Neutral Citation Number: [2018] EWHC 1776 (Ch)

Appeal Ref: CH-2018-000121
Case No:CR-2018-001163

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS &**
**COMPANIES AND INSOLVENCY LIST**

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 11 July 2018

**Before**:

**MR JUSTICE MORGAN**

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**Between :**

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| **LF2 Ltd** | **Appellant** |
| **- and -** | |
| **(1) MARK SUPPERSTONE** | **Respondents** |
| **(2) HENRY SHINNERS** | |
| **(Joint administrators of Pennyfeathers Ltd)** | |

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**Philip Coppel QC** (instructed by **Ballinger Law Ltd**) for the **Appellant**
**Reuben Comiskey** (instructed by **Sprecher Grier LLP**) for the **Respondents**
**Hilary Stonefrost** (instructed by **Fieldfisher LLP**) for **Fieldfisher LLP**

Hearing dates: 26 – 28 June 2018

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# Judgment Approved

**MR JUSTICE MORGAN:**

*Introduction*

1. This is an appeal by LF2 Ltd ("LF2") against the order dated 8 May 2018, made by Deputy ICC Judge Barnett, whereby he dismissed an application by LF2 for an order pursuant to paragraph 74 of schedule B1 to the Insolvency Act 1986 ("the 1986 Act"). LF2 was granted permission to appeal by Rose J on 18 May 2018. Rose J also ordered that the hearing of the appeal be expedited.

2. LF's application under paragraph 74 of schedule B1 to the 1986 Act was made on 12 February 2018. By that application, LF2 sought an order requiring Mr Supperstone and Mr Shinners as the joint administrators of Pennyfeathers Ltd ("the company") to assign to LF2 the cause of action which the company allegedly had in relation to a claim against its former solicitors, Fieldfisher LLP ("Fieldfisher"). By his order, the judge dismissed the application and ordered LF2 to pay the costs of the administrators, summarily assessed at £26,000, and also to pay the costs of Fieldfisher, summarily assessed at £45,833.33.

3. In its appellants' notice, LF2 advanced a single ground of appeal against the order dismissing its application under paragraph 74 of schedule B1. That ground of appeal was that the judge was wrong to hold that the alleged claim was frivolous or vexatious. LF2 advanced a separate ground of appeal against the order that it pay to Fieldfisher its costs of resisting the application under paragraph 74 of schedule B1; that ground of appeal was that the judge was wrong to make an order for costs in favour of Fieldfisher when it had not been a party to the application and had not been made a party pursuant to CPR 46.2. Although LF2 appealed against the order for costs in favour of Fieldfisher, it did not name Fieldfisher as a respondent to the appeal.

*The background*

4. In 2012 and 2013, the company was one of three claimants which had brought a substantial claim in the Chancery Division. The other two claimants were Mr Steer and Mr Taylor, who were directors and shareholders in the company. Those three claimants sued Pennyfeathers Property Company Ltd and two former directors of the company, namely, Mr Attwell and Mr Bowdery. The claimants alleged, in particular, that Mr Attwell and Mr Bowdery had acted in breach of various fiduciary duties owed by them. The claim was tried by Rose J in October 2013 and she gave judgment on 19 November 2013; the neutral citation of her judgment is [2013] EWHC 3530 (Ch). She held that Mr Attwell and Mr Bowdery had committed breaches of fiduciary duty and she granted declarations that certain assets were held on trust for the company and other relief. She awarded the claimants their costs on the indemnity basis and ordered a payment to be made on account of those costs.

5. The company and Mr Steer and Mr Taylor had entered into various agreements in relation to their costs of the above litigation and its funding. On 7 March 2012, the company entered into a funding agreement with Managed Legal Solutions ("the Funder"). The company also obtained ATE insurance. On 14 March 2012, the company and Mr Steer and Mr Taylor also entered into a conditional fee agreement (a "CFA") with Fieldfisher. The CFA contained detailed terms as to the payment of a basic fee and a success fee and included a definition of "Success". On 22 March 2012, the company, Mr Steer and Mr Taylor entered into a priorities agreement with Managed Legal Solutions and with Fieldfisher. Under the priorities agreement, the parties agreed how "the Claim Receipts" would be divided up. The first party to be paid was the ATE insurer, next was to be the Funder, then Fieldfisher under its CFA and then the company, Mr Steer and Mr Taylor.

6. Fieldfisher delivered various invoices in relation to its fees. The invoices covered the period from 28 February 2013 to 14 February 2014. The last two of these invoices, following the judgment given in the claim, were for sums approaching £1 million and the total fees payable as at 14 February 2014 exceeded £1.45 million. The company, Mr Steer and Mr Taylor disputed their liability to pay these fees to Fieldfisher.

7. At some point in 2014, Fieldfisher referred to arbitration its claim in relation to fees. The respondents to the arbitration were Mr Steer and Mr Taylor but not the company. On 19 November 2014, the Law Society appointed Ms Bradford, a partner in Linklaters LLP, as arbitrator. On 17 December 2014, Fieldfisher served its Points of Claim in the arbitration. On 12 January 2015, Mr Steer and Mr Taylor served their Points of Defence which had been settled by counsel. The Points of Defence raised a large number of challenges to Fieldfisher's reliance on the CFA. In the course of the

hearing before me, Mr Coppel QC for LF2 focussed on the part of the pleading which made the case that Fieldfisher had owed fiduciary duties to Mr Steer and Mr Taylor in relation to the negotiation of the CFA and had committed breaches of those fiduciary duties. Although the pleading sets out the allegation in detail, it can be summarised as follows:

(1) the CFA was in the interests of Fieldfisher but not in the interests of Mr Steer and Mr Taylor;

(2) the claims which were the subject of the CFA and the funding agreement would not of themselves result in a cash payment to Mr Steer and Mr Taylor;

(3) the only Claim Receipts which would be available to be paid out would be pursuant to any award of costs against the defendants to the claim;

(4) such an award of costs would probably be insufficient to pay the Funder and Fieldfisher's fees;

(5) Mr Steer and Mr Taylor would be immediately liable for Fieldfisher's fees, which they could not afford to pay;

(6) Mr Steer and Mr Taylor would thereby be exposed to the risk of bankruptcy.

8. I was told that at some point the arbitration was stayed as regards Mr Steer on the grounds of his ill health but continued as against Mr Taylor. At some stage, Mr Taylor ceased to be represented by solicitors and counsel and continued by representing himself. I was also told that Mr Taylor indicated at some point that he did not wish to rely on all of the matters which had been pleaded in the Points of Defence. I am not clear as to the extent to which Mr Taylor advanced the case that Fieldfisher had committed a breach of fiduciary duty in relation to the negotiation of the CFA. It seems from what I was shown that Mr Taylor did continue to allege that he had not been personally advised by Fieldfisher but he perhaps did not allege specific fiduciary duties in that respect.

