[2022 Gib LR 141]

IN THE MATTER OF INSPIRATO FUND No. 2 PCC LIMITED (Cells E, F & G in cell administration)

KNIGHT v. WILD (in her capacity as cell administrator of Cells E, F & G of INSPIRATO FUND No. 2 PCC LIMITED)

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): May 31st, 2022

2022/GCA/08

Companies—protected cell companies—administration—under Protected Cell Companies Act 2001, s.26(3)(c) court may make orders relating to exercise of cell administrator's functions and powers conferred by s.26(1)(a) and (b), which include in s.26(1)(a) doing all such things as might be necessary for purpose for which administration order made—on cell administrator's application, court may order examination of company director

An administrator applied for an order under s.26 of the Protected Cell Companies Act 2001.

The respondent was the administrator of three cells of Inspirato Fund No. 2 PCC Ltd., a company incorporated in 2011 under the former Companies Act 1930 but governed by the Protected Cell Companies Act 2001 ("the PCC Act"). The company itself was not in administration but the three cells entered into administration by a Supreme Court order in 2021.

The respondent decided that, in order to progress the administration, she required the provision of information and documents by the appellant, a director of the company. She applied in the Supreme Court for an order under s.26 of the PCC Act for (i) his private examination under oath before the Supreme Court; and (ii) the production by him of specified classes of documents two weeks in advance. The appellant opposed the application, claiming that he had been given insufficient time to respond to it and asserting that the Supreme Court did not have jurisdiction to order any such examination.

In the Supreme Court, Restano, J. held that s.26(3)(c) of the PCC Act empowered the court to order an examination of the type the respondent sought. Provided that the court was satisfied that such an examination was required for the furtherance of the cell administration order, the court had jurisdiction under s.26(3)(c) to order such an examination. The judge gave

directions for a further hearing to consider whether and if so how the jurisdiction should be exercised in this case.

Relevant provisions of the PCC Act provided:

"24. . . .

(4) The purposes for which an administration order may be made are—

(a) the survival as a going concern of the cell or (as the case may be) of the company;

(b) the more advantageous realisation of the business and assets of or attributable to the cell or (as the case may be) the business and assets of the company than would be achieved by a receivership of the cell or (as the case may be) by the liquidation of the company."

"26.(1) The administrator of a cell of a protected cell company—

(a) may do all such things as may be necessary for the purpose set out in section 24(4) for which the administration order was made; and

(b) shall have all the functions and powers of the directors in respect of the business and cellular assets of or attributable to the cell.

. . .

(3) The administrator may at any time apply to the Court—

. . .

(c) for an order as to any matter arising in the course of his administration."

The appellant was granted leave to appeal on the grounds that (1) the judge had misinterpreted s.26(3)(c); and (2) the judge was wrong to order the requested examination because the respondent had no power or right to examine the appellant under oath, nor therefore did the court have any jurisdiction to order the holding of such an examination. The appellant's oral argument was devoted to Ground 2. The appellant submitted *inter alia* that (a) in contrast to the rights and powers expressly conferred by statute on other office holders (including liquidators and general administrators), an administrator of a cell company or of its cells ("a cell administrator") had no like statutory right or power to examine anyone under oath, which the judge correctly recognized; (b) that apparently deliberate gap in a cell administrator's powers could not be filled by an order of the court under s.26(3)(c) because the jurisdiction thereunder extended no further than (i) making orders giving effect to such powers, rights and duties as the cell administrator had (*i.e.* those under s.26(1)); and (ii) making orders relating to matters arising in the course of the administration (*e.g.* as to any question of priorities or as to the cell administrator's remuneration); and (c) the PCC Act's omission to entitle a cell administrator to the benefit of an express statutory power of examination was fatal to the respondent's application.

The respondent submitted *inter alia* that (a) the judge was correct to interpret the PCC Act by reference to its own terms rather than by comparison with other statutes; and (b) s.26(3)(c) of the PCC Act enabled

the court to make the orders in furtherance of the administration, which was what the judge did.

Held, dismissing the appeal (Elias, J.A. dissenting):

Section 26(3)(c) of the PCC Act conferred a jurisdiction on the court to make orders relating to the exercise of an administrator's functions and powers. That meant, in the case of an administrator of one or more cells, the functions and powers conferred by s.26(1)(a) and (b) of the Act. Those functions and powers included, *inter alia*, doing "all such things as may be necessary for the purpose . . . for which the administration order was made" (s.26(1)(a)). In the present case, the respondent deposed that the holding of a private examination of the appellant in court was necessary for the purpose of the cell administration. On the premise that she was right, it appeared to the court that, contrary to the appellant's position, the language of s.26(1)(a) showed that the holding of such an examination fell within her powers and rights. Inquiries by an administrator of those formerly concerned in the management of a company were likely to be necessary in many if not most administrations. The court rejected the submission that the wording of s.26(1)(a) was too general to empower and entitle the administrator in this way. The wording was indeed general, but it had to be so. It could not have been cast in more specific terms. There was no difficulty in the interpretation and operation of s.26(1)(a). In any question that might arise as to whether any "thing" the administrator had done or wished to do was within the s.26(1)(a) powers, the only question was whether it was "necessary" for the s.24(4) purpose of the administration order. That was a question of fact or evaluation of the type with which courts were familiar. The court did not accept that the suggested extraordinary nature of the examination sought by the respondent was a feature telling against the court having the jurisdiction to order it. Although the court's approach was different from that of the judge, the judge's decision was correct and the appellant's appeal would be dismissed (paras. 35–50).

Cases cited:

(1) *British & Commonwealth Holdings plc*, *In re*, [1993] A.C. 426; [1992] 3 W.L.R. 853; [1992] 4 All E.R. 876, referred to.

(2) *R. (Simms)* v. *Home Secy*., [2000] 2 A.C. 115; [1999] 3 W.L.R. 328; [1999] 3 All E.R. 400, referred to.

(3) *Rolls Razor Ltd. (No. 2)*, *In re*, [1970] Ch. 576, considered.

Legislation construed:

Protected Cell Companies Act 2001 (as amended), s.4: The relevant terms of this section are set out at para. 2.

s.24: The relevant terms of this section are set out at paras. 8 and 9.

s.26: The relevant terms of this section are set out at para. 10.

Protected Cell Companies Act 2001 (as enacted), s.3(3): The relevant terms of this subsection are set out at para. 18.
s.19(3): The relevant terms of this subsection are set out at para. 46.

Companies Act 1930, s.241(2)(h): The relevant terms of this provision are set out at para. 62.
s.242: The relevant terms of this section are set out at para. 19.
s.262: The relevant terms of this section are set out at para. 20.

Insolvency Act 2011, s.2(1): The relevant terms of this subsection are set out at para. 72.

Insolvency Act 1986 (c.45), s.2(1): The relevant terms of this subsection are set out at para. 26.
s.14(1): The relevant terms of this subsection are set out at para. 43.
s.71(1): The relevant terms of this subsection are set out at para. 31.
s.235: The relevant terms of this section are set out at para. 23.
s.245: The relevant terms of this section are set out at para. 28.

D. Feetham, *Q.C.* and *R. Pennington-Benton* (instructed by Hassans) for the appellant;
W. Buck and *A. Rose* (instructed by Ince) for the respondent.

1 **RIMER, J.A.:**

Introduction

This appeal is against the decision of Restano, J. in a dispute arising in the administration of cells E, F and G of Inspirato Fund No. 2 PCC Ltd. ("the company"). The company is a "protected cell company" incorporated in 2011 under the former Companies Act 1930 but governed by the Protected Cell Companies Act 2001 ("the PCC Act"). The company itself is not in administration, only the three cells are. They entered into administration by a Supreme Court order of June 9th, 2021. Their cell administrator is Joanne Wild. She is the respondent to the appeal. The appellant, Steven Knight, is a director of the company.

2 By way of any required introduction to protected cell companies, s.4 of the PCC Act empowers such a company to "create one or more cells for the purpose of segregating and protecting cellular assets in the manner provided by this Act." The cells in this case were created in December 2014. Any cell so created is not a legal person separate from the company, but it is of the essence of a cell that its assets (known as "cellular assets") are required to be kept separate, and separately identifiable, both from the cellular assets of other cells and the company's "non-cellular assets." At a risk of over-simplification, the general rule is that liabilities attributable to a particular cell must be met primarily out of its cellular assets and, secondarily, out of the company's non-cellular assets; they cannot be met out of the cellular assets of other cells (ss. 6, 7 and 13 of the PCC Act).

Cellular assets therefore enjoy an element of ring-fencing. A protected cell company may, in respect of any of its cells, create and issue cell shares. For the purposes of the appeal, it is unnecessary to explain the scheme of cell companies and their cells more fully.

