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Case No: CH-2024-000249
CR-2023-006026

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM DECISION OF ICCJ BURTON 26.09.2024

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

Date: 22/01/2026

Before :

SIR ANTHONY MANN SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

JEREMY ROBERT WEBB AND ZELF HUSSAIN (AS JOINT LIQUIDATORS OF EVERSHOLT RAIL (365) LIMITED (IN LIQUIDATION))	**Appellants**
- and -	
(1) EVERSHOLT RAIL LIMITED	**Respondents**
(2) NORTON ROSE FULBRIGHT LLP	

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Lexa Hilliard KC and **Adam Deacock** (instructed by **DLA Piper UK LLP**) for the **Appellants**
Daniel Bayfield KC and **Paul Fradley** (instructed by **Norton Rose Fulbright LLP**) for the **Respondents**

Hearing dates: 11th & 12th December 2025

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APPROVED JUDGMENT

Sir Anthony Mann :

Introduction

1. This is an appeal from an order of ICCJ Burton dated 27th September 2024, based on a judgment of hers delivered on 29th August 2024. In her order she dismissed the application of the appellants, the joint liquidators of Eversholt Rail (365) Ltd (in this judgment "365", but described in the judgment as "365Co"), for orders under sections 235 and 236 of the Insolvency Act 1986 ("the Act") seeking records and information from Eversholt Rail Ltd ("ERL") in connection with the business of 365 on the grounds (essentially) that the liquidators had not made out a proper case for information of the width sought. This appeal raises questions about what liquidators have to establish about their needs and entitlement to information and documents under those sections. Ms Lexa Hilliard KC appeared for the liquidators and Mr Daniel Bayfield KC appeared for the respondents, ERL and Norton Rose Fulbright LLP ("NRF").

The background facts

2. The background facts were not a matter of dispute and I can take them from the judgment below.

3. 365 and ERL were sister companies in the same group, the Eversholt UK Rails Group. That group owns and maintains railway engines and carriages that are leased to various train operating companies. Within the group ERL provides asset management and administrative services to other companies in the group, including 365 (before its liquidation).

4. 365 was a special purpose vehicle within the group whose role was to hold some of the group's train fleet. It leased a single fleet of Class 365 rolling stock comprising 160 vehicles including 40 trains, from two head lessor companies. It had no employees and 3 directors, who were also directors of other companies in the group including ERL. All of its functions were discharged by ERL pursuant to a Services Agreement dated 25th February 2010 ("the Services Agreement"), and all its functions depended on the provision of those services (described as "core services"). All documents relevant to 365 and its business were held by ERL

5. The Services Agreement provided that ERL:

> "[7.3] shall keep written records of all acts and things of a material nature including without limitation technical records, inspection records, audits reports, business cases, instructions, procedures, authorisations, contracts and insurance documentation, calculations and computer data in relation to the provision of the Consultancy Services. Such records shall be kept in a secure location for a period expiring on the earlier of: (a) six (6) years after the expiry of the Lease to which such

> records relate (b) completion of the Consultancy Services; or (c) expiry or termination of this Agreement. At the Company's request the Service Provider shall make such records available for Inspection and provide one copy to the Company at the Service Provider's cost."

In practice ERL did not segregate 365 documents from those of the other companies in the group for whom it provided services. 365 did not even have a separate domain name, so all relevant emails were sent to and from a generic Eversholt email address.

6. 365 entered creditors' voluntary liquidation on 29th August 2019 when it became apparent that the rental income from train operators who had taken leases of rolling stock would not be sufficient to service head leases granted in favour of 365.

7. The effect of the above arrangements between 365 and ERL is that when the liquidators took office there was no real corpus of corporate documents available to them to enable them to consider the business and affairs of 365. All, or perhaps virtually all, relevant documents were in the hands of ERL.

8. In those circumstances the liquidators in due course asked 365 for some documents, were given some, and made further requests (one of them after a gap of 2 years with no relevant contact). Requests were made of ERL and of Norton Rose Fulbright ("NRF"), solicitors to certain companies in the group, including ERL. The detail of this, where relevant, appeared in evidence and is referred to in the judgment below. I will not repeat it here, but where appropriate I will refer to it when considering the detailed grounds of appeal. In due course, because they were not satisfied, the liquidators launched their application under the Act against both ERL and NRF.