9. I was shown a witness statement prepared by Mr Phillips of Fieldfisher. He explained that on 14 March 2012, just before the CFA was signed, he spoke to both Mr Steer and Mr Taylor. In that witness statement, Mr Phillips referred to the explanation which he gave to both of them as to specific clauses in the CFA. I was not shown any record of any cross-examination of Mr Phillips. In her award, the arbitrator referred to the evidence as to the conversation between Mr Phillips and Mr Taylor on 14 March 2012. She stated that Mr Taylor recalled little about this conversation and did not accept that it could have been comprehensive. The arbitrator referred to other parts of the evidence of Mr Taylor. She accepted that he was an honest witness but she considered that his recall of events was vague. She held that Fieldfisher had given appropriate advice on the risks and liabilities involved. Fieldfisher succeeded in its arbitration claim against Mr Taylor. I understand that, thereafter, Fieldfisher obtained a bankruptcy order against Mr Taylor.

10. Fieldfisher then applied for an administration order in relation to the company on the ground that it was unable to pay its debts. The debts relied upon by Fieldfisher in its application were the sums said to be due to it by way of fees. That application came

before Nugee J, who dismissed it on 8 March 2016 on the ground that there was a dispute as to Fieldfisher's fees and that dispute was the subject of a compulsory arbitration clause in the CFA. The judge applied to this administration application the principle laid down in Salford Estates (No. 2) Ltd v Altomart Ltd [2015] Ch 589, in relation to a petition for the winding up of a company based on a disputed debt where the dispute was to be determined by arbitration, and held that it was not appropriate for the court to investigate the dispute as to the alleged debt as that would be contrary to the arbitration clause. That reasoning produced the result that the application was dismissed. Nugee J's judgment is reported at [2016] BCC 697.

11. Ten days later, on 18 March 2016, Nugee J rescinded his earlier order dismissing the administration application and he then made an administration order in relation to the company on the application of Fieldfisher. At this second hearing, the judge accepted that the company owed some £270,000 either to Fieldfisher or to HMRC. This sum related to VAT, on Fieldfisher's invoices for their fees, which the company had recovered from HMRC as input tax but which in the events which had happened was either payable by the company to Fieldfisher or repayable to HMRC. As administrators, the judge appointed Mr Supperstone as the nominee of Fieldfisher and Mr Shinners as the nominee of the Funder.

*Mr Ballinger and LF2*

12. In 2017, Mr Ballinger of Ballinger Law Ltd became involved in this matter. I will take a description of his involvement from the judgment of the Deputy Judge. The Deputy Judge referred to an approach by Mr Steer and Mr Taylor to Mr Ballinger in the spring of 2017. Mr Ballinger then contacted Mr Shinners and raised with him the possibility of a claim by the company against Fieldfisher. Mr Ballinger offered to act as the solicitor for the company in connection with that claim. On 20 July 2017, Mr Ballinger wrote to Mr Shinners offering to act for the company on a CFA basis or alternatively, to purchase the claim outright for £10,000. On 1 August 2017, the administrators rejected the offer of £10,000 on the ground that it would not make a material difference to the unsecured creditors. On 3 August 2017, Mr Ballinger responded explaining why he had offered £10,000 for the claim and then proposing an alternative arrangement which involving buying the cause of action for £1 plus deferred consideration contingent on success in the claim. The administrators replied and said that they intended to "park" the issue.

13. In further correspondence, Mr Ballinger sought to persuade the administrators to take action in relation to a claim against Fieldfisher. He pointed out that the limitation period would expire within a short time. Then, on 6 October 2017, Mr Steer assigned to Ballinger Law Ltd his interest as a creditor of the company (pursuant to an earlier loan made by Mr Steer to the company). On 7 November 2017, Ballinger Law further assigned that interest to LF2 which then gave notice of the assignment to the administrators. The administrators made no reply to this notice. Mr Ballinger wrote to the administrators again on 10 January 2018, complaining of their inactivity and stating that LF2 would apply for an order under paragraph 74 of schedule B1 to the Insolvency Act 1986.

14. On 15 January 2018, the administrators wrote to Mr Ballinger stating that:

(1) Mr Ballinger had not supplied any evidence to show that the advice given by Fieldfisher to the company had been negligent;

(2) Mr Ballinger had not provided any evidence as to the value of the claim;

(3) the administrators were not persuaded that it was in the interests of creditors to incur costs and/or management time in pursuing the claim; and

(4) they should not facilitate the pursuit of spurious or vexatious claims and did not propose to take the matter further.

*The application*

15. On 12 February 2018, LF2 applied for an order under paragraph 74 of schedule B1 to the 1986 Act. The administrators were the only respondents to that application. LF2 sought an order that the administrators assign to LF2 the rights to the company's claim against Fieldfisher.

16. The application was supported by a witness statement from Mr Ballinger. Mr Ballinger is a solicitor and is the sole director and shareholder of LF2. He described the intended claim against Fieldfisher. He stated that Mr Steer and Mr Taylor were not wealthy or sophisticated. Mr Steer was described as a plumber and Mr Taylor as a carpet salesman, although he had some experience in relation to planning and development matters. Mr Ballinger then described his instructions from Mr Steer and Mr Taylor as to their understanding as to the operation of the funding agreement and the CFA. This description included the statement that:

> "in the event of a successful outcome, once the fruits of the litigation were realized in monetary form, then the third party funders and the ATE insurers would be paid their entitlements, FF would be paid the balance of their base fee plus a 20% success fee, and the balance of any proceeds would then belong to the Company."

17. Mr Ballinger then quoted in detail from the email communications between the company and Fieldfisher prior to the CFA and he commented upon them. He suggested that these communications were all consistent with the company (and Mr Steer and Mr Taylor) not being liable to pay Fieldfisher's fees at a time before they had received "the fruits of the litigation in monetary form". Mr Ballinger referred to the conversations which Mr Phillips had with Mr Steer and Mr Taylor on 14 March 2012 and said that there was no indication of what Mr Phillips had "explained" as to the operation of the CFA and there had been nothing to contradict the earlier understanding as to when Fieldfisher would be entitled to be paid its fees.

18. Mr Ballinger then explained the legal basis of the intended claim against Fieldfisher. He contended that the CFA was unsuitable for the company and that Fieldfisher had not given the company appropriate advice to that effect. He submitted that if Fieldfisher had given the company appropriate advice, the company would have obtained a suitable CFA from another firm of solicitors and he expressed the opinion that the company would have been able to find another firm which would act on the basis of a suitable CFA. He referred to various possible losses which the company had

incurred as a result of the inappropriate advice from Fieldfisher. These losses included the placing of the company into administration, and the fees of the administrators, and the difficulties which the administration caused for the company in pursuing its remedies under the order of Rose J and maximising the value of its development opportunity. Mr Ballinger added that he considered that the company had a claim in deceit against Fieldfisher but that it was not necessary to advance that claim.