3 Ms. Wild decided that, in order to progress the administration, she required the provision of information and documents by Mr. Knight. To that end, on November 17th, 2021 she issued an application in the Supreme Court for an order under s.26 of the PCC Act for (i) his private examination under oath before the Supreme Court, and (ii) the production by him of specified classes of documents two weeks in advance. She explained in her supporting affidavit of November 16th, 2021 why she regarded such an examination as necessary for the purposes of the cell administration.

4 Mr. Knight opposed the application. He said he had been given insufficient time to respond to it. He also asserted that the Supreme Court anyway had no jurisdiction to order any such examination. In view of time constraints, the parties confined their arguments in the first instance to the potentially decisive issue as to the court's jurisdiction to order the type of examination for which Ms. Wild was applying. If it were to decide that in Ms. Wild's favour, there would be a further hearing to determine whether, on the facts, the court ought to order such an examination and, if yes, the terms on which it should be conducted.

5 By his reserved judgment of December 13th, 2021, Restano, J. found in favour of Ms. Wild on the issue of jurisdiction. He held that s.26(3)(c) of the PCC Act empowered the court to order an examination of the type for which Ms. Wild was applying. His order of the same date did not, as it should have done, include a declaration as to the jurisdiction he so held the court to have, but merely gave directions for a further hearing to be devoted to the questions whether and, if so, how the jurisdiction should be exercised in this case.

6 Restano, J. refused Mr. Knight leave to appeal but on January 21st, 2022 Mr. Justice Dudley, the Chief Justice, granted him leave on two of his three grounds but refused leave on the third. We had a full and helpful oral argument from Mr. Feetham, Q.C. for Mr. Knight in support of the appeal and a succinct response from Mr. Buck for Ms. Wild in answer to it.

7 Mr. Feetham's skeleton argument opened by asserting that the statements and affidavits in the record of appeal are irrelevant to the question raised by the appeal, which is one of statutory interpretation. Mr. Buck, in his skeleton argument, disagreed that the facts are irrelevant. He observed that the appeal, like all appeals, does not arise in a vacuum and that context is important. In principle, I agree with Mr. Buck. In this case, however, the facts that Ms. Wild asserted in support of her bid for her examination order were unanswered by Mr. Knight at the time of the hearing before the judge, who approached the question of jurisdiction as a

question of general principle. In the circumstances, I do not at this stage propose to say more about the facts asserted by Ms. Wild, beyond repeating that her case was that the court did have the claimed jurisdiction *if*, as she claimed, such an examination was required or necessary for the progress of the purpose of the administration order, which in this case was the survival of the cells as a going concern.

The appointment of an administrator under the PCC Act

8 Part III of the PCC Act, headed "Administration Orders," provides for the making of an administration order in relation to protected cell companies or their cells. The criteria for making such an order are in s.24(1). They require the court: (i) to be satisfied as to (in short) the likely insolvency of a particular cell or (as the case may be) of the company; and (ii) that it "considers that the making of an order under this section may achieve one of the purposes set out in subsection (4)," in which event it may make an administration order in respect of that cell or (as the case may be) the company. As originally enacted, s.24 further provided materially:

> "(2) An administration order may be made in respect of one or more cells.
>
> (3) An administration order is an order directing that, during the period for which the order is in force, the business and assets of or attributable to the cell or, as the case may be, the business and assets of the company, shall be managed by a person (an 'administrator') appointed for the purpose by the Court.
>
> (4) The purposes for which an administration order may be made are—
>
> (a) the survival as a going concern of the cell or (as the case may be) of the company;
>
> (b) the more advantageous realisation of the business and assets of or attributable to the cell or (as the case may be) the business and assets of the company than would be achieved by a receivership of the cell or (as the case may be) by the liquidation of the company."

9 Following the enactment of the Insolvency Act 2011, a new subs. (3A) was added to s.24, providing that the court "shall not appoint a person as administrator under an administration order unless the person is a licensed insolvency practitioner"; and subs. (4)(b) was amended to provide as follows:

> "(b) the more advantageous realisation of the business and assets of or attributable to the cell or (as the case may be) the business and assets of the company than would be achieved by a cell

liquidation or (as the case may be) by the liquidation of the company."

10 At the heart of the argument is s.26, headed "Functions of administrator and effect of administration order." Section 26 (which remained unchanged following the Insolvency Act) provides materially as follows (my quotation includes all the provisions relating to the "Functions of [an] administrator"):

"26.(1) The administrator of a cell of a protected cell company—

(a) may do all such things as may be necessary for the purpose set out in section 24(4) for which the administration order was made; and

(b) shall have all the functions and powers of the directors in respect of the business and cellular assets of or attributable to the cell.

(2) The administrator of a protected cell company—

(a) may do all such things as may be necessary for the purpose set out in section 24(4) for which the administration order was made; and

(b) shall have all the functions and powers of the directors in respect of the business and assets of the company, including its cells.

(3) The administrator may at any time apply to the Court—

(a) for directions as to the extent or exercise of any function or power;

(b) for the administration order to be discharged or varied; or

(c) for an order as to any matter arising in the course of his administration.

(4) In exercising his functions and powers the administrator is deemed to act as the agent of the protected cell company . . .

(7) During the period of operation of an administration order—

(a) in respect of a cell of a protected cell company—

(i) the functions and powers of the directors shall cease in respect of the business and cellular assets of or attributable to the cell; and

(ii) the administrator shall be deemed a director of the company in respect of the company's non-cellular assets, unless there are no creditors of the company in respect of that cell entitled to have recourse to the non-cellular assets;

(b) in respect of a protected cell company, the functions and powers of the directors shall cease."

The judge's decision

11 In what follows, my references to "general administrators" are to administrators *other* than administrators of protected cell companies or of their cells; that is to say, to administrators of companies appointed under the Insolvency Act 2011. Ms. Wild accepted before the judge that, in contrast with the powers statutorily enjoyed by office-holders under other types of corporate insolvency regime (including by general administrators), an administrator of a cell company or of its cells has the benefit of no like express statutory power entitling him to require any person to attend before him to be examined on oath or affirmation. Her case was, however, that that statutory difference was no obstacle in her path. That was because, she said, the jurisdiction conferred on the court by s.26(3)(c) of the PCC Act enabled it to order such an examination if it was necessary to further the s.24(4) purposes of the cell administration order.

12 Mr. Knight's counter argument was that this involved a mistaken interpretation of s.26(3)(c). In contrast with the statutory right to hold a private examination enjoyed by general administrators, the legislature had decided against including in the PCC Act any express statutory right entitling the administrator of a cell company or its cells to conduct a like examination, let alone one in court; and s.26(3)(c) could not be invoked as a provision enabling the court to confer on a cell administrator, and enforce, a power and right he did not have. The court's role under that sub-paragraph was confined to (i) making orders giving effect to such powers, rights and duties as the administrator does have, namely those enjoyed under s.26(1); and (ii) making orders relating to matters arising in the course of the administration (for example, as to any question of priorities or as to the cell administrator's remuneration). As for the cell administrator's s.26(1) powers, it was submitted that s.26(1)(a) could not be interpreted as a catch-all provision entitling an administrator to claim a right to an examination power before a court (which Ms. Wild was asking for), being a power going beyond even that which a general administrator enjoyed.

13 The judge, in a succinct judgment, preferred Ms. Wild's argument. He recognized that a general administrator had the benefit of an express power under the Insolvency Act 2011 to require specified persons to attend before him for private examination, being an express power of a nature that a cell administrator does not have. But he held that did not mean that the court had no jurisdiction under s.26(3)(c) to make the order sought by Ms. Wild. His reasoning was as follows:

"10. There are therefore two distinct regimes which apply to cell companies and general administrations. Cell administrators only have

> a general power under the PCC Act to seek the court's assistance in relation to any matter arising in the course of the administration and must satisfy the court that any order it is asking for needs to be made. General administrators on the other hand enjoy specific powers set out in the Insolvency Act. The fact that the powers enjoyed by a general administrator have been expressly disapplied under section 2A of the PCC Act does not mean that the court's jurisdiction when considering applications under section 26(3)(c) of the Act should be circumscribed and that it cannot make orders which mirror the sorts of powers which a general administrator might invoke under the Insolvency Act when dealing with a similar issue. What the disapplication of those powers means is that a cell administrator does not enjoy the statutory powers enjoyed by a general administrator as a matter of right. Other than that, the court's jurisdiction is a wide one and the court can make an order as to 'any matter' arising in the course of the administration should it consider it appropriate to do so. It would therefore be wrong for the court to limit a jurisdiction which is cast in very wide terms. If a cell administrator is able to persuade the court that a private examination in court is required and that certain documents need to be produced to further the purposes of the cell administration, there is no reason in principle why the court cannot make such an order.
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> 11. . . . A cell administrator has not been given the statutory power to hold a private examination subject to criminal sanction which a general administrator has under the Insolvency Act. In order to pursue her inquiries, therefore, a cell administrator must not only persuade the court that there is a proper case for a private examination to be ordered but the examination itself, if ordered, would be subject to judicial control as it would be held in court. This means, for example, that the court can ensure that the examination is conducted properly and that it can control a line of questioning if it considers that it is unfair.
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> 12. For the reasons set out above, I consider that the court does have jurisdiction to make the orders sought by the cell administrator . . ."