The section 235/236 application

9. That state of affairs led to the application which was before ICCJ Burton. Some transactional documents were provided to 365 by ERL prior to the application being made but the liquidators apparently felt the need to make the application. The wording of the application is important. As it was at the time of the hearing before ICCJ Burton (and after the excision of a material paragraph 3) it sought the following relief pursuant to sections 235 and 236 of the Act (as identified in a draft order):

> "1. The First Respondent shall provide to the Applicants copies of all documents (save insofar as any such document has already been provided in unredacted form) in its possession custody or control

relating to the business, dealings, affairs or property of 365 (including for the avoidance of doubt any such documents relating to 365 on its own or together with any other person or entity) ("365 business") including but not limited to:

1.1 all documents created for the purpose of carrying out services pursuant to the Services Agreement dated 25 February 2010;

1.2 all correspondence entered on behalf of 365 (whether on its sole behalf or on behalf of it and any other company) or relating to 365 business;

1.3 all minutes, agendas, board packs, reports or advice to or work commissioned by the "Exec", Executive Management Committee, Re-letting and New Business Committee, Business Management Board or any other Group body whose responsibilities included consideration of 365 business;

1.4 any documents including internal and external correspondence, notes, advice, drafts and memorandums in the period 1 January 2017 to the date of the liquidation of 365 relating to:

1.4.1 communications or negotiations with the DfT, the head lessors or any other party relating to the 365 Fleet;

1.4.2 communications or negotiations between 365 and Group companies with a view to the provision of loans or other finance to 365, including in relation to the repayment by 365 to the First Respondent of the £5 million loan (which was provided pursuant to the facility agreement dated 19 December 2014);

1.4.3 the payment or non-payment of creditors of 365;

1.4.4 any legal advice or other legal services provided by the First Respondent's in house legal team personnel relating to 365 business;

> 1.4.5 any legal advice or other legal services procured by the First Respondent from the Second Respondent or any other person or entity and relating 365 business;
>
> 1.4.6 accounts, management accounts, financial projections or modelling relating to 365 business;
>
> 1.4.7 the solvency or otherwise of 365; and
>
> 1.4.8 the duties of 365's directors.
>
> 2. The Second Respondent [NRF] shall provide to the Applicants copies of any documents sought at paragraph 1 above which are held by them and relate to 365 business, except insofar as the same have already been provided in unredacted form by the First Respondent or Second Respondent and shall provide a summary of any advice given save insofar as is set out in the documents disclosed."

10. The second respondent referred was NRF, who provided legal services to members of the group including advice relating to the business and affairs of 365. I use that neutral formulation for the present because of a dispute in the background as to whether they technically provided any, and if so what, services to 365.

11. For the purposes of this appeal it should be noted that in paragraph 1 of that application there is a generalised application for a very wide body of documents and information, unlimited by time or any other factor other than their relationship to the business of 365. The following sub-paragraphs focus more on particular aspects, some of which are expressly time-related, but some are again widely phrased by the words "relating to" or similar. The application is not couched as applications for the wider and narrower relief each in the alternative; the narrower relief is expressed to be part of ("including but not limited to") the wider form.

The sections underpinning the application

12. The two sections of the Act were sections 235 and 236. They read (so far as relevant) as follows:

> "235 - Duty to co-operate with office holder
>
> (1) This section applies as does section 234; and it also applies, in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver, whether or not he is the liquidator.
>
> (2) Each of the persons mentioned in the next subsection shall—
>
> (a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and (b) attend on the office-holder at such times as the latter may reasonably require.
>
> (3) The persons referred to above are—
>
> (a) those who are or have at any time been officers of the company,
>
> (b) those who have taken part in the formation of the company at any time within one year before the effective date,
>
> (c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,
>
> (d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question, and
>
> (e) in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.
>
> …
>
> 236 - Inquiry into company's dealings etc
>
> …
>
> (2) The court may, on the application of the office-holder, summon to appear before it—

> (a) any officer of the company,
>
> (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or
>
> (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.
>
> (3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection."