19. Mr Ballinger then dealt with the suggestion in the adminstrators' email of 15 January 2018 that the intended claim against Fieldfisher was spurious or vexatious. He said that prior to this email, the administrators had not requested to be given the evidence in support of the claim but that he had now done so in his witness statement. He also dealt in more detail with the losses to be claimed. He added that he had considerable experience of comparable litigation, that he was prepared to fund the claim, that leading counsel had agreed to conduct the claim on a full CFA and that ATE insurers had agreed to support the claim.

20. Mr Ballinger then addressed the point made by the administrators that the assignment of the cause of action against Fieldfisher would not benefit the creditors. He suggested that the outcome of the administration would result in a dividend to the unsecured creditors and that a payment for the assignment of the cause of action would increase the dividend.

21. Mr Shinners served a witness statement in response to Mr Ballinger. As to the merits of the intended claim against Fieldfisher, Mr Shinners said that he had concerns as to the merits of the claim. He suggested that the company had experienced directors and that the arbitration proceedings and the administration applications might give rise to an estoppel per rem judicatem in favour of Fieldfisher. He also suggested that the passage of time between the order of Rose J in November 2013 and the administration order on 18 March 2016 showed that the fact of administration was not the cause of any difficulties which the company alleged it had in relation to enforcement of its rights.

22. Mr Shinners also put forward a number of reasons why it would not be appropriate for the administrators to assign the cause of action in return for a share of any proceeds of the litigation against Fieldfisher. He submitted that the only offer of payment from LF2 which the administrators could accept would be the payment of the fixed sum of £10,000 for the assignment. He said that a payment of £10,000 would not result in any benefit to the creditors as that sum would be consumed by the fees and time costs involved in dealing with the assignment. He then said that if the court considered that the cause of action ought to be considered capable of assignment, the hearing of the application should be adjourned to allow the administrators to auction the cause of action in a way which involved all the creditors of the company, including Fieldfisher.

23. The application came before Deputy Registrar Schaffer on 21 February 2018. LF2 and the administrators were both represented. The administrators had notified Fieldfisher of the application and of the hearing and Fieldfisher appeared through counsel at that hearing. I was provided with a transcript of that hearing. In the course of that hearing, in response to a question from the Deputy Registrar, LF2 indicated that, instead of the cause of action being assigned to LF2, it would agree to the

administrators auctioning the cause of action. At the end of the hearing, the Deputy Registrar adjourned the application to allow Fieldfisher to put documents relating to the arbitration against Mr Taylor before the court, on terms that Fieldfisher would agree a period of standstill in relation to the limitation period for the alleged cause of action against them. A standstill period was agreed and I was told that that period expires on 11 July 2018.

24. Thereafter, Fieldfisher served the witness statement of a partner, Mr Jarvis, which referred to the course of the arbitration against Mr Taylor. This witness statement exhibited a 15-page letter dated 7 March 2018 from Fieldfisher to the administrators' solicitors (copied to Mr Ballinger) in which Fieldfisher raised a number of points about the application including its comments on the alleged cause of action against it.

25. Mr Ballinger then served a second witness statement. He referred to the fact that Fieldfisher had now served a total of 1176 pages of documents from the arbitration proceedings. Mr Ballinger complained about the effect of the service of this amount of material on the course of the application under paragraph 74 of schedule B1 and as to the costs involved in dealing with that material. He referred to the 15-page letter from Fieldfisher to the administrators' solicitors and he produced a 27-page response to that letter. I note that in the course of the hearing before me, none of the three counsel took me to the 15-page letter nor the 27-page response.

26. Next, Mr Shinners served his second witness statement. He said that if the court considered that if LF2 had discharged the burden of showing that the cause of action was not frivolous and/or vexatious and that the assignment of the cause of action ought to be explored further then the administrators would wish to hold an auction of the cause of action because that would be likely to realise a higher price for it and result in a better outcome for the creditors as a whole. He ended his witness statement by asking the court to determine whether the cause of action was frivolous or vexatious. Mr Ballinger replied to this witness statement but I need not refer further to this evidence in reply.

*The judgment*

27. The application was heard by Deputy ICC Judge Barnett on 13 April 2018. The hearing was attended by LF2, the administrators and by Fieldfisher, all of whom appeared through counsel. The Deputy Judge reserved judgment and he handed down judgment on 8 May 2018. He dismissed the application under paragraph 74 of schedule B1 and made orders that LF2 pay the costs of the administrators and of Fieldfisher.

28. In his judgment, the Deputy Judge:

    (1) summarised the background to the litigation, the funding arrangements, the arbitration against Mr Taylor and the administration of the company;

    (2) referred to the communications between Mr Ballinger and the administrators;

(3) referred to paragraph 74 of schedule B1 and to the submissions of Mr Comiskey for the administrators;

(4) held that the legal principles which he should apply included the following:

a) officeholders are under a positive duty not to assign a cause of action that is without merit;

b) the court should not direct the assignment of a claim which is frivolous or vexatious, which includes a claim with no real prospect of success;

c) the applicant bears the burden of proving that the claim does have prospects of success;

d) where the proposed assignee of the cause of action is unlikely to be able to meet an adverse costs order made against it, the court will need to be satisfied that there are clear and certain benefits for the creditors;

(5) held that LF2 was a creditor of the company, having taken an assignment of a debt owed by the company to Mr Steer;

(6) held that the claim against Fieldfisher was frivolous and vexatious; he referred to some of the communications between Fieldfisher and the company prior to the CFA; he noted the submission by Mr Coppel on behalf of LF2 that Fieldfisher had not properly advised the company and the submission by Ms Stonefrost for Fieldfisher that they had given proper advice to the company; he referred to the terms of the CFA which recorded that its terms had been explained to Mr Steer and Mr Taylor; he referred to the arbitration award against Mr Taylor and to the submissions made to him as to the relevance of the award;

(7) held that Mr Taylor was aware that absent a settlement or earlier sale of the land in dispute, the judgment that could be obtained in the litigation was a non-monetary judgment and that his costs liability was triggered by that success;

(8) held that Fieldfisher had given careful and full explanations to Mr Steer and Mr Taylor;

(9) held that the evidence strongly indicated that Mr Ballinger's motive in making the application on behalf of LF2 was to be able to exploit the commercial opportunity involved in bringing proceedings against Fieldfisher rather than to protect LF2's interests as a creditor;

(10) held that he was not satisfied that LF2 had discharged the burden of showing that the creditors would derive any benefit from an assignment of the claim and, indeed, that he was driven to the conclusion that there would be no benefit to LF2 as a creditor;

(11) held that there was no evidence that the creditors would suffer unfair harm by the administrators declining to assign the claim against Fieldfisher.

*The appellant's notice*

29. The appellant's notice asked for the orders of the Deputy Judge to be set aside and for the appeal court to order the administrators to carry out an auction of the cause of action against Fieldfisher and to order the administrators to pay LF2's costs of the application and of the appeal. The appellant's notice put forward two grounds of appeal. The first ground challenged the finding that the claim against Fieldfisher was frivolous and vexatious. The second ground of appeal challenged the order that LF2 pay the costs of Fieldfisher.

30. There are two oddities about the appellant's notice. The first is that it did not put forward any ground of appeal by way of challenge to the Deputy Judge's findings that the assignment of the claim would not result in any benefit for creditors and that LF2 had failed to show that it would suffer unfair harm as a result of the administrators not assigning the claim. The second is that although the appellant's notice challenged the order for costs in favour of Fieldfisher, it was not named as a respondent to the appeal.

*Discussion*

31. As will be seen, for the reasons given below, I take the view that the Deputy Judge was wrong to conclude on the material before him that the claim against Fieldfisher was frivolous and vexatious. However, I wish to consider in the first instance, on the assumption that the claim was not frivolous and vexatious, whether it is open to me to allow the appeal having regard to the terms of the appellant's notice.

32. Paragraph 74 of schedule B1 to the 1986 Act provides:

> "[a] creditor or a member of a company in administration may apply to the court claiming that –
>
> (a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
>
> (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members of creditors)."

33. In the present case, LF2 satisfied the Deputy Judge that it was a creditor of the company and so it had locus to make an application under paragraph 74. In order for LF2 to succeed in its application, it had to satisfy the court that the administrators were acting in a way which unfairly harmed the interests of LF2, whether alone or in common with some or all other creditors.

34. The Deputy Judge held that he was not satisfied that the administrators were acting in a way which harmed, in particular, which unfairly harmed, the interests of LF2, whether alone or in common with some or all creditors. I consider that it follows that unless the appeal court reverses that finding, the appeal must be dismissed. As I have pointed out, there is no ground of appeal by way of challenge to that finding. The ground of appeal which challenges the finding that the claim was frivolous and

vexatious is not a challenge to the finding that there was no unfair harm in this case. If the Deputy Judge's finding that there was no unfair harm was based on his finding that the claim was frivolous and vexatious, then a successful challenge to the latter finding might have been enough to enable the appeal court to reject his finding as to unfair harm. However, it is clear from the judgment that the question of unfair harm was an "other argument" as to why the court should dismiss the application. The Deputy Judge found that the actions and omissions of the administrators did not cause harm to the creditors even if the claim was not frivolous or vexatious. That approach was in accordance with the evidence put forward by Mr Shinners who explained the case why an assignment of the cause of action would not result in a benefit for the creditors. If an assignment would not benefit the creditors then it would follow that an omission to assign would not harm the creditors.

35. Mr Coppel's skeleton argument was served at the same time as the appellant's notice and, like the appellant's notice, did not involve any challenge to the Deputy Judge's finding as to unfair harm. However, the fact that LF2 had not challenged the finding as to no unfair harm was expressly referred to in the skeleton argument prepared by Mr Comiskey for the administrators and his skeleton argument was served at the same time as the administrators served a respondent's notice in this case. LF2 did not then seek to amend its appellant's notice or file a supplemental skeleton argument. Ms Stonefrost prepared a skeleton argument on behalf of Fieldfisher in relation to the appeal. She also expressly pointed out that for the appeal to succced there needed to be a challenge to the finding as to unfair harm but there was no such challenge.

36. At the hearing of the appeal, I first heard submissions from Mr Coppel in support of the appeal. He did not address the finding as to unfair harm. I then heard from Mr Comiskey and Ms Stonefrost. Mr Comiskey, in particular, addressed me on the finding as to unfair harm and he also volunteered further information, on instructions, as to the up to date position as to the administration and made the submission that it was only if the cause of action were sold for a substantial six-figure sum that such a sale would result in a benefit to the creditors.

37. In his submissions in reply, Mr Coppel began by submitting that it was not necessary for LF2 to challenge the finding as to unfair harm. He submitted that there was a convention of some kind in relation to alternative findings by judges at first instance which made it inappropriate, and certainly unnecessary, for an appellant to challenge the alternative reasoning of a first instance judge which provided an alternative ground for reaching the same conclusion as was supported by the court's primary reasoning. I indicated to Mr Coppel that I was not aware of any such convention. Mr Coppel then applied for permission to amend the appellant's notice and he put forward a pre-prepared draft raising four grounds of appeal by way of challenge to the finding as to unfair harm. In summary, these draft grounds of appeal:

    (1) relied upon Mr Ballinger's first witness statement;

    (2) contended that the Deputy Judge failed to give reasons as to why the receipt of £10,000, or possibly more following an auction, would not benefit the creditors particularly since the cost of negotiating and documenting an assignment would be borne by LF2;

(3) contended that the Deputy Judge did not have regard to the interests of all of the creditors;

(4) contended that the Deputy Judge failed to give reasons as to why LF2 did not benefit from its proportion of the benefit to all the creditors.

38. At the hearing of the appeal, I refused to grant LF2 permission to amend its appellant's notice on an application made in the course of its reply to the submissions for the administrators and Fieldfisher and I gave brief reasons for that refusal. The appeal had been heard all day on 26 June, in the morning of 27 June and in the morning of 28 June 2018 and Mr Coppel made his application for permission to amend in the course of his submissions in reply on the last of these days.

39. I considered that the application for permission to amend the appellant's notice was made very late in a way which would prejudice the position of the administrators and Fieldfisher. There was no good explanation for the lateness of the application. It should always have been obvious to LF2 that it needed to challenge the alternative reasoning as to unfair harm. If that had not been initially obvious to LF2, then it was expressly pointed out to LF2 when the administrators served their skeleton argument and again when Fieldfisher served its skeleton argument but yet there was no application for permission to amend the appellant's notice. LF2 presented its appeal in oral argument without addressing this point.

40. If I had granted permission to amend, I would then have had to consider an oral application for permission to appeal on this further ground of appeal. That would have given rise to similar arguments as those that would arise if I had given permission to appeal and heard a substantive appeal on this further ground. I would have needed to hear the submissions from LF2 and, at least, the administrators, as to the evidence before the Deputy Judge as to unfair harm. I may have been asked to allow the administrators to put in a respondent's notice to support the finding as to unfair harm on additional and/or alternative grounds to those put forward by the Deputy Judge, given that he had expressed himself concisely in making his findings. Further, and very importantly, if I had formed the view that the Deputy Judge's conclusion as to unfair harm could not stand on the basis of the material before him, I would probably have wished to remake the decision as to unfair harm and if I had done so I would probably have sought to make that decision on the basis of the current position in relation to the administration. As I explained earlier, Mr Comiskey had made submissions, based on his instructions, that an assignment would be unlikely to produce a benefit for the creditors. If I were to remake the decision based on the current position, then the administrators would probably have been allowed to put in up to date evidence as to the position and LF2 ought to have been allowed to answer that evidence. All of these further steps would have taken some time and I took into account the fact that Fieldfisher's agreement as to a standstill period as to limitation would expire on 11 July 2018 and the court had already accommodated LF2 by dealing with the original application and with the appeal on an expedited basis.

41. I am not refusing permission to amend on the ground that the draft grounds of appeal would inevitably fail. Instead, as I said to Mr Coppel, his best point might be that if the court expressed the view that the claim was not frivolous and vexatious, the administrators indicated to me that they would seek to auction the cause of action so that would suggest that they considered that an auction of the claim might be of

benefit to someone, either to themselves in relation to the recovery of their administration expenses or conceivably the creditors. However, as I consider that the claim is not frivolous or vexatious and as the administrators have indicated that they do intend to auction it and as, further, the appellant's notice seeks an order that the administrators auction the claim, the only real importance of an amendment to the appellant's notice would seem to be in relation to a possible effect on the costs of the application and of the appeal. For the reasons given earlier, it is not appropriate to grant permission to amend the appellant's notice with all of the consequences that might then flow just to improve LF2's position as regards costs.

42. The result of this reasoning was that I indicated at the end of the hearing that I would dismiss the appeal.

*Frivolous and vexatious*

43. Most of the argument at the hearing of the appeal related to the Deputy Judge's finding that the claim against Fieldfisher was frivolous and vexatious. Mr Coppel submitted that this finding was wrong. Mr Comiskey explained that the administrators were not satisfied that the claim had merit but they did not formally oppose the application under paragraph 74 of schedule B1 on that basis. Instead, they welcomed the court's determination as to the merits of the claim because it was found to be "properly assignable" then the administrators intended to do so in order to realise its value. Ms Stonefrost submitted that the Deputy Judge was right in his assessment of the lack of merit of the claim.

44. At the end of the hearing, conscious of the deadline of 11 July 2018, I expressed my concluded view that the claim against Fieldfisher was not frivolous and vexatious and I would give my reasons for dismissing the appeal and my conclusions as to the alleged claim in a written judgment. This judgment contains those reasons.

45. Although I take the view that the Deputy Judge was wrong in his assessment of the merits of the claim against Fieldfisher, I am not making any final decision as to the outcome of such a claim. It is therefore not appropriate for me to give elaborate reasons for my assessment of the position and in particular it is not appropriate for me to predict the outcome of a trial which would involve oral evidence and, in particular, the cross-examination of witnesses. However, I ought to give sufficient reasons to explain why I have reached the conclusion that the Deputy Judge's assessment was wrong on the material before him.

46. The funding arrangements in this case were sufficiently complex so that they would not necessarily be immediately understood by a non-lawyer. There was the potential for confusion as regards the priorities agreement and the terms of the CFA. Someone in the position of Mr Steer or Mr Taylor might well have considered that the effect of the Priorities Agreement meant that Fieldfisher would only be paid out of the Claim Receipts and indeed only after the ATE insurer and the Funder were paid. It might not have been apparent to them that even if the Claim Receipts were not available to pay Fieldfisher's fees, then Fieldfisher could still proceed against the company and against Mr Steer and Mr Taylor at a time when they had no funds with which to pay the fees, with the result that the company and the individuals could be made the subject of a compulsory process of insolvency. I refer to what Mr Steer and Mr Taylor might have thought in order to explain that there is nothing inherently unlikely in the case that

they did not understand how the funding arrangements and the CFA worked. That likelihood only emphasised the need, which existed anyway, for Fieldfisher to explain to them not only what the CFA provided but also to spell out the practical implications of those provisions. I consider that it is arguable that the CFA in this case was unsuitable for the company having regard to the nature of its claims in the litigation and it seems improbable that Fieldfisher explained to the company that the CFA was unsuitable. Indeed, in view of Fieldfisher's case that the CFA was not in any way unsuitable, it must also be their case that it did not advise the company to that effect.

47. In those circumstances, I have looked to see what material the Deputy Judge had which enabled him to hold that:

(1) Fieldfisher had given careful and full explanations; and

(2) it was frivolous and vexatious for the company to contend otherwise.

48. Having reviewed the material before the Deputy Judge and having considered the submissions before me, I consider that the Deputy Judge did not have the material which would have enabled him to find that it was frivolous and vexatious to contend that Fieldfisher failed to give appropriate advice which warned the company of the potentially adverse practical implications of the CFA. Further, I consider that it was not frivolous and vexatious to contend that the CFA was unsuitable for the company and that Fieldfisher failed to give appropriate advice to the company in that respect. Indeed, there is a complete lack of detail as to precisely what explanations Fieldfisher did give to the company. Given the duty to explain, which Fieldfisher arguably owed to the company, it is simply not sufficient on the present application for Fieldfisher to say "we explained the CFA" without going into detail as to what that explanation amounted to. I consider that at any trial of this claim, it will be imperative for the court to investigate in detail and with care precisely what explanation was given to the company, in particular as to the practical implications of the funding arrangements, before one could form a view as to whether such an explanation was adequate.

49. As to damages, Mr Ballinger has put forward a case as to causation of loss which is not frivolous or vexatious. That case is that if the company had been advised that the proposed CFA was unsuitable, it would have found a solicitor to conduct the litigation on the basis of a suitable CFA. If that case were established, damages would be assessed to reflect the disadvantages to the company of being subject to an unsuitable CFA rather than a suitable CFA.

50. I was reminded by Ms Stonefrost that this is an appeal from the Deputy Judge and I am not free to reverse his assessment of the position unless I am satisfied that it was "wrong" for the purposes of CPR 52.21(3)(a). For the reasons given above, I consider that it was simply not open to the Deputy Judge to reach the conclusion which he reached and that his conclusion was wrong.

*The approach and the procedure adopted in this case*

51. Before parting with the appeal in relation to the assignment of the cause of action, I wish to comment on certain features of the approach and the procedure adopted in this case which appeared to have created difficulty for the parties and which have

lengthened the hearing of the application and of the appeal and have increased the costs.

52. The first point relates to the attitude an administrator should adopt in relation to the possibility of a claim by the company against a third party. I referred earlier to the findings of the Deputy Judge that he should apply the following legal principles:

(1) officeholders are under a positive duty not to assign a cause of action that is without merit;

(2) the court should not direct the assignment of a claim which is frivolous or vexatious, which includes a claim with no real prospect of success;

(3) the applicant bears the burden of proving that the claim does have prospects of success;

(4) where the proposed assignee of the cause of action is unlikely to be able to meet an adverse costs order made against it, the court will need to be satisfied that there are clear and certain benefits for the creditors;

53. Mr Comiskey and Ms Stonefrost submitted that this was an accurate statement of the relevant principles. Indeed, in the course of seeking to apply those principles, the argument seemed to be that if an administrator was unclear as to whether a claim had merit, then he had a duty not to assign it.

54. The origin of the suggestion that an administrator is under a positive duty not to assign a cause of action that is without merit was said to be the following passage in the judgment of Browne-Wilkinson J (as he then was) in Re Papaloizou (1980) reported at [1999] BPIR 106 at 112D-F:

> "Although it is not necessary for me to decide the point, I should sound a note of warning to trustees. At best the transaction here was very close to the line of what is permissible. Although I loyally accept the decision of the Court of Appeal in *Ramsay v Hartley* that the sale of a bare cause of action by the trustee in bankruptcy back to the bankrupt is not per se contrary to public policy, I think trustees should exercise their power to take such a step with great circumspection. It must not be forgotten that by so doing they are enabling the bankrupt to conduct possibly vexatious litigation against third parties who will have no effective remedy in costs against him, since all his assets have been vested in the trustee. There may be cases in which this is an appropriate course to adopt, for example if immediate substantial assets are made available for the creditors. But in general the policy of the bankruptcy legislation is for the trustee – and not any one else – to get in the assets of the bankrupt and for that purpose to decide whether causes of action should be pursued, if necessary with funds provided for that purpose by the creditors in the bankruptcy. Before abdicating this responsibility by putting the bankrupt back in the saddle, the trustee should bear in mind the

> consequences to the other parties in litigation of so doing. My present view is that it should not be done unless clear and certain benefits are obtained for the creditors."

55. This passage does not identify the legal principle which produces the result that the office holder should be circumspect before assigning a cause of action. As the office holder has a statutory power to assign the cause of action and has a duty to act in the interests of the creditors, it might be thought that if the assignment produced a benefit for the creditors then the office holder should be prepared to receive that benefit, unless the case came within the principle in Ex parte James, In re Condon (1874) LR 9 Ch App 602. That principle might mean that it would not be honest and fair for the office holder to assign an alleged cause of action where a claim by the assignee would be frivolous or vexatious.

56. The position of a trustee in bankruptcy who intends to assign to the bankrupt a cause of action vested in the trustee was the subject of comment by Lord Hoffmann in the House of Lords in Stein v Blake [1996] 1 AC 243 at 260D-H. I will not set out that passage but I draw attention to what is said about a difference of opinion between the bankrupt and the trustee as to the alleged claim against a third party, the trustee's duty to act in the interests of the creditors generally and the practicality of a course whereby the trustee assigns the claim to the bankrupt and lets him pursue it. The attitude of the courts to an office holder using his statutory power to assign the benefit of a cause of action vested in him or in the company which is in insolvency proceedings was considered again by Lord Hoffmann in the House of Lords in Norglen Ltd v Reeds Rains Prudential Ltd [1999] 2 AC 1 at 11E-12E. Whilst the judgments in those cases do not refer to Papaloizou, the tenor of the remarks seems to me to be at variance with the "note of warning" expressed in that case.

57. The approach of an office holder asked to assign an alleged cause of action was considered in detail by the Federal Court of Australia in Citicorp Australia v Official Trustee in Bankruptcy [1996] FCA 1115. This case was referred to in the English case of Cummings v The Official Receiver [2002] EWHC 2894 (Ch) to which I was referred, although it was referred to by a different name, namely, Re: the Bankrupt Estate of Serillo with no citation given. In fact, "Serillo" was a misspelling of the name "Cirillo". The Citicorp case contains a valuable discussion of the approach to be adopted by the office holder and by the court. Having considered a number of authorities, including Stein v Blake, the court held:

> "The foregoing authorities do not deny that in a case where it is clear that the claim sought to be pursued by the bankrupt or other proposed assignee is frivolous or vexatious, the trustee or the court should not allow the assignment to occur. A claim with no reasonable prospect of success would be a frivolous one, and the prosecution of such a claim would be vexatious. As earlier noted, in most cases it will not be clear that an alleged claim has no reasonable prospect of success. However when a clear case arises, the trustee as an officer of the Court, and the Court itself, in the public interest, should not allow the assignment to occur, even where an immediate sum of money is offered as consideration that would benefit the estate of the bankrupt."

58. It was argued in the Citicorp case that if there were an issue as to whether a claim was frivolous or vexatious, the burden was on the person seeking to take an assignment of the claim to satisfy the court that the claim was not frivolous or vexatious. This submission was rejected. The court put the matter the other way around and said:

> "Where a creditor or intervening party contends that an assignment should not be authorised because the proposed claim has no prospect of success it is for that party to demonstrate the absence of any prospect of success. This follows from the general principle that a party who asserts a proposition carries the evidentiary onus of establishing the necessary facts to support it."

59. In Faryab v Smith [2001] BPIR 246, Robert Walker LJ said at [38]:

> "The more difficult a claim is to evaluate (and I do not in any way diminish the problems of evaluation or the size of the difficulty facing Mr Smith), the stronger the argument must be for the sort of procedure described by Lord Hoffmann in Stein v Blake (1995) 2 All ER 961 which enables the claim to go forward and see whether it is worth anything or not."

That comment was made in the context of the trustee in bankruptcy having to choose between assigning the cause of action to the proposed defendant and assigning the cause of action to the bankrupt in return for a share in the proceeds of the litigation. Robert Walker LJ also referred to the claim in that case as "not obviously hopeless or near hopeless" although I accept that he was not attempting a definition of what causes of action an office holder might choose to assign. He also referred to the public interest element in not allowing a cause of action to be stifled by the defendant to the claim making the claimant bankrupt.

60. In Cummings v The Official Receiver [2002] EWHC 2894 (Ch), Blackburne J dismissed an appeal by the bankrupt, Mr Cummings, acting in person, against a decision of the registrar whereby he refused to make an order that the Official Receiver assign two alleged causes of action to the bankrupt. The judge stated that the Official Receiver and the judge knew very little about the nature of the alleged causes of action. The judge referred to the remarks in Re Papaloziou and to Re the Bankrupt Estate of Serillo (which was a reference to the Citicorp case). The judge appeared to proceed on the basis that these two cases adopted the same approach. He said that the Official Receiver did not know whether there was any merit in the claims and took the view that it would not be right to assign them to the bankrupt if they had "no merit" and if they had merit, it would be appropriate to require a payment to be made for the assignment. The judge held that the registrar was entitled to come to the decision which he did. The judge then commented on the lack of information about the causes of action and said that if Mr Cummings could show the Official Receiver that the claims had merit then there was no reason why the Official Receiver could not assign the claims back to Mr Cummings. In the case, the judge disposed of the appeal before him on the specific facts of that case but his remarks appear to have led to the submission made to the Deputy Judge in this case that there was a burden of proof on the party seeking an assignment to show that the claim was not frivolous or vexatious.

61. In Wilson v The Specter Partnership [2007] EWHC 133 (Ch), the judge declined to make an order that the liquidator assign an alleged cause of action to a former director and creditor when the proposed assignee had declined to provide the liquidator with any information as to the proposed claim and the liquidator did not have any information of his own with which to form a view as to the assignability, merits or value of the claim or even whether it existed. The case turned very much on its specific facts.

62. Hockin v Marsden [2017] BCC 433 was an application under paragraph 74 of schedule B1 by a creditor of the company seeking an order that an administrator assign to her an alleged claim. The judge referred to Re Papaloizou and Cummings v Official Receiver and then held (at [23]) that there was a burden on the creditor to establish that the claim was not frivolous or vexatious.

63. Apart from the Citicorp case which was not cited to me, these are the cases which are said to support the principles relied upon by the Deputy Judge and the further proposition put to me that when it is not clear whether the cause of action has merit, the administrator ought not to assign it and should instead place a burden on the party seeking the assignment to demonstrate that the claim is not frivolous or vexatious. I consider that this approach reads far too much into the remarks in Papaloizou and Cummings v Official Receiver and is wrong in principle. I also consider that the most helpful authority is the decision in Citicorp which contains an accurate statement of the principles to be applied.

64. The administrator's power to assign a cause of action is conferred by paragraph 2 of schedule 1 to the 1986 Act, as a cause of action is "property" within that paragraph. That paragraph is not limited by any words which require the administrator to satisfy himself as to the arguability of an alleged cause of action.

65. A viable claim by the company against a third party is an asset of the company. A claim which is arguably viable, is a potential asset of the company. In principle, an administrator ought to be ready to investigate whether such an asset should be preserved and pursued. Of course, there may be obstacles in the way of doing so. The administrator may have no funds with which to take legal advice. In such a case, it may be open to the body of creditors to provide the necessary funds.

66. If the administrator has no funds to investigate a possible claim against a third party and he receives an offer from a potential assignee of the claim to pay for an assignment, that offer will potentially constitute an asset of the company. The administrator should normally wish to preserve and pursue that asset. If it is clear to the administrator that the claim would be hopeless and that the potential assignee is bent on pursuing a hopeless claim in order to harass the third party, then the administrator should normally decline to assign the hopeless claim. The administrator is an officer of the court and the court expects him to behave honestly and fairly. In the same way as the court would not direct an assignment of a hopeless claim where the court was of the view that the assignee's intention was to use the hopeless claim to harass a third party, then the administrator might well take the same view as to his own participation without finding it necessary to seek a direction from the court.

67. But there will be other cases. One such case is where the administrator does not have a clear view that the proposed claim would be vexatious and he is offered a sum of

money for the assignment of the claim. In such a case, the administrator should be prepared to obtain a proper payment for the assignment. If it is not clear that the offer reflects the true value of the cause of action, then the administrator may well be advised to conduct some process of inviting rival bids or to hold an auction of the cause of action. The receipt of a sum of money for the claim would be likely to benefit someone, whether it is the administrator (as a contribution to his expenses) or the creditors.

68. There may also be practical considerations and time pressures which the administrator has to take into account. If the administrator is considering whether the company has a potential claim and there is a high risk that the limitation period for the claim may be about to expire, the administrator may have to take immediate action to protect a potential asset of the company. The administrator may have to cause the company to issue a protective claim form or even to conduct some rapid negotiations to obtain the best available offer for an assignment of the cause of action.

69. The focus of the submissions on behalf of the administrators in this case was on protecting a third party from the possibility of being harassed by litigation rather than (as it should be) on the administrators realising the assets or potential assets of the company for the benefit of the creditors. It must be remembered that if the alleged claim is assigned and the assignee then issues a claim form, the defendant will be able to apply to strike out the claim form or to seek a reverse summary judgment if the defendant wishes to contend that the claim is frivolous or vexatious.

70. Indeed, I consider that it may well be undesirable for the court when it is dealing with a dispute between a creditor or a member and an administrator under paragraph 74 of schedule B1 to have a lengthy hearing as to whether the claim is frivolous or vexatious rather than, save in a clear case, allowing or directing the administrator to assign the alleged cause of action and then if a claim form is issued against a third party to allow the third party, if so advised, to apply to strike out the claim form. It is more appropriate for an argument as to whether the claim is frivolous and vexatious to be conducted in the ordinary way between the assignee of the claim and third party (without involving the administrator) rather than in the Companies Court between the potential assignee and the administrator (with possible limitations on the part to be played by the third party at any hearing).

71. Further, the possibility that the assignee of the claim will bring a claim where it is unable to meet an adverse costs order against it would normally be dealt with by the court ordering security for costs in the proceedings brought by the assignee. It is better for the administrator to leave the third party to seek security from the assignee of the claim for the costs of the claim against the third party rather than for the administrator to take on the task of arguing, on an application under paragraph 74 of schedule B1, that the applicant has not discharged the burden of showing that the claim is not frivolous and vexatious and the further task of applying for an order for security of its costs in responding to the application under paragraph 74 of schedule B1.

72. The second point on which I wish to comment relates to the procedure to be adopted in relation to an application under paragraph 74 of schedule B1, particularly in relation to the part to be played by the proposed defendant to the claim who wishes to be heard on the application.

73. On an application under paragraph 74 of schedule B1, the creditor or member will be the applicant and the administrator will be the respondent. The Insolvency Rules 2016 contain provisions as to the procedure to be adopted by the court in relation to insolvency applications: see Part 12, Chapter 3, rules 12.6 to 12.13. Pursuant to rule 12.9, the court may give directions as to who is to be served with the application. This provides for the possibility that it may be appropriate to serve the application on someone in addition to the named respondent. Pursuant to rule 12.11, the court may give further directions as to how the application is to be dealt with.

74. If the application is served on the proposed defendant to the claim or if the proposed defendant comes to hear of the application and wishes to be heard in response to it, the court has power to allow the proposed defendant to be heard. If the proposed defendant wishes to submit that the claim is frivolous or vexatious, then the court has power to allow the proposed defendant to put forward that submission. However, the proposed defendant does not have a right to participate in the hearing. In such a case, the court will have to consider whether to permit such participation. The court should bear in mind that if the cause of action is assigned and a claim is brought, then it will be open to the defendant to the claim to apply to strike out the claim or to apply for reverse summary judgment, if so advised. An application of that kind may in many cases be a more appropriate occasion for the court to consider whether the claim is frivolous or vexatious as compared with an application by a creditor or member under paragraph 74 of schedule B1. For one thing, the administrator need not be involved in the subsequent claim to strike out or for summary judgment. Further, on such an application, the court may be in a much better position to assess whether the claim is frivolous or vexatious as the claim ought to have been pleaded. Whilst I understand the temptation for the proposed defendant to a claim to try to nip the claim in the bud by opposing the application under paragraph 74 of schedule B1, it may not be in the interests of the other parties or of the court to allow any prolonged argument from the proposed defendant on that application. (I add that if the proposed defendant is also a creditor or member of the company and wishes to be heard in that capacity on the application under paragraph 74 of schedule B1, that raises different considerations.)

75. If the court does decide to hear from the proposed defendant on the application under paragraph 74 of schedule B1, the question then arises whether the court should permit the proposed defendant to attend the part of the hearing when the court hears submissions from the creditor or member and the administrator as to the merits of the claim. In some cases, it may be wholly inappropriate for the proposed defendant to be able to hear the debate as to the merits of the claim, particularly where that debate might involve references to privileged material. In such a case, the court should be guided by the decision of the Court of Appeal in Craig v Humberclyde Industrial Finance Group Ltd [1999] 1 WLR 129. The headnote to that case reads:

> "A company was wound up by court order and the official receiver was appointed liquidator. Its assets included a hotel complex whose expansion had been financed by the H. group of companies, and causes of action against four members of that group. The official receiver was unable to pursue those actions and considered assigning them to two of the company's former directors. The four members of the H. group proposed instead that the actions be compromised. The liquidator was

ordered to seek directions from the court. At the hearing of the liquidator's application for directions, the judge adopted the procedure used in the Chancery Division where trustees sought directions under R.S.C., Ord. 85, r. 2(3) as to whether to take action against a beneficiary, and heard evidence and submissions from the former directors having excluded the representatives of the H. group members from the court. He directed that the liquidator assign the actions to the former directors.

On appeal by the four members of the H. group: —

*Held*, (1) that the liquidator's power to sell the property of the company pursuant to paragraph 6 of Schedule 4 to the Act of 1986 was subject to the control of the court and in exercising that control the court's function was essentially administrative, to ensure as far as practicable the proper exercise of fiduciary powers or obligations; that the practice and procedure of the Chancery Division on actions by trustees for directions under R.S.C., Ord. 85, r. 2(3) should be applied on comparable applications by a liquidator under section 168(3) of the Act of 1986, save as otherwise provided in the Act or the Insolvency Rules 1986; that the judge had therefore been entitled to exclude the representatives of the H. group members from that part of the hearing dealing with evidence and submissions as to the merits of the company's actions against the members of the group; and that the judge had given counsel for the H. group members adequate opportunity to be heard and there had been nothing unfair in the course the proceedings had taken (post, pp. 136A,138C–F, 142A).

*In re Moritz, decd. [1960] Ch. 251* and dicta of Wilberforce J. in *In re Eaton, decd. [1964] 1 W.L.R. 1269, 1270 applied*."

76. This authority was not drawn to the attention of the Deputy Judge in the present case and he conducted a hearing in which all three parties, including Fieldfisher, participated in a full discussion as to the merits of the claim against Fieldfisher. When the appeal began before me, the parties appeared to envisage that the same course would be adopted on the hearing of the appeal. I drew attention to the decision in the Craig case and stated that I would be inclined to follow the guidance in that case even on the hearing of the appeal. I had in mind that the court would be assisted by a degree of candour and openness when considering the submissions of LF2 and the administrators as to the merits of the claim and that candour might not be possible if Fieldfisher were present throughout the hearing. I then applied the guidance in that case and conducted the hearing accordingly.

*The appeal on costs*

77. The Deputy Judge ordered LF2 to pay Fieldfisher's costs. The second ground of appeal in the Appellants' Notice is a specific ground of appeal relating to this order for costs. LF2 relies on CPR 46.2 which states that when the court is considering

whether to exercise its power under section 51 of the Senior Courts Act 1981 to make a costs order in favour of or against a person who is not a party to proceedings, that person must be added as a party to the proceedings for the purposes of costs only and must be a given a reasonable opportunity to attend a hearing at which the court will consider the matter further. LF2 submits that this rule applies in the present case, that Fieldfisher had not been a party to the application under paragraph 74 of schedule B1 and that the Deputy Judge failed to comply with the mandatory requirements of CPR 46.2.

78. Rule 12.1 of the Insolvency Rules 2016 provides that the CPR apply for the purposes of proceedings under Parts 1 to 11 of the Insolvency Act 1986 with any necessary modifications except so far as disapplied by or inconsistent with the Insolvency Rules 2016. The Insolvency Rules 2016 do contain specific provisions as to the costs of insolvency proceedings: see Part 12, Chapter 8. Rule 12.41(3) provides that CPR Parts 44 and 47 apply to such costs; this rule does not refer to CPR Part 46. Rule 12.48(1) contemplates that an application for costs may be made by a party to, or a "person affected by" any proceedings in an insolvency. In the present case, Fieldfisher was a person affected by the application within the meaning of rule 12.48(1).

79. There was no need in the present case for the Deputy Judge to make Fieldfisher a party to the application and to follow the procedure of CPR 46.2 which did not apply in this case. It is not suggested that the Deputy Judge adopted an unfair procedure when he dealt with costs. He heard from all sides and he made his decision. Indeed, even if I had held that the Deputy Judge ought to have made Fieldfisher a party to the application, that would have been a purely formal step in this case and I doubt if I would have been persuaded to remit the matter to the Deputy Judge for him to take that step and then reach the same conclusion as he had already reached as to costs. For the avoidance of doubt, I should state that I have not considered whether the procedure adopted in this case where the Deputy Judge heard Fieldfisher on the substance of the application amounted to it being a party to the application.

80. I therefore reject the second ground of appeal. However, that may not be the end of any challenge to the order that LF2 pay Fieldfisher's costs. The first ground of appeal which related to whether the alleged claim was frivolous or vexatious was relied upon as a ground of appeal against all of the order made by the Deputy Judge, including therefore the order for costs in favour of Fieldfisher. Ms Stonefrost accepted that because I had upheld the first ground of appeal and although I will dismiss the appeal against the actual decision on the application under paragraph 74 of schedule B1, it is still open to me to review the order for costs in favour of Fieldfisher to reflect (if that is appropriate) my conclusion as to whether the claim was frivolous or vexatious.

81. I will deal with the costs of the application before the Deputy Judge and of the appeal following the hand down of this judgment.