14 In light of what the judge said in the last sentence of para. 10, I would summarize the *ratio* of his decision as being that, provided the court is satisfied that a private examination in court of the nature sought by the administrator is *required* for the furtherance of the purposes of the cell administration order, the court has jurisdiction under s.26(3)(c) to order such an examination. He was not also deciding that such an examination *was* required in the present case. That would be a matter for decision at the further hearing for which he gave directions.

The appeal

15 The PCC Act was enacted at a time when the so-called "rescue culture" was much in vogue with insolvency practitioners and it represented Gibraltar's first foray into the insolvency regime of administration. The Insolvency Act 2011 would later introduce administration generally as a possible insolvency solution for Gibraltarian companies in difficulty and it resulted in certain amendments to the PCC Act.

16 Ground 1 of Mr. Knight's appeal asserted that the judge had misinterpreted s.26(3)(c), but Mr. Feetham devoted none of his oral argument to a separate development of this ground. That was because the same point was at the heart of the main ground, Ground 2, which was that the judge was wrong to order the requested examination. That was said to be because the administrator had no power or right to examine Mr. Knight under oath, nor therefore did the court have any jurisdiction to order the holding of such an examination. Mr. Feetham's oral argument was devoted to Ground 2.

17 The essence of Mr. Feetham's submissions was this. First, in contrast with the rights and powers expressly conferred by statute on *other* insolvency office-holders (including liquidators and general administrators), an administrator of a cell company or of its cells (hereafter, compendiously, "a cell administrator") has no like statutory right or power to examine anyone under oath. The judge correctly recognized that. Second, that apparently deliberate gap in a cell administrator's armoury cannot be filled by an order of the court under s.26(3)(c) because the jurisdiction thereunder extends no further than the twofold jurisdiction summarized in para. 12 above, neither of which was in play. Mr. Feetham asserted that the PCC Act's omission to entitle a cell administrator to the benefit of an express statutory power of examination was fatal to Ms. Wild's application. Neither s.26(3)(c) nor anything else empowered the court to make the declaration it did.

18 By way of underlining the claimed significance of the absence from the PCC Act of any express statutory provision entitling a cell administrator to examine anyone under oath, Mr. Feetham's skeleton argument referred us to a long line of corporate insolvency legislation, starting with the English Joint Stock Companies Act 1844, and identifying the invariable inclusion in it of various forms of express statutory powers enabling the oral examination of officers of the company and others likely to be capable of giving relevant information about the company's affairs. In his oral argument, however, Mr. Feetham started with Gibraltar's Companies Act 1930, which was still in force when the PCC Act was enacted but was destined to be repealed by the Companies Act 2014. Section 3(3) of the PCC Act (as originally enacted) provided that the provisions of the 1930 Act "shall, subject to the provisions of this Act, and unless the context

requires otherwise, apply in relation to a protected cell company." Section 241ff of the 1930 Act dealt with the powers of a liquidator in a compulsory winding up and s.241(1) listed 14 of them.

19 Section 242 was headed "Exercise and control of liquidator's powers." Included in its six subsections was s.242(4), which provided that "The liquidator may apply to the court in manner prescribed for directions in relation to any particular matter arising under the winding up." That provision is, I infer, the father to the legislative thought that 71 years later would underlie s.26(3)(c) of the PCC Act, from which the judge derived the jurisdiction he declared. The heading to s.242 made it clear that the right of application under subs. (4) related only to the exercise and control of a liquidator's powers, meaning those powers conferred upon him by the 1930 Act. Mr. Feetham made a like point about the limitations of the jurisdiction conferred by s.26(3)(c) of the PCC Act.

20 An example of an express examination power in the 1930 Act was in s.262. Headed "Power to summon persons suspected of having property of the company," it empowered the court in relation to a company in provisional or compulsory liquidation to summon before it any person—

> "known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company."

The section permitted such person to be examined on oath, and empowered the court to require him to produce any books or papers in his custody relating to the company. It further empowered the court to apprehend him and have him brought before it for examination if, having been tendered a reasonable sum for his expenses, he refused to do so without having earlier satisfied the court that he had a lawful impediment. In practice, the jurisdiction under s.262 would be invoked by the company's liquidator.

21 The Companies Act 1930 was substantially based on the English Companies Act 1929. The latter Act was later replaced by the Companies Act 1948, s.268 of which was identical to s.262 of the 1930 Act. The s.268 jurisdiction was the subject of Megarry, J.'s judgment in *In re Rolls Razor Ltd. (No. 2)* (3). The case concerned an *ex parte* order by the Registrar of the Companies Court, made on the application of the liquidator in a creditors' voluntary winding up, for leave to examine a former director and a general manager (s.307 enabled the court to make an order under s.268 also in a *voluntary* winding up if satisfied it would be "just and beneficial"). The proposed examinees challenged the order. The passage in the judgment to which Mr. Feetham drew our attention is one in which Megarry, J. referred no fewer than six times to the "extraordinary" nature of the jurisdiction under s.268. He said ([1970] 1 Ch. at 591F):

> "Before I turn to the authorities I should say something further about the nature of the process under section 268. I have already referred to the words of Bowen L.J. in *In re North Australian Territory Company* 45 Ch.D. 87, 93, in which he spoke of the section as being an extraordinary section giving an extraordinary power of an inquisitorial nature. I also bear in mind the views expressed by Chitty J. in *In re Greys Brewery Company* (1883) 25 Ch.D. 400, 403. The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.
>
> In such a process, it seems to me that the court must give great weight to the views of the liquidator, with his detailed knowledge of the problems that exist in relation to the affairs of the company and the information that is required. At the same time, the court must be astute to prevent any oppressive, vexatious or unfair use of this extraordinary process, especially as the liquidator's report is kept hidden from the examinees. Indeed, in *In re Greys Brewery Company*, 25 Ch.D. 400, 408, Chitty J. said that the section had been called the Star Chamber clause. These circumstances seem to me to point at least to the desirability of the examinees having the right to have the unfettered discretion of the judge brought to bear upon any exercise of this extraordinary jurisdiction."

22 Mr. Feetham cited that authority for its emphasis on the "extraordinary" nature of the inquisitorial process that s.268 enabled. The type of order sought by Ms. Wild in this case is for the holding of a like process. Whether or not the "extraordinary" nature of provisions such as those under s.268 adds anything to Mr. Feetham's reliance on the legislative absence of any like statutory provision available for use by a cell administrator, I understand his primary point drawn from *Rolls Razor* to be that it is improbable that s.26(3)(c) of the PCC Act could have been

intended to leave it to the discretion of the court as to whether, in any particular case, it could and should make an order for the holding of a like "extraordinary" process: it is not, he said, the sort of jurisdiction likely to be intended to be granted to courts by a side wind or the use of general words.

23 When the PCC Act was enacted, the English Insolvency Act 1986 had been in force for 15 years. Section 235 of that Act imposed a duty on various identified persons, including former officers, to co-operate with office-holders (including an administrator) and to "attend on the office-holder at such times as the latter may reasonably require." And, put shortly, s.236 empowered the court, on the application of an office-holder (including an administrator), to require any officer of the company to appear before it and submit an account of his dealings with the company. The PCC Act, however, conferred no express power on a cell administrator akin to that in s.235; nor did it confer on the court an express power akin to that in s.236.

24 The Insolvency Act 2011, however, later introduced general administrations in Gibraltar and its s.240 entitled an "office-holder" to require (*inter alios*) an officer of the company to attend before him (but not in court) to be examined on oath or affirmation. Section 2A of the consequential amendments to the PCC Act provided that Part 2 of the Insolvency Act (Company Voluntary Arrangements) and Part 3 (Administration) did not apply in relation to a protected cell company, the latter disapplication being presumably because the PCC Act already included its own administration provisions. Section 240 of the Insolvency Act is, however, in its Part 8, which the PCC Act amendments did *not* disapply. Part 8 is headed "General provisions with regard to companies that are insolvent or in liquidation."

25 Given such non-disapplication, there is at least an argument for the view that one consequence of the enactment of s.240 in the Insolvency Act was that it created a power also exercisable by cell administrators. That is because (i) s.231 of the Insolvency Act, which opens Part 8, defines various terms in it, including that an "office-holder" in respect of a "company" means (a) in ss. 232–239 the company's "administrator, liquidator, provisional liquidator or administrative receiver" and (b) in "sections 240 to 246 the company's administrator, liquidator or provisional liquidator." The Insolvency Act's definition of a "company" for the purposes of, *inter alia*, Part 8 includes a company formed and registered under the former Companies Act 1930, as the cell company was (see s.12 of the PCC Act). There is thus an argument for the view that the administrator of a cell company enjoys the powers created by s.240 of the Insolvency Act.

26 That said, neither counsel supported or advanced any such argument. Mr. Buck offered nothing about the possible impact of s.240, which is perhaps not surprising as his case was based exclusively on the proposition

that the beginning and end of it reposes in the court's jurisdiction under s.26(3)(c) of the PCC Act. As for Mr. Feetham, his position was that a cell administrator does *not* enjoy the s.240 powers. That was because s.231's reference to "the company's administrator" can, in context, mean only an administrator appointed under the Insolvency Act, whereas Ms. Wild's appointment was made under the PCC Act. In support, Mr. Feetham referred us to (i) the definition of an "administration order" in s.2(1) of the Insolvency Act, namely "an order appointing an administrator of a company made under s.59(1);" and (ii) the definition of an "administrator" which immediately follows it and meaning "in relation to a company, . . . the person appointed as the administrator of the company." Section 59 is in Part 3 of the Insolvency Act, which s.2A of the PCC Act expressly disapplied in relation to a protected cell company.

27 As we had no full argument on the application or otherwise of s.240 of the Insolvency Act to an administrator of a protected cell company appointed under the PCC Act, I would not be disposed to decide that finally, and do not do so, although I regard Mr. Feetham's submissions as compelling and shall proceed on the basis that he is correct. There is also a further consideration that I regard as supporting the view that Ms. Wild does not enjoy the s.240 powers. That is that she is of course not an administrator of a protected cell *company*, but only of three of its *cells*. On no view, therefore, can she be said to be a "company's administrator" within the meaning of s.231 of the Insolvency Act, a consideration that appears to me to lend additional force to Mr. Feetham's argument that a "company's administrator" in Part 8 of the Insolvency Act means only an administrator appointed under that Act. Had it been the intention of the Insolvency Act to extend that meaning to embrace an administrator of a protected cell *company*, it is difficult to see why it would not have gone one step further and also brought administrators of a *cell* of such a company within its grasp.

28 If, therefore, as I shall assume, the consequence of the Insolvency Act was not to confer on a cell administrator the benefit of its s.240 examination powers, nevertheless one possibly relevant feature of the amendment to the PCC Act was the replacement of its Part II (headed "Receivership Orders") with a new Part II headed "Cell Liquidation," which enabled the making of an order for the liquidation of a *cell* and, in particular, by a new s.20A of the PCC Act, applied the Insolvency Act 2011 to cell liquidations as if the cell was a company in liquidation under the latter Act. The effect of that was therefore to include the application to a cell liquidation of the provisions in ss. 240–246 of the Insolvency Act 2011, under which the liquidator was entitled to apply for the examination of specified persons. Sections 242–246 deal in particular with examinations before a court, and s.245 is of some interest. It provides that an examinee is not excused from answering a question on the ground that his answer may incriminate him

or tend to incriminate him, but also provides that the record of the examination is not admissible in any criminal proceedings against the examinee "except where he is charged with the offence of perjury." The inclusion of that provision is perhaps a reflection of why the conferring of powers of examination on office-holders has long been regarded as a matter best covered by legislation providing expressly for it. Not all statutory examination provisions are, however, as elaborate as those in ss. 242–246, and most do not include a provision equivalent to that in s.245. Section 268 of the English Companies Act 1948, the subject of the decision in *Rolls Razor* (3), included no such provision.

29 This tour of the legislation makes good Mr. Feetham's point that, whereas other categories of insolvency office-holders have the benefit of statutory provisions expressly directed at enabling the examination of persons likely to be able to provide information relevant to the working out of the applicable insolvency regime, cell administrators have the benefit of no express like statutory provisions. Mr. Feetham submitted that this was the end of the matter. Had Parliament intended a cell administrator to have a like power, it would have included one in the PCC Act.

30 Mr. Feetham's further submission was that, contrary to the judge's decision, an alternative source for the making of an examination order cannot be found in s.26(3)(c). That is not a sub-paragraph empowering the court to make any order it may regard as convenient or necessary for the purposes of a cell administration. It extends no further than empowering the court to make orders (i) in aid of the due performance of an administrator's powers under s.26(1) of the PCC Act; and (ii) relating to matters arising in the course of the administration, for example as to the fixing of the cell administrator's remuneration. That, however, said Mr. Feetham, is the limit of the court's powers under s.26(3)(c). Insofar as the judge based his decision on the premise that the claimed jurisdiction was available if an examination was *required* for the progress of the administration, that added nothing. The judge was not purporting to make his order in aid of any power that the administrator claimed.

31 Mr. Feetham fairly recognized, however, that it might be said that (i) Ms. Wild's claim that an examination in court was *necessary* for the s.24(4) administration purpose meant that she had a power or right under s.26(1)(a) of the PCC Act to call for such an examination; and (ii) that the court could aid the enforcement of that right by an order under s.26(3)(c). But he then rejected that as a serious possibility, asserting that the language of s.26(1)(a)—"all such things as may be necessary for the purpose"—was too general to embrace a power to examine under oath. Mr. Feetham sought to make that good by once again contrasting the PCC Act with the Insolvency Act 2011. Section 71(1) of that Act provides similarly that a general administrator "(a) may do anything necessary for the management of the business, assets and affairs of the company; and (b) has the specific

powers specified in Schedule 1"; and s.71(2) then provides that "Without limiting subsection (1), the administrator may" do any of the various things then set out in sub-paras. (a)–(g). Mr. Feetham's point was that, despite the general language of s.71(1)(a), the Insolvency Act still regarded it as necessary to provide specific statutory powers enabling general administrators to conduct examinations. The PCC Act had not done likewise.

32 Ground 3 of Mr. Knight's grounds of appeal asserted that, if it was correct, the judge's interpretation of s.26(3)(c) meant that it violated his rights (i) under s.7, "Protection for privacy of home and other property," of the Gibraltar Constitution Order 2006; (ii) under s.8, "Provisions to secure protection of law"; and (iii) at common law. Both the judge and the Chief Justice refused leave to appeal on that ground and, formally, Mr. Feetham was making a third bid before this court for leave. Although he was subject to no time constraints in the presentation of his oral argument, he chose not to develop his Ground 3 leave application orally, saying he was content simply to rely on his skeleton argument. He was thereby inviting us to decide the Ground 3 leave application and (if leave should be granted) his Ground 3 points simply by reference to the skeleton arguments.

33 I respectfully deprecate the notion that this court should be expected to decide potentially important constitutional questions involving challenges to the lawfulness of a Gibraltar statute simply by reference to written arguments. We heard this appeal in open court and expected to hear oral argument on all the matters in issue. If there was any arguable substance in Mr. Feetham's Ground 3 points, he could and should have developed them orally and Mr. Buck could have answered them orally. Written submissions are, by themselves, no adequate substitute for the invaluable benefits of oral argument. My reading of Mr. Feetham's written submissions in fact failed to impress me that there was any obviously arguable substance in any of the Ground 3 points. It may be that Mr. Feetham could have persuaded me otherwise. As he made no attempt to do so, I would refuse leave to appeal on Ground 3. I do not propose to opine in this judgment on the undeveloped points advanced in his skeleton argument.

34 Mr. Buck, in his brief submissions in answer, confined his oral argument to a defence of the judge's invocation of s.26(3)(c). His written argument was rather fuller. He there submitted that the judge was correct to interpret the PCC Act by reference to its own terms rather than by comparison with other statutes. He also advanced the simple proposition that s.26(3)(c) enabled the court to make orders in furtherance of the administration, which is what the judge did. It was no part of Mr. Buck's submission that the s.26(3)(c) jurisdiction was limited to the making of orders in aid of an administrator's powers and functions.

Discussion

35 Mr. Feetham made an unanswerable case that the legislation governing corporate insolvency regimes other than that in the PPC Act relating to cell administration includes (and has done for decades) express statutory provisions providing for various types of examination by an office-holder of various classes of person. Why the PCC Act included no like express provision, the court does not know. I would not, however, approach this appeal on the basis that, when it was enacting the PCC Act, the Gibraltar legislature was unaware of the inclusion in other insolvency legislation of such express examination provisions. In particular, I would regard it as likely that it would have been aware of the inclusion in the English Insolvency Act in its provisions relating to administration of the examination powers I referred to in para. 23 above. But it still chose not to include any express like powers in the PCC Act.

36 Like the judge, I would, however, decline to interpret the PCC Act by way of an exercise involving a simple comparison of its provisions with those of other legislation. The proposition that Acts A, B and C all include express examination provisions of various types, whereas Act D does not, therefore the court has no jurisdiction under Act D to order any like such examination is one I would reject. It may, on an examination of Act D, be the correct conclusion. But Act D has to be interpreted by reference to its own provisions in order to determine whether or not it confers a jurisdiction on the court in any circumstances to order an examination. That was the judge's approach and I agree with it.

37 Next there was a good deal of discussion about the scope of s.26(3) of the PCC Act. There is no difficulty with its first two sub-paragraphs. Section 26(3)(a) applies to the case in which the administrator is uncertain as to how or whether, in any particular circumstance, he may (or may not) lawfully exercise any of his functions or powers. Its purpose is to enable the administrator to resolve his uncertainty by applying to the court for directions. Section 26(3)(b) speaks for itself. Section 26(3)(c) is the one this appeal is concerned with.

38 There was a difference between Mr. Feetham's and Mr. Buck's respective analyses of the scope of this sub-paragraph. I have already made Mr. Feetham's position clear: see paras. 12, 17 and 30 above.

39 Mr. Buck put it differently, saying in his skeleton argument: (i) at para. 5(a)(i), that "Section 26(3)(c) gives [the court] the jurisdiction to consider requests from an administrator for assistance in furtherance of the administration; that is clearly its purpose"; and (ii) at para. 22, that "any order made under [s.26(3)(c)] must be in furtherance of the statutory purposes of the cell administrator and after being subject to judicial scrutiny." At para. 14, Mr. Buck conceded that "the Administrator does not have the power to require Mr. Knight to attend an examination of any

nature; as that is not a power of a director and is not something that the Administrator can unilaterally demand." That reflects Mr. Buck's rejection of there being a necessary link between the s.26(3)(c) jurisdiction and the administrator's functions and powers.

40 As between counsels' alternative propositions, I respectfully prefer and agree with Mr. Feetham's analysis. Section 26 is headed "Functions of administrator and effect of administration order," but the body of the section shows that it is also about the administrator's "powers." Section 26(3)(a) is expressly limited to the giving by the court of directions relating to the extent or exercise of any such function or power. Section 26(3)(c) is, as I observed in para. 19, a descendant of s.242(4) of the Companies Act 1930, and is in my judgment, like s.242(4), similarly confined to conferring a jurisdiction on the court to make orders *relating to* the exercise of an administrator's functions and powers. That means, in the case of the administrator of one or more cells, the functions and powers conferred by s.26(1)(a) and (b). My above emphasized words "relating to" are mine, but I adopt them to indicate what I would regard as the broad range of the court's jurisdiction under s.26(3)(c). I agree with Mr. Feetham that it extends, for example, to the making of orders in relation to the fixing of the remuneration to which the administrator is entitled in consequence of the exercise of his functions; or to resolving any question as to priorities that may arise in such exercise, or other like questions. I also agree with Mr. Feetham that the s.26(3)(c) jurisdiction enables the making of orders for the purpose of giving effect to or acting in aid of the functions and powers conferred on a cell administrator by s.26(1)(a) and (b).

41 In my view, however, that is the limit of the court's jurisdiction under s.26(3)(c). In particular, it does not empower the court simply to make any order it may perceive to be convenient for the furtherance of the s.24(4) purpose of administration. It is narrower than that. Its jurisdiction is exclusively related to the interpretation or exercise of the administrator's functions and powers or to matters connected thereto.

42 As Mr. Feetham recognized, those functions and powers include, *inter alia*, those conferred by s.26(1)(a). They thus include doing "all such things as may be necessary for the purpose . . . for which the administration order was made." In paras. 1 and 10.6 of her affidavit in support of her s.26(3)(c) application, Ms. Wild deposed that the holding of a private examination of Mr. Knight in court *was* necessary for the purpose of the cell administration. On the premise that she was right, it appears to me that, contrary to Mr. Buck's position, the language of s.26(1)(a) shows that the holding of such an examination *does* fall within her powers and rights. Of course, faced with a proposed examinee determined to avoid any such examination, it was not a power or right she could exercise unilaterally, and so she had to apply to the court for an appropriate order; indeed, she would probably

have had so to apply in any case. Restano, J. was satisfied, for the reasons he gave, that the court did have jurisdiction to order such an examination.

43 As earlier summarized, Mr. Feetham, however, rejected this reading of s.26(1)(a), asserting that its words are simply too general to empower and entitle the administrator in the way just described. I would in turn respectfully reject that submission. The words are indeed general. But they had to be in order to cover everything that in any particular case they might need to cover. No draftsman could cast s.26(1)(a) in more specific terms. The logic of Mr. Feetham's selective attack on s.26(1)(a)'s generality must be that it does not mean what it says and that its breadth of purpose is too uncertain to be regarded as having any reliable meaning. That cannot be so. Its chosen generality was deliberate and its straightforward language must be interpreted accordingly: as we might once have said, *generalia verba sunt generaliter intelligenda.* The English Insolvency Act 1986, which the architects of the PCC Act are likely to have had in mind when formulating its provisions, is instructive in this regard. Its s.14(1) provides that an administrator—

> "(a) may do all such things as may be necessary for the management of the affairs, business and property of the company; and
>
> (b) *without prejudice to the generality of paragraph (a)*, has the powers specified in Schedule 1 to this Act . . ." [Emphasis added.]

The general words in s.14(1)(a) of the English statute were thus plainly intended to mean what they said. So too, in my judgment, were their equivalent in s.26(1)(a) of the PCC Act. The most likely explanation of why, unlike the English Insolvency Act, the PCC Act included (i) no list of specific powers that an administrator had "without prejudice to the generality of section 26(1)(a)," or (ii) any express examination powers is simply that it was content to proceed on the basis that s.26(1) meant what it said and told the administrator all he needed to know as to his functions, powers and rights. It chose not to spell out that the administrator also enjoyed any further specific rights or powers because it did not need to. Section 26(1)(a) and (b) had said it all.

44 There is in any event no difficulty in the interpretation and operation of s.26(1)(a). In any question that may arise as to whether any "thing" the administrator has done or wishes to do is within his s.26(1)(a) powers, the only question is whether it was or is "necessary" for the s.24(4) purpose of the administration order. That is a question of fact or evaluation of the type that courts are familiar with. As always, some questions may be more difficult than others, but all will be capable of being answered. The critical feature of s.26(1)(a) is, however, that it does not confer a power on an administrator to do anything and everything. Every function, power or right claimed under it is linked to the test of *necessity* for the purposes of the

administration. Once, however, such a function, power or right is identified, the court has a jurisdiction under s.26(3)(c) to lend its aid in enforcing it.

45 Of course it does not follow that the court will also *exercise* such jurisdiction in every case of proved necessity. In his judgment, Sir Patrick Elias, J.A. questions the potential reach of my approach by postulating cases in which an administrator assesses it to be necessary to enter into a particular commercial transaction to which the would-be counterparty declines to agree. Does my interpretation mean that the court would have to exercise its s.26(3)(c) jurisdiction to compel the counterparty to do so? Of course not. The sub-paragraph plainly does no more than confer a discretionary jurisdiction and no court will compel A to enter into a contract with B. Whilst s.26(1)(a) empowers an administrator to do all that is necessary, it does not also warrant that he will be able to achieve it. The present case, however, is not remotely akin to Sir Patrick's examples. It concerns Ms. Wild's wish to obtain information held by a director who is said to have been in office throughout the relevant period of the company's life. During that time he owed fiduciary duties to the company; and he is said to have information relating to its affairs to which the company and Ms. Wild have a good arguable case to be entitled and which is said to be necessary to progress the purpose of the administration. Inquiries by an administrator of those formerly concerned in the management of the company are likely to be necessary in many, if not most, administrations; and the inability to carry out such examinations may in some cases result in a serious obstacle in the way of carrying out the administration. It would, in my view, be remarkable if the combined effect of the general words in, and terms of, s.21(1) of the PCC Act did not empower and entitle Ms. Wild to pursue such an inquiry and to obtain the court's assistance under s.26(3)(c) in doing so. Is it really to be said that the PCC Act's deliberate, and apparently exceptional, legislative economy in identifying the administrator's functions and powers in only the general, but nevertheless comprehensive, terms it did was intended to *exclude* such an important power and right? In my judgment, its better interpretation is to the reverse effect. Its less may not be more; but it is at least enough.

46 Further support for this conclusion can perhaps be found in the original Part II of the PCC Act. That provided for the making of a *receivership* order in respect of one or more insolvent cells of a protected cell company. Such an order was in substance one for the liquidation of a cell, its purpose being, by s.19(3):

> "(a) the orderly winding up of the business of or attributable to the cell; and
>
> (b) the distribution of the cellular assets attributable to the cell to those entitled to have recourse thereto."

The receiver's functions and powers were set out in s.21. A receiver's functions and powers under s.21(1) are, *mutatis mutandis*, identical to an administrator's under s.26(1); and s.21(2) is, likewise, identical to s.26(3).

47 Thus the only two insolvency regimes originally applicable to a cell were (i) receivership; and (ii) administration. If there is no jurisdiction in the court, at the behest of an administrator, to order a necessary examination of an officer of the company, nor could there be any jurisdiction to order likewise at the behest of a receiver. The lack of such a power could likewise present a serious obstacle in the way of the receiver's efficient winding up of the cell's affairs. As explained, a receivership of insolvent cells has, since the Insolvency Act 2011, been replaced by a provision for their liquidation, with the liquidator enjoying certain express powers. But the position of a cell administrator remains the same as it has always been.

48 I recognize that Restano, J. did not analyse the case as I have. His approach was in line with that urged by Mr. Buck, namely that provided the claimed examination was necessary or required for the purpose of the administration, the court has a jurisdiction under s.26(3)(c) to order it. He did not link the s.26(3)(c) jurisdiction with the administrator's functions, powers and rights under s.26(1). I would therefore respectfully regard his approach as formally incorrect. But if he had adopted the route that I would favour, namely that of considering whether the s.26(3)(c) jurisdiction could be invoked in aid of the administrator's right and power under s.26(1) to call for an examination if such was necessary for the purpose of the administration, his decision would of course have been the same.

49 The final consideration I would add is whether the "extraordinary" nature of the examination jurisdiction upon which Mr. Feetham focused is a feature pointing away from there being within s.26(3)(c) a jurisdiction enabling Restano, J. to make the declaration that he did. Megarry, J.'s judgment in *Rolls Razor* (3) was delivered over 50 years ago; and he derived his assertions as to the "extraordinary" nature of the examination jurisdiction there in question from what had been said by Bowen, L.J. eighty years before that. Times have moved on. Express statutory provisions for the holding of examinations in insolvency regimes of all natures have long been commonplace. Section 268 of the Companies Act 1948, with which *Rolls Razor* was concerned, gave the court a *discretionary* jurisdiction as to whether to order the requested examination. Other statutory examination provisions enacted since Megarry, J.'s observations (for example s.235 of the English Insolvency Act 1986 and s.240 of the Gibraltar Insolvency Act 2011) confer a *right* on an office-holder to enforce them. Viewed through the lens of the era in which we live, when there are ever readier demands for, and expectations of, accountability and answerability whenever anything has, or may have, gone wrong, I regard that as unsurprising. I would not accept that the suggested "extraordinary" nature of Ms. Wild's application was a feature telling against the court

having the jurisdiction the judge declared. He was anyway not also saying that this was a case in which the jurisdiction should be exercised. That was to be the subject of determination at the further hearing for which he gave directions. If there are any sound reasons as to why it would or might be unjust for Mr. Knight to be required to attend an examination, that will be the occasion when they can be deployed.

50 In my judgment, although for reasons differing from those he gave, I consider that the judge's decision was a correct one and I would uphold it. I would dismiss Mr. Knight's appeal.

51 **ELIAS, J.A.:** I am grateful to Sir Colin Rimer, J.A. for setting out the background, the material legislation, and the conflicting arguments so clearly and comprehensively. I adopt his discussion on those matters in this judgment. However, I am unable to agree with his conclusion that this appeal should be dismissed. Since Sir Maurice Kay, P. agrees with Sir Colin, I will explain my reasons relatively briefly.

52 There are two main issues in this appeal. The first is the scope of the powers conferred on the administrators of a cell or cells of a protected cell company in s.26(1) of the Protected Cells Companies Act 2001 ("the PCCA"). The second is the relationship between those powers and the role of the court in s.26(3)(c). For convenience I shall set these provisions out again:

> "26.(1) The administrator of a cell of a protected cell company—
>
> (a) may do all such things as may be necessary for the purpose set out in section 24(4) for which the administration order was made; and
>
> (b) shall have all the functions and powers of the directors in respect of the business and cellular assets of or attributable to the cell.
>
> . . .
>
> (3) The administrator may at any time apply to the Court—
>
> (a) for directions as to the extent or exercise of any function or power;
>
> (b) for the administration order to be discharged or varied; or
>
> (c) for an order as to any matter arising in the course of his administration."

53 Section 26(7) provides that the powers of the directors shall cease whilst the administration order is in force. Where the order relates to the whole of the protected cell company, the administrator takes over all the powers of the directors. Where it is a cell or cells in administration, as

opposed to the whole company, the administrator takes over the powers of the directors only in respect of the business and the cellular assets of, or attributable to, the cell or cells subject to the order. Since the directors typically manage the company, this means that the administrator will take over the management of the company or the cell, as the case may be (although the precise scope of the board's managerial powers will turn on the particular articles of the company).

54 Restano, J. accepted that s.26(1)(a) did not itself confer upon the administrator any power to require the provision of documents or information from third parties. Indeed, neither counsel sought to argue before him that it did. Mr. Feetham submitted that it did not, and Mr. Buck did not seek to contend otherwise. Mr. Buck's case was that s.23(3)(c) empowered the administrator to make an application to the court, and the court itself had the power under that provision to make the order sought in an appropriate case. Restano, J. accepted that submission. If the court were persuaded that, for example, an examination in court of a particular party was required to achieve the purposes of the administration, it then had the power under s.26(3)(c) to order it. An examination in court is the order sought here, although presumably, on the judge's analysis, the court could also make other orders, such as one requiring the party to appear before the administrator to provide information out of court, or provide it in a written memorandum. The power conferred upon the court was, in the judge's view, a very broad one.

55 Sir Colin takes the opposite view, reflecting the argument adopted by Mr. Feetham both below and before us. He considers that the power of the court in s.26(3)(c) is limited to giving effect to the powers conferred upon the administrator, or making other orders which arise in the course of the administration and are consistent with the court's role, such as fixing remuneration or determining priorities. That subsection does not confer a general power on the court to make any order which the court believes would help achieve the purposes of the administration. However Sir Colin considers, contrary to the submissions of Mr. Feetham, that it is within the powers of the administrator in s.26(1)(a) to require a third party to co-operate with the administrator and provide information and/or documents under threat of legal sanction. It follows that where the administrator cannot enforce that power because of a lack of co-operation, he may have recourse to the court under s.26(3)(c) to seek its assistance and the court may then make an appropriate order to compel co-operation.

56 In my judgment, neither approach is correct. I agree with Sir Colin, essentially for the reasons he has given, that Restano, J. was wrong to hold that the court has a general power pursuant to s.26(3)(c) to make orders whenever the court considers that they would be either convenient or necessary in order to achieve the statutory objectives. However, I respectfully differ from Sir Colin with respect to his analysis of s.26(1)(a)

and I agree with the approach of Restano, J. to that provision. For reasons I develop below, in my view the administrator does not have the power by virtue of s.26(1)(a) to compel the co-operation of a third party to provide either information or documents. I now develop my reasons for that conclusion.

The scope of s.26(1)

57 Sir Colin's view is that the language of s.26(1)(a) is sufficiently broad to enable the administrator to require co-operation from third parties. If co-operation is not forthcoming voluntarily, the court may, in aid of the administrator's power, make an appropriate order to compel co-operation under legal sanction. The only requirement is that the administrator must be able to satisfy the court that it is necessary to obtain such co-operation to enable the purposes of the administration to be achieved; that is the language of the subsection. The court will not lightly question a statement from the administrator that it is necessary in any particular case. The court is not compelled to make the order even where it is necessary if there are good reasons not to do so, such as where it might be unjust to the party concerned. But the court has jurisdiction to make the order if it thinks it appropriate.

58 I do not accept that s.26(1)(a) can be read in such a broad way. This does not, however, mean that an administrator has no remedy against a director or other officer who is concealing company information from him. An administrator could of course seek to recover documents belonging to the company in the same way that any person could seek to recover in law property in the hands of another, and no doubt a court would readily assume that the defendant held such property if this was not denied. But I see no basis for treating the broad language in s.26(1)(a) as enabling the administrator to compel co-operation from third parties which they would not otherwise have to give in law. I say this for the following inter-related reasons.

59 First, and crucially, I agree with Mr. Feetham that it is an extraordinary power to compel a third party to co-operate by providing information under legal sanction. This was how the power was described by Megarry, J. in *Re Rolls Razor (No. 2)* (3) in the passage quoted by Sir Colin at para. 21 above. The same epithet was used by Lord Slynn giving the judgment of the House of Lords in *In re British & Commonwealth Holdings plc* (1), less than a decade before the 2001 Act was passed. I accept that in what is often referred to as the "rescue culture," Parliament has been increasingly willing to confer that exceptional power on company officers in the context of insolvencies and liquidations because the public interest justifies compelling the co-operation of third parties to protect, as far as possible, the interests of the creditors and shareholders affected by any liquidation. But the fact that the power is now more widely exercised does not make it

any the less intrusive, and in that sense extraordinary. I agree with Mr. Feetham that such power to compel co-operation should not be conferred by a side-wind or by the generous construction of broad statutory language. I would expect Parliament to confer such a significant power only by adopting clear, express language.

60 Second, if the administrator can compel third parties to co-operate whenever that is necessary in order to achieve the purposes of administration, where does that stop? An administrator may quite properly believe that it is necessary in order to secure those purposes to borrow money from a bank, or to buy a piece of scarce machinery. But it is surely inconceivable that the administrator could require the bank or vendor to co-operate, with the potential for compulsion by a court order if they refuse. Of course, there is much more justification for requiring third parties who would have had at least some involvement with the company to co-operate than for banks or vendors of equipment, who will have had none, to do so. But it is not easy to see how the section can be construed so as to catch the former but not the latter. Sir Colin says that the simple answer to this problem is that the court would never make an order pursuant to an application directed against a commercial party. He does not, however, deny that the court would in principle have jurisdiction to make the order but says that in practice it would never exercise it in an administrator's favour. I do not, with respect, find this a convincing answer. In my view the reality is that the court simply does not have jurisdiction to make an order of that nature; it is hardly satisfactory to say that it has a jurisdiction which it could never lawfully exercise.

61 Third, as Sir Colin accepts, in every other piece of legislation relating to insolvency, in both Gibraltar and the UK, the obligation to co-operate, whether by disclosing documents or providing information, is conferred expressly on the relevant officer (whether liquidator, receiver or administrator). The precise scope of these provisions varies and I will not set them out. Suffice it to say that whilst they vary in their particularity, they generally provide in some detail as to who may be questioned, whether with or without an order of the court, and the penalties resulting from non-cooperation. These are matters which one might expect Parliament to want to specify rather than to leave them to the unfettered discretion of the court.

62 Fourth, when the PCCA was passed in 2001, the draftsman would have had in mind, as Sir Colin accepts, both the Gibraltar Companies Act 1930 and the British legislation, the Insolvency Act 1986. In both those pieces of legislation there is a provision cast in almost identical terms to s.26(1)(a). In the Companies Act 1930 it is s.241(2)(h) which, after setting out a range of powers exercisable by the liquidator, empowers him "to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets." In similar terms, s.14 of the Insolvency Act 1986 provides that an administrator "(a) may do all such things as may

be necessary for the management of the affairs, business and property of the company . . .” As Sir Colin points out, there is a wide range of powers also found in Schedule I to that Act, but these are explicitly said to be without prejudice to the generality of s.14(1).

63 I agree that the presence of this range of powers in the Schedule does not limit the scope of s.14(1) and would not, in principle, preclude reading the general words as including the right to compel co-operation with regard to the provision of information or documents. But there are two very powerful reasons why in my view it would be impossible to read those pieces of legislation as conferring that power. First, one would surely expect that such an important power as one compelling co-operation would be included in the very extensive range of express powers. In the Insolvency Act 1986 in particular, the Schedule identifies virtually all powers which the administrator is likely to want to exercise; it would be extraordinary if this extremely important power were omitted and left to be inferred from the general catch-all provision. Second, there are express powers dealing with the right to compel co-operation in each of those statutes (in the case of the 1986 Act, s.234 (relating to documents) and s.235 (relating to information)). This suggests (to take the 1986 Act by way of example) that Parliament either did not think that the general power in s.14 would suffice to confer those powers, or Parliament wished to confine the operation of the power which s.14 would otherwise have conferred so as to remove the general discretion from the court. In my judgment, the former is the better explanation. If that is so, I see no reason to construe s.26(1)(a) as permitting these powers. This would be to interpret it inconsistently with virtually identical powers conferred in earlier statutory provisions of an essentially similar nature.

64 Sir Colin says that the PCCA should be read independently of earlier legislation in the field. Even if that were so, in my view the extraordinary nature of the power would require it to be conferred expressly; the catch-all power would not suffice. But I do not, with respect, accept that it is illegitimate to look at these other pieces of legislation as an aid to interpretation. They are on a related subject matter and would have been very much in the mind of the draftsman of the PCCA, as Sir Colin concedes. Indeed, the PCCA expressly states that the protected cell companies will be subject to the Gibraltar Companies Act then in force (now the Companies Act 2014): see s.12. In my view it is artificial and wrong to read these provisions of the PCCA wholly independently of the earlier legislation. They must inevitably have had an impact upon the way the Act was drafted. Indeed, Sir Colin accepts that s.242(4) of the Companies Act 1930 was in all probability the father of the thought underlying s.26(3)(c) of the PCCA.

65 There is nothing unusual in reading a statute in its evolutionary development as the following passage from *Bennion on Statutory*

Interpretation, 8th ed., s.24.5, at 715 (2020) makes clear: "In order to understand the meaning and effect of a provision in an Act it is essential to take into account the state of the previous law and, on occasion, its evolution." The comment on this principle goes on to say this:

> "At its most basic level, the purpose of an Act is normally to make changes in the law. In order to understand the meaning and effect of a provision it is essential to understand the state of the law at the time the Act was passed. The court cannot soundly judge the mischief that a provision is intended to remedy unless it knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislature to pass the legislation. Moreover, an Act is drafted against the backdrop of general legal principles and with a view to the Act taking its place in the wider scheme of statutory and common law rules. The courts will often look to the previous law to support a particular construction."

There are then cited numerous examples of cases where the courts have construed legislation in the light of previous statutes.

66 In my judgment that principle is highly relevant here. I believe that it is not only legitimate but in this case necessary to look at related statutes to see how they have secured the co-operation of third parties in the context of insolvencies. It is of course true that the PCCA is the first Act in Gibraltar to introduce the concept of administration, but in my judgment it would be false to say that it must therefore be construed in a blinkered fashion, without regard to other statutes which have dealt with the power to compel co-operation of administrators and other officers dealing with insolvency. This is reinforced by the fact that administration is an alternative to liquidation, and if unsuccessful almost inevitably leads to a liquidator being appointed.

67 I appreciate that it can be said that since the earlier legislation envisages the power to compel the co-operation of (at least some) third parties, it may be inferred that Parliament must have intended a similar power to be conferred on administrators in the PCCA. Indeed, Sir Colin says it would be "remarkable" if the administrator did not have this power. It seems to me that this is really the fundamental premise underlying his (and, indeed, Sir Maurice's) argument: Parliament must have intended to confer this critical power, and the language can be construed to confer it. I do not accept this premise and nor do I think that this is a legitimate method of construction. In my judgment it is far from compellingly obvious that Parliament must have intended the administrator to be given this power. In this context it is very important to note that when the PCCA was passed, only liquidators had powers of this nature in Gibraltar law. The Companies Act 1930 conferred a power on the court to compel co-operation by certain company officers in relation to winding up by the court and voluntary

liquidations (see s.262 and s.295 respectively) but critically it did not appear to have conferred this or any similar power on receivers (although the Insolvency Act 2011 now does so). In the circumstances I do not think it at all surprising that in 2001 Parliament should have decided, in connection with this limited piece of company legislation, not to confer this power on administrators or receivers of protected cell companies or their cells. (As Sir Colin points out in para. 46, when initially drafted the PCCA in Part 2 dealt with receivers rather than liquidators, albeit that these particular receivers seem to have been cell liquidators in all but name.) It would have been giving this limited class of administrators and receivers preferential treatment. Furthermore, this was the first piece of legislation in Gibraltar establishing the office of administrator, and Parliament may have chosen to see whether administrators were in practice prejudiced by the lack of this power before choosing to provide it. That is speculation of course; we do not know for sure why no express powers have been included in the legislation. But it is no more speculative than the assumption that the power is so critical to insolvency officers that Parliament must have intended to confer it—notwithstanding that receivers could not at that time exercise any such power.

68 In short, there is no obvious reason to explain why Parliament chose not to confer express powers on the administrator to enable him to compel co-operation. That would have been the obvious route to adopt if that had been Parliament's intention, and the precedents were available to the draftsman. But the lack of any express power does not in my view justify construing the legislation in a manner which is wholly at odds not only with the exceptional nature of the power claimed, but also with the way in which this power has been conferred in earlier legislation. The power has never been left to implication from general words and in my judgment, for all the reasons I have set out above, it could not have been Parliament's intention to do that here.

69 Sir Colin says that the logic of limiting the scope of s.26(1)(a) in this way is that it can have no reliable meaning. I do not believe that follows; it is no different from the earlier legislation which, as I have explained, has adopted general provisions of this nature which were plainly not intended to confer the powers claimed in this case. Courts frequently read down general words on the assumption that Parliament would not have intended, by adopting such words, to interfere with the rights or freedoms of individuals: see *e.g. R. (Simms)* v. *Home Secy.* (2). Such a construction does not leave the provision bereft of any sensible meaning at all.

70 I would add that even if, contrary to my view, s.26(3)(c) does confer upon the court a wide discretion to make orders which are conducive to achieving the administrator's objectives, as Restano, J. held, I do not accept that it would extend to enforcing co-operation in the way sought here,

essentially for the same reasons that have led me to conclude that s.26(1)(a) cannot be so construed.

The Insolvency Act 2011

71 The Insolvency Act 2011, being a later piece of legislation, can have no bearing on the proper construction of the PCCA. The latter could not have meant something different after the 2011 Act was passed than it did before it was passed. However, Part 8 provides express powers on a wide range of insolvency officers, including administrators, to compel co-operation by certain third parties. Mr. Feetham gave reasons why in his view Part 8 did not apply to administrations under the 2001 Act at all, whether of cells or the protected cell company itself, and since Mr. Buck did not contend to the contrary, we did not hear full argument about it. The assumption before us, therefore, was that any power to compel co-operation had to be found in the PCCA itself. Sir Colin takes the view that Mr. Feetham has provided at least a *prima facie* "compelling argument" why Part 8 does not apply to administrators appointed under the 2001 Act. The main argument is that the concept of "administrator" must mean someone appointed pursuant to an "administration order" as defined by the 2011 Act, and that means an order made under the 2011 Act itself. It follows that administrators under the 2001 Act do not fall into that category since they are appointed under that Act and not the Insolvency Act.

72 Whilst I accept that Mr. Feetham may well be right, and particularly where a cell or cells only are subject to the administration procedure, I do not find the argument as compelling as Sir Colin does. I think the question may warrant further consideration in another case. Section 2(1) of the Insolvency Act 2011 defines an "administrator" as follows: "'administrator', in relation to a company, means the person appointed as the administrator of the company . . ." A company is simply defined as one "formed and registered under the former Companies Act or the Companies Act," and it is not disputed that that includes protected cell companies. I do not see why the fact that the definition of an "administration order" is limited to orders made under the 2011 Act should necessarily affect the apparently plain meaning of the term "administrator" under the 2011 Act. It is true that "administrator" follows "administration order" in the definition section, s.2, but no significance can in my view be read into that because the definitions are all placed in alphabetical order. If Parliament had intended the definition of "administrator" to be restricted to administrators appointed pursuant to administration orders made under the 2011 Act, one might have expected it to say so in terms (as it has done in the definition of "liquidator"). Moreover, the draftsman appears to have assumed that protected cell companies in administration were in principle subject to the provisions of Part 3 of the 2011 Act, which deals with administration, because s.2A of the PCCA has expressly disapplied Part 3. There would

have been no need to disapply Part 3 if the administration could not fall within the scope of the Act in any event. Moreover, the draftsman did not disapply Part 8. It is not, on the face of it, an unreasonable inference that the draftsman intended the powers conferred by that Part of the Act to apply to protected cell company administrators in the same was as it applies to administrators of other companies registered under the Companies Acts. Moreover, there is no logical or obvious reason for treating administrators of protected cell companies differently from all other company administrators, merely because the company happens to have adopted the cell structure. It may be that the definition of "administrator" was not linked to appointments made under the 2011 Act deliberately to catch PCCA administrators.

73 I accept, however, as Sir Colin points out, that it is not clear how the administrators of one or more cells, as opposed to the protected cell company itself, would fall within the scope of Part 8. The cells are not themselves separate companies and a cell administrator is not, therefore, a company administrator. However, since the cells are a part of the company, it may be possible to stretch the language of "an administrator of a company" to cover administrators of a part of the company too. But I accept that this is uncertain and even if the protected cell company administrator can exercise the powers in Part 8 of the Insolvency Act, cell administrators may not be able to do so. These, however, are all matters for another day, or preferably perhaps, for clarification by Parliament when the opportunity presents itself.

Conclusion

74 In my judgment, the PCCA does not confer a power on either the administrator or the court to compel a third party to co-operate with the administrator under threat of legal sanctions, either by providing documents (unless they belong to the company) or information to the administrator. The view of the majority that it does confer such a power is based on the construction of the general power in s.26(1)(a). I do not believe that this provision can properly be relied upon as a source of what judges have described as an "extraordinary" power. Furthermore, where a power of this nature has been conferred on similar office holders appointed as a consequence of an insolvency, it has always been by express terms, often with a careful identification of persons who are subject to this power and the penalty for failing to comply. Moreover, earlier legislation has contained a general power conferred on what might be termed an insolvency officer in similar terms to s.26(1)(a), and yet it has never been argued that it could bear the construction now relied upon.

75 For all these reasons, I would uphold the appeal.

76 **KAY, P.:** The statutory provisions with which this case is concerned are set out in the judgment of Sir Colin Rimer, J.A. His judgment and that of Sir Patrick Elias, J.A. demonstrate that, although the language deployed in the PCC Act is uncomplicated, it gives rise to a difficult issue of interpretation. The interpretation favoured by Sir Colin permits a wider application of the power conferred by s.26(3)(c) than the interpretation favoured by Sir Patrick. The wider application is not open-ended. It is constrained by the relationship between s.26(3)(c) and s.26(1)(a) and (b). It only permits applications for orders which have the purpose of giving effect to, or acting in aid of, the functions and powers conferred on a cell administrator by s.26(1)(a) and (b).

77 Section 26(1)(a) in particular provides that the administrator of a cell of a protected cell company "may do all such things as may be necessary for the purposes set out in s.24(4) for which the administration order was made . . ."

78 By s.24(4), the purposes for which an administration order may be made are:

> "(a) the survival as a going concern of the cell or (as the case may be) of the company;
>
> (b) the more advantageous realisation of the business and assets of or attributable to the cell or (as the case may be) the business and assets of the company than would be achieved by a cell liquidation or (as the case may be) by the liquidation of the company."

79 These provisions set the context. The legislature has enacted a statute the purpose of which is a form of investor and creditor protection, permitting a cell or cell company which might otherwise be faced with receivership to benefit from a form of rescue with less intrusive intervention than receivership would entail. Needless to say, the administration may result in the establishment of facts and matters which are such that receivership or liquidation cannot be averted.

80 It is axiomatic that the successful administration of a cell or cell company requires that the administrator is able to obtain the information and material necessary to carry out his (or in the present case, her) task effectively. This will generally require a reasonable degree of cooperation from the directors and managers of the cell or company. In the absence of a coercive power, an administrator could be frustrated by an obstructive or recalcitrant director or manager and receivership or liquidation might become inevitable, to the detriment of investors and creditors.

81 Plainly there is no specific provision of an express coercive power in the PCC Act. That is avowedly crucial to the narrower interpretation of s.26(3)(c) favoured by Sir Patrick. He has concluded that the power of an administrator to apply to the court for the private examination under oath

before the Supreme Court of a director and the production by him of specific classes of documents is so intrusive and "extraordinary" that it is not permitted by the general words of s.26(3)(c). In short, if the legislature had intended to confer such a power, it would have done so expressly.

82 For my part, I do not consider this approach to be correct. I respectfully agree with the analysis and reasoning of Sir Colin. It seems to me that the legislature cannot have intended to create a situation in which a beneficent measure of investor and creditor protection depends on the voluntary cooperation of those in charge of the cell or the company before the commencement of the administration. The wider interpretation of s.26(3)(c) does not pave the way for uncontrolled intrusion. It is, as Sir Colin has explained, limited by its relationship with ss. 26(1)(a) and 24(4). Moreover, and importantly, the making of an order of the kind sought in the present case is ultimately subject to judicial control.

83 For these reasons, and notwithstanding the impressive submissions of Mr. Feetham and the careful analysis of Sir Patrick, I would dismiss this appeal.

Appeal dismissed.