It was common ground that those sections were capable of applying to ERL and its office-holders, and that section 235 applied because the services which ERL supplied brought it within subsection (3)(c).

The decision below

13. The judge below dismissed the application because, in short, the liquidators needed to make out a reasonable requirement for having the documents and information sought and they had failed to do so, both because the application was framed too widely without justification and because ERL had actually been co-operating in the provision of documents (paragraphs 29-31). In the following paragraphs she described the dealings between the parties in which liquidators from time to time made requests for documents to which ERL responded (including declining to supply material when the requests were what the judge described as too "far-reaching and inadequately explained requests" (paragraph 31)). In paragraph 59 she held that the application against ERL was "fundamentally misconceived" because it was based on the premise that the liquidators were entitled to be in the same position as they would have been in had 365 held its own records and had to work "work within the confines of the circumstances of the company to which they have been appointed" (paragraph 60, which Ms Hilliard said was a reference to the arrangements in the Services Agreement).

14. Then the judge set out a summary of the requests made by the liquidators from time to time and the responses provided by ERL, It is unnecessary to deal with the detail of that summary. It was not suggested that it betrayed any misunderstanding of the process. It started with the voluntary provision (without a prior request) of some information at the start of the liquidation. There then followed some requests (which ERL had difficulty dealing with for a time because of the pressures of the Covid epidemic). In August 2022 the liquidators approached NRF for a lot of documents and information, some of which was resisted on the basis that 365 was not the client of

NRF. NRF also fielded requests directed at ERL, but complained that some requests were extremely broad and that the liquidators were required to indicate why they were reasonably required. During this process ERL from time to time suggested that a meeting or meetings might enable a more focused approach to the problem to be adopted. The liquidators did not take up the suggestion of a meeting. In paragraph 55 the judge summarised the situation as follows:

> "55. Thus it can be seen that four years into the liquidation, the parties were at an impasse: ERL and NRF maintained their willingness to provide documents in response to focused requests explaining why they were reasonably required, whilst the Liquidators persisted in their demand that ERL and NRF provide absolutely everything they held "relating to" 365Co's business, complaining when apparent omissions came to light."

15. That difference gives rise to one of the big issues arising in this appeal, which is the extent to which the liquidators were entitled in the circumstances and on the evidence to ask for extremely wide categories of documents and information, including documents "relating to" the affairs of 365 which might contain material going beyond the process of reconstituting the corporate knowledge of 365 (a key aim of the liquidators in this application and appeal).

16. In paragraph 57 the judge acknowledged that the court would give considerable weight to a liquidator's assertion of what he reasonably requires but pointed out that the liquidators' evidence was largely devoted the existence of documents rather than explaining or justifying their being required. In paragraph 58 she referred to the balancing exercise which had to be carried out in an application under the two sections and to the fact that the liquidators' blanket assertions did not assist in that exercise.

17. Paragraph 59 concludes:

> 59. "In my judgment, the application against ERL, as framed, is fundamentally misconceived. Mr Deacock's [counsel appearing for 365 below] submissions revealed the error. He asked rhetorically why the Liquidators should not be in the same position that they would have been in, if 365Co had held its own records.
>
> 60. The answer is straightforward: the Liquidators are not in the position they would like to be in, because that was not how the ERL Group operated. They must work within the confines of the circumstances of the company to which they have been appointed."

18. This point was the subject of particular criticism to which I will return. The remaining paragraphs make it clear that the liquidators had failed to establish a reasonable requirement for the information they sought, and the problem was that their requests were too broad. The liquidators had, until shortly before the hearing itself, failed to take up the opportunity of having a meeting, and that was "unfortunate" (paragraph 62). Paragraphs 65 and 66 make it clear that the application "as framed" (paragraph 59) failed because the liquidators had failed to establish a reasonable requirement for the broad generalised categories of documents and information they sought (see the opening words of the application notice):

> "65. If a reasonable requirement is identified, then the question of the burden on the respondent in complying must be viewed in the light of that requirement. Having concluded that the evidence fails to explain why all or any of the documentation sought by the widely-drawn application is reasonably required, there is no cause for me even to start to consider any alleged inