen*, [1946] A.C. 459; [1946] 1 All E.R. 586, referred to.

(15) *Owen, Ex p., Re Anglesea Island Coal & Coke Co. (Ltd.)* (1861), 4 L.T. 684, applied.
(16) *Oxted Motor Co., In re*, [1921] 3 K.B. 32; (1921), 90 L.J.K.B. 1145, referred to.
(17) *R.* v. *Home Secy., ex p. Chinoy*, [1991] T.L.R. 189; [1991] C.O.D. 381; (1992) 4 Admin. L.R. 457; *sub nom. R.* v. *Governor of Pentonville Prison, ex p. Chinoy*, [1992] 1 All E.R. 317, applied.
(18) *Rolled Steel Prods. (Holdings) Ltd.* v. *British Steel Corp.*, [1986] Ch. 246; [1985] 3 All E.R. 52, referred to.
(19) *Stonegate Secs. Ltd.* v. *Gregory*, [1980] Ch. 576; [1980] 1 All E.R. 241, applied.
(20) *Union Accident Ins. Co. Ltd., In re*, [1972] 1 W.L.R. 640; [1972] 1 All E.R. 1105, applied.
(21) *W.E.A. Records Ltd.* v. *Visions Channel 4 Ltd.*, [1983] 1 W.L.R. 721; [1983] 2 All E.R. 589, applied.
(22) *Welsh Brick Indus. Ltd., Re*, [1946] 2 All E.R. 197, applied.
(23) *Williams & Glyn's Bank Ltd.* v. *Barnes*, [1981] Com. L.R. 205, referred to.

Legislation construed:
Companies Ordinance (1984 Edition), s.171:

> "(1) Subject to the provisions of this section, the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition.
>
> (2) The appointment of a provisional liquidator may be made at any time before the making of a winding-up order, and either the official receiver or any other fit person may be appointed.
>
> (3) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him."

Companies (Winding-up) Rules 1929 (S. R. & O. No. 612), r.131:

> "(1) After the presentation of a petition for the winding-up of a Company by the Court, upon the application of a creditor . . . and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the Court, if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment."

L.W.G.J. Culatto for the objectors;
A. Vasquez for the petitioner.

1 **KNELLER, C.J.:** The issue now before the court is whether or not the appointment of the provisional liquidator of Nuevo Castille Ltd. ("the company") should be discharged. It was made *ex parte* on January 25th, 1991 by Alcantara, A.J. and, according to the order, the provisional liquidator was empowered to take possession of and protect the assets of the company, and to carry on its business until further order. The company was given leave to apply to discharge the appointment. The

petition is to be heard on June 4th, 5th and 6th and by all accounts will be strenuously opposed.

2 The court may set aside any order made *ex parte*, under the Rules of the Supreme Court, O.32, r.6. There is no limitation to this power (see *R.* v. *Home Secy., ex p. Chinoy* (17), *per* Bingham, L.J. and McCullough, J.) The court has an inherent jurisdiction to discharge an order if it concludes the *ex parte* order was made under a misapprehension when new matters come to be placed before it (see *Becker* v. *Noel (Practice Note)* (1)). Failure to make a full and fair disclosure to the court granting the *ex parte* order of all relevant factors may be a ground for setting aside that *ex parte* order (see *The Hagen* (8) ([1908] P. at 201, *per* Farwell, L.J.); *Lazard Bros & Co.* v. *Midland Bank Ltd.* (10) ([1933] A.C. at 307) and *Bloomfield* v. *Serenyi* (2)).

3 An application to set aside an *ex parte* order is not an appeal from the judge who made it so he or another judge are not inhibited from discharging or varying the original order (see *W.E.A. Records Ltd.* v. *Visions Channel 4 Ltd*. (21), *per* Donaldson, M.R.). However, the power should be invoked very sparingly. The courts would make such an order only in very plain cases. It would be quite wrong to set aside an *ex parte* order unless the issue is very clear: see *Chinoy* (17).

4 So far as a failure to make full and frank disclosure is concerned, it may well be that the evidence on an *ex parte* application was not as strong as it became during the *inter partes* hearing of the matter. That would not be a ground for setting aside the *ex parte* order. Material non-disclosure, even by an error of judgment, would be a ground for doing so. It must be remembered that the purpose of the interlocutory hearing is to decide what is to happen in the future. When it comes to the full hearing a dispute over whether the full and frank disclosure had been made may be investigated. The learned authors of *The Supreme Court Practice 1991*, para. 32/1–6/14, at 511, doubt that for material non-disclosure to be sufficient cause for setting aside an *ex parte* order it must have amounted to an attempt to deceive the court, as Morton, J. held in *Ellinger* v. *Guinness, Mahon & Co.* (6), and I respectfully agree.

5 The power to appoint a provisional liquidator is set out in s.171 of the Companies Ordinance and r.31 of the Companies Winding-Up Rules 1929. They reflect the provisions of the equivalent section and rule in the English Bankruptcy and Winding-Up Rules, so, in the absence of any decision of the Gibraltar courts (which has not been put before me and which my researches have not so far unearthed), I will apply the principles set out in relevant decisions of the English courts, including *In re Highfield Commodities Ltd.* (9) ([1984] 3 All E.R. at 887, *per* Megarry, V.-C.); and *In re Union Accident Ins. Co. Ltd.* (20) ([1972] 1 All E.R. at 1107, *per* Plowman, J.). See *Palmer's Company Precedents*, 17th ed., Part

II, Chapter 13, at 100–101 (1960). These underline the fact that the court has to exercise an unlimited discretion save for the fact that it must be exercised judicially.

6 The need to exercise this discretion judicially outweighs any consequences that it might have for the company. The same decisions emphasize that first of all the applicant for the appointment of a provisional liquidator must make out a good *prima facie* case for the winding up to be made at the hearing of the petition. Then, if it succeeds in passing that test, it must persuade the court that it is right in the circumstances to appoint a provisional liquidator before the hearing of the petition and the order of winding up is made. The power to appoint a provisional liquidator is not restricted to cases where the company is obviously insolvent, or where it is otherwise clear that it is bound to be wound up, or where the company's assets were in jeopardy, or where it was in the public interest to make such an appointment.

7 Winding-up proceedings are not suitable proceedings in which to determine a genuine dispute as to whether the company owes the sum in question, or to determine whether that liability is an immediate liability or only a prospective or contingent one, unless the point is simple and straight-forward. It is not a legitimate means of seeking to enforce payment of a debt which is disputed in good faith and on substantial grounds: see *Re Welsh Brick Indus. Ltd.* (22) ([1946] 2 All E.R. at 198); and *Stonegate Secs. Ltd.* v. *Gregory* (19) ([1980] 1 All E.R. at 243).

8 Until a creditor is established as a creditor, he is not entitled to present the petition and has no *locus standi*: see *Mann* v. *Goldstein* (13) ([1968] 2 All E.R. at 775); and *In re Lympne Invs. Ltd.* (12).

9 The ability or the inability to pay debts is a question of fact for the judge: see *Re Welsh Brick Indus. Ltd.* (*ibid.* at 199, *per* Lord Greene, M.R.). A company should not be considered to be unable to pay its debts because it has not paid a debt which it disputes and which the creditor has not established in due course of law: see Holroyd, Commr. in *Ex p. Owen, Re Anglesea Island Coal & Coke Co. (Ltd.)* (15); *In re London & Paris Banking Corp.* (11) (L.R. 19 Eq. at 445–446); *In re Lympne Invs. Ltd.* (12); and *Re a Company* (4) ([1984] 3 All E.R. at 81).

10 The petitioner must be in a position to make a genuine demand for a specified sum. The creditor must be able to point to a debt of a specified sum that cannot be seriously questioned as to its existence or quantum. It will make no difference if, by inadvertence, he specifies the sum wrongly in a statutory demand: see *Re a Company* (*ibid.*, at 82).

11 Only a resolution passed at a meeting of the company can be regarded as an act of the company itself. There are exceptions to this, including a resolution of all the shareholders at an informal meeting (see

In re Express Engr. Works Ltd. (7)) and the normal length of notice of the meeting being waived by all members at informal meeting (see *In re Oxted Motor Co.* (16)). The principle is that the veil is lifted to equate the decision of members with the decision of the company itself.

12 Money lent is repayable without demand, or at latest on demand, unless the lender expressly or impliedly agrees otherwise. Whether or not a bank, by a facility letter, agrees otherwise is a question that will be decided by reading the facility letter as a whole in order to find out what the intention of the parties was concerning repayment: see *Williams & Glyn's Bank Ltd.* v. *Barnes* (23); and *Cryne* v. *Barclays Bank PLC* (5).

13 Persons dealing with the company are bound to make themselves acquainted with the memorandum and articles of association. They are not bound to do more. Persons contracting with the company, in dealing in good faith, may assume that acts within its constitution and powers have been properly and duly performed and are not bound to enquire whether acts of internal management have been regular. The wheels of business would not go smoothly round unless it could be assumed that that was in order which appeared to be in order: see *Morris* v. *Kanssen* (14) ([1946] A.C. at 474–475, *per* Lord Simonds).

14 This is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. The rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it has been put upon his enquiry. He cannot presume in his own favour that things are rightly done if the enquiry that he ought to make would tell him that they were wrongly done. If a person has notice of the irregularity he cannot rely on it, so the maxim has its proper limits.

15 The very nature of the proposed transaction may put a person upon enquiry as to the authority of the persons to effect it, *e.g.* the directors of the company, even if he has no special relationship with the company. Whether or not he is put on enquiry depends on all the particular circumstances: see *Rolled Steel Prods. (Holdings) Ltd.* v. *British Steel Corp.* (18) ([1986] Ch. at 284–285, *per* Slade, L.J.).

16 As an artificial person, a company can only act by duly authorized agents. Apart from questions of ostensible authority, directors, like any other agents, can only bind the company by acts done in accordance with the formal requirements of their agency, *e.g.* by a resolution of the board at a properly constituted meeting. Acts done otherwise than in accordance with these formal requirements would not be the acts of the company. However, the principles of ostensible authority apply to the acts of the directors acting as agents of the company. So a third party dealing in good faith with directors is entitled to assume that the internal steps requisite

for the formal validity of the directors' acts have been carried through. If, however, the third party has actual or constructive notice that such steps had not been taken, he will not be able to rely on any ostensible authority, and their acts, being in excess of their actual authority, will not be the acts of the company: see *Rolled Steel Prods. (Holdings) Ltd.* v. *British Steel Corp.* (*ibid.*, at 304, *per* Browne-Wilkinson, L.J.).

17 Where a company has knowledge of a loan granted to it, and acquiesced in it and/or took the benefit of it, although there may have been irregularities, by implication it is held to have contracted to repay the loan to the lender: see *In re Cleadon Trust Ltd.* (3).

18 Those are some of the matters of law canvassed in the interlocutory hearing on the question of whether the *ex parte* appointment of the provisional liquidator should be discharged. It is time to see on what material the *ex parte* appointment was made.

19 There was an affidavit of December 27th, 1990 of Mr. Bradshaw, the senior corporate manager of Barclays Bank PLC, Guernsey, and an affidavit dated December 19th, 1990 of Mr. Harris, who used to be a director of Federated Homes Ltd. Between them they allege that Nuevo Castille Ltd. is a company registered in Gibraltar, with its registered office at 3 Bell Lane, and it is necessary that a provisional liquidator be appointed in order to protect the assets in Nuevo Castille's possession or under its control.

20 A company search shows that it was incorporated on November 16th, 1988 and that the subscribers were L & I Nominees Ltd. and L & I Management Ltd. Its main objects are to carry on business as estate agents, property developers, civil construction engineers, and building and electrical contractors. Shares were allotted to Portfolio Properties Ltd., a Gibraltar company, the trustees of the Ongley Family Trust of Guernsey, and Federated Homes Ltd., an English company. The directors of Nuevo Castille are Mrs. Harnanji of Gibraltar, Mr. Hilton and Mr. Grant of Guernsey, and Mr. Bell, Mr. Richard, Mr. Vosper of England. Past directors included Mrs. Isola of Gibraltar and Mr. Harris, the deponent of the other affidavit.

21 Nuevo Castille is said to be indebted to Barclays Bank in the amount of £428,108.50, which arises out of an advance made by Barclays Bank according to the terms of a facility letter of June 7th, 1989. Barclays Bank agreed to advance to Nuevo Castille the sum of £500,000 to assist Nuevo Castille with a leisure property development in Portugal. The loan was for a term of three years but subject to annual review on the part of Barclays Bank, and was to be repaid from the proceeds of a sale of the properties to be constructed in Portugal or by a bullet repayment at the end of the three years. The only security provided to Barclays Bank in consideration of

the advance was a bank guarantee for that sum given by Federated Homes Ltd. ("Federated"). Federated is a shareholder in Nuevo Castille.

22 Under the terms of the facility letter, in the event of, among other things, a breach in the performance of any other term or condition of the loan, or any security held by Barclays Bank PLC, the whole of the outstanding loan and all accrued interest and any other amounts owing under the facility letter would become repayable forthwith on demand in writing made by Barclays Bank at any time.

23 Round about June 21st, 1990, which was the anniversary of the date of the advance, Barclays Bank, in accordance with the terms of the facility letter, reviewed the loan and decided it was not prepared to renew it because Federated had been put into administrative receivership on May 14th, 1990. The only security had been put in jeopardy by the appointment of the receivers, and that was an event of default under the terms of the facility letter.

24 Barclays sent a letter of demand dated November 15th, 1990 to Nuevo Castille and the loan had not been repaid to Barclays Bank. Moreover, the receivers of Federated had become aware of certain information which they passed on to Barclays. The consequence was that unless a provisional liquidator was appointed to protect the assets of Nuevo Castille, the creditors of Nuevo Castille, and in particular Barclays Bank, would be prejudiced in the period before the winding up could be heard and a liquidator appointed.

25 These matters were specified. Nuevo Castille's only asset is a subsidiary in Portugal which owns the land. This is managed and controlled by Mr. Topham, a director of it. He is a signatory to the bank account of the subsidiary and he is in full control of it as owner of the land. The subsidiary is known as Quinto das Furnas/Alcaria-Investimos Turisticos Lda. (Portugal) ("QDF"). On August 15th, 1988 Mr. Bradery was appointed trustee in the bankruptcy of Mr. Topham's estate in England. Mr. Topham never declared to either Federated or Mr. Ongley that he was a bankrupt. As an undischarged bankrupt he should not be director of any company and should not be the person who has full control of the only asset of Nuevo Castille.

26 If the land in Portugal, also the only asset of QDF, were sold and the proceeds applied in some manner which defeated the interests of the creditors, Nuevo Castille had no other funds to satisfy the creditors. QDF had executed charges over the land in Portugal. Federated was in receivership. The chargees of that land might foreclose on the property, forcing a sale at a reduced price. No voluntary arrangement was in force or proposed for Nuevo Castille, an administrator or an administrative receiver had not been appointed, and no liquidator had been appointed for the voluntary liquidation of Nuevo Castille.

27 How did this all come about and how are all these people and companies inter-related? Mr. Harris provides the answers, or some of them, in his affidavit. Federated was a house building company in the south-east of England. It was on the lookout for a project on the Continent because there was a Portuguese bank that might be willing to provide financial support. Federated was not to provide extensive resources to monitor design, management accounts or marketing in Portugal or in the United Kingdom.

28 Mr. Clive Ongley was the principal of Glenbran PLC, a development company in south-east London. Mr. Topham wanted a partner to participate in the development of about 100 acres of land which he had secured under options in the western Algarve. He had obtained planning permission for the first phase of the development and had started work on the site. He was looking for partners willing to invest capital in return for an equity share in the development. He wanted to keep a significant share himself. So it was suggested that Mr. Ongley would look after the design, cost estimates, budgeting and sales in Portugal and in the United Kingdom; Mr. Topham would direct the management of the project; and Federated would not be asked to do anything more except keep an eye on matters in its own interest.

29 There were visits to the land in Portugal on November 6th, 7th and 8th, 1988. Mr. Harris was prepared to recommend that Federated participated in a joint venture to promote and develop the land. Later that same month, a meeting was held between Mr. Topham, Mr. Ongley and Mr. Harris to agree the basis of the joint venture, and they drew up a shareholders' agreement which was executed on May 5th, 1989. Mr. Topham would retain 40% of the equity in the new joint venture company; Mr. Ongley would invest new loan capital in it and have a 25% share in it; and Federated would put new loan capital into the new company and hold 35% of the equity.

30 After several meetings, there was an engrossed partnership agreement prepared in the name of Nuevo Castille Ltd., a company formed and registered in Gibraltar. Mr. Ongley and Mr. Topham's interests were best served by dry offshore representation. Mr. Topham had a company registered in Gibraltar called Portfolio and Mr. Ongley had his interest registered in Guernsey as the Trustees of the Ongley estate. Benefits arising from this project would be free of UK income tax and available for further investment in other projects overseas.

31 No money was raised from other sources, so in order to salvage the project Mr. Bell, the Finance Director of Federated Homes, in conjunction with Mr. C. Ongley, negotiated a loan from Barclays Bank, Guernsey for this amount of £500,000. It was offered to Nuevo Castille but it had to be guaranteed by Federated's own bankers, Barclays, Sutton,

as security. In return, Federated agreed not to draw finance on its commercial property at Newport Pagnall, which was already charged to Barclays, Sutton. Federated bore an unreasonable proportion of the risk for the project. It was out of all proportion to the original intention and the respective shareholdings in the joint venture company.

32 By September 1989, Federated concluded that the land should be sold to realize the investment or avoid the necessity for further risk capital. Mr. Ongley and Mr. Topham disagreed. Later they agreed to grant Federated rights under a deed poll of November 3rd, 1989, wherein Federated would have the right to dispose of the land, provided that the Ongley Trustees and portfolio were paid a value for their shareholding equivalent to the loan capital they had provided. The deed poll expired on November 3rd, 1990 and during that year no prospective purchaser was identified. The life of the development depended on more funds being invested by the shareholders or further funds being borrowed from the banks, but Nuevo Castille could not sell an unfinished development and so it could not raise income to allow it to continue the development.

33 Meanwhile Federated was in financial trouble and on May 14th, 1990 Federated was placed in administrative receivership under the provisions of a debenture held over certain assets of the company by Barclays Bank. The debenture included the shareholding held by Federated in Nuevo Castille Ltd.

34 Mr. Topham never disclosed that he was declared personally bankrupt in June 1988 and was still registered as an undischarged bankrupt. If he had done so, Federated would probably not have entered into the joint venture.

35 On all that, the learned judge exercising his discretion made an *ex parte* order for the appointment of a provisional liquidator. Why, then, do the objectors say that the appointment should be discharged? I will now briefly set out those objections.

36 There is no evidence that Nuevo Castille or QDF will sell the land. It would not make economic sense to do so at the moment. Planning permission was still needed, the market had fallen, and it was impossible to sell an unfinished development. They would never recover the money that was invested.

37 The debt was vehemently disputed. The objectors say that the debt was not even due for repayment yet. It was due for repayment in June 1992 because the facility letter was a term loan and could not be shortened without the consent of the borrower. In any event, the facility letter and its terms had not been agreed to by the company, Portfolio or Ongley, but only by Federated.

38 Barclays Bank had Federated's guarantee still and Barclays, Guernsey also had a guarantee from Barclays, Sutton. In fact, the amount said to be due had already been passed by Barclays, Sutton to Barclays, Guernsey, and put into a suspense account. The directors of the company, Mrs. Harnanji and Mr. Vosper, had never heard of the facility letter or the loan or its details. Mr. Topham of Portfolio and Mr. Ongley of the Trustees declare they had not approved the loan nor had their companies. They did not know the details of the facility letter. They suggested that the repayment of the loan was the responsibility of Federated, since it had probably been made to Federated so that it could fund Nuevo Castille. There was no contract between Nuevo Castille and Barclays. The statements of the loans were not sent to the registered offices of Nuevo Castille by Barclays, Guernsey but instead to the registered offices of Federated in Leatherhead, Surrey.

39 No properly constituted board had met to approve of the loan or ratify it. No notice of the meeting had been sent to Nuevo Castille. There had to be representatives of the A, B and C group shareholders which were Portfolio, the Trustees and Federated, respectively, at directors' meetings. These meetings could have been held by telephone, according to the Articles.

40 There was no need for a deed poll in return for a £200,000 injection of capital if the loan by Barclays was to Nuevo Castille because there was still plenty in the Barclays loan to Nuevo Castille which could be drawn down on November 3rd, 1990. The demand letter was incorrect because it was made on the basis of a sum said to be due on the current account when in fact, if it was due on any account (which was denied), it would be due on the loan account.

41 These matters and more were said to have been kept from the attention of Alcantara, A.J. It was submitted that had he known of these points he would certainly not have made an *ex parte* order for the appointment of a provisional liquidator.

42 The reply of counsel for the petitioner was, in short, that the facility letter is the agreement for the borrowing. It is not a simple three-year term loan but a three-year term loan subject to an annual review on the part of the bank, and not the bank and anyone else. Each year the bank would look at the loan and ask itself: "Do we want to continue this loan?" On the first annual review in June 1990, Federated had been put into receivership, so there was no security for the loan; there were no more drawings on the loan account allowed after March 1990; the deed poll which was Federated's attempt to sell the assets of Nuevo Castille expired in November; and the demand letter closely followed it. Nuevo Castille was given time to arrange for another guarantor or to find some other finance. It failed to do so.

43 The bank's commitment to advance the loan or the balance ceased and the whole of the outstanding loan and interest was repayable forthwith. It did not have to wait for three years to pass, and if it had Federated would have been stripped of all its assets by then. It admitted that there was a mistake in the demand note when the current account and not the loan account was referred to but Nuevo Castille knew of the loan. The company only had two accounts with Barclays, and Nuevo Castille knew which one it concerned. The existence and the quantum of debt was quite clear.

44 Barclays Bank admitted that their notice convening the meeting to approve of the facility terms had been sent out and that there was no quorum for the meeting itself. The fact was, however, that Nuevo Castille was merely a holding company and that the principals controlled it by management meetings and not by directors' meetings. This was in consequence of the terms of cl. 6 of the shareholders' agreement of May 5th, 1989. Nuevo Castille had delegated management to Mr. Topham, Mr. Ongley and Mr. Harris. Nuevo Castille had never held any board meetings except the first one. Mr. Topham, Mr. Ongley and Mr. Harris had arranged for the loan and used it. It did not lie in the mouth of Nuevo Castille to say they knew nothing about it. Mr. Harris knew all about it and so did Mr. Ongley and Mr. Topham, and thus it was that Nuevo Castille owed this debt.

45 Articles 6 and 7 of the Articles of Association provided that actions taken by directors or members could bind the company.

46 Then counsel for the bank referred to matters in the affidavits of Mr. Bradshaw and Mr. Harris which had been filed after the application for the discharge of the provisional liquidators had been made. These included the fact that Mr. Bradshaw claimed that on April 11th, 1989 he met Mr. Topham, Mr. Ongley and Mr. Bell (for Federated) in Guernsey, and they discussed the loan. The last three gentlemen are principals of Nuevo Castille. It was decided that Federated would guarantee the loan. Mr. Topham and Mr. Ongley did not want to appear as signatories for Nuevo Castille, the Gibraltar company, so it was agreed that two officers of Federated would be signatories of the loan account and they would hold management meetings. They were to keep Mr. Topham and Mr. Ongley informed, or so Mr. Bradshaw thought. That is why the bank sent all correspondence and statements relating to Nuevo Castille's accounts to Federated's address in Surrey. There was nothing untoward in that. The court should notice that this had not been touched upon by Mr. Topham or Mr. Ongley, and that there was no denial that there had been such a meeting.

47 The minutes of other management meetings, such as those of May 24th, 1990, when Mr. Harris, Mr. Bell, Mr. Ongley and Mr. Topham were

present, showed that the Barclays, Guernsey £500,000 loan was approved and that it was a three-year one, subject to annual review. It was to be to Nuevo Castille, but it was secured on the property owned by Federated. Barclays, in turn, was to hold the share certificates of Nuevo Castille, and its property title deeds would be lodged with Barclays in the Algarve. The deed poll was described as a way around the shareholders' agreement.

48 The fact was, continued counsel for the petitioner, Nuevo Castille did not have £450,000 in any account with Barclays or any other bank. There had been no *mala fides* in not putting this before Alcantara, A.J. Barclays never thought Mr. Ongley and Mr. Topham would dispute the loan and Nuevo Castille's liability to repay it now. The guarantee given by Barclays, Sutton to Barclays, Guernsey had not been concealed from Alcantara, A.J. and, in any event, was not relevant to the Barclays loan to Nuevo Castille. Nuevo Castille in fact had no assets except the land in Portugal. The provisional liquidator was not going to appear in Portugal and start disposing of the assets. All he was going to do was to apply to be made a joint signatory with Mr. Topham for all the dealings of QDF, and there need be no publicity for that.

49 The two tests had been passed by Barclays, namely, that it had made out a good *prima facie* case for winding up at the hearing of the petition, and that being so, it was right in the circumstances, to appoint a provisional liquidator.

50 Considering the case for each side together as a whole, it seems to me that it is very clear that had all those matters been put before the learned judge, he would probably have refused to make an *ex parte* order and instead directed that the matter should be heard *inter partes*. The law in Portugal as to whether or not Mr. Topham can be a director of a Portuguese company such as QDF when he is an undischarged bankrupt according to the findings of an English court is not clear. Nor is it clear yet, under Gibraltar law, whether he can be a director of a Gibraltar company. There is no evidence to suggest that he is going to dispose of the assets of QDF, which are the only assets of Nuevo Castille. It would seem, on what has been put before this court, that it would be very difficult for him to do so.

51 The present situation is that I cannot, in law, find that this alleged debt is not a disputed one, and I cannot say now quite clearly that this debt is owing. Further affidavits may be filed, I am told.

52 There has been some material non-disclosure—not in an attempt to deceive the court, but probably by an error of judgment. There has been the denial of any knowledge of the facility letter and the failure of the board of directors to approve of the loan at a properly constituted meeting of the directors. The effect of all that is something that will have to be

decided before this court can say that Barclays made out a good *prima facie* case that Nuevo Castille should be wound up at the hearing of the petition. As it is, at this stage, it would not seem to be right in the circumstances for the *ex parte* appointment of the provisional liquidator to stand.

53 Consequently, the power to discharge the original order must be exercised and the application will be granted. The appointment of Richard Hoover as provisional liquidator by an *ex parte* order dated January 25th, 1991 is hereby discharged. The costs of and occasioned by the application are reserved.

Order accordingly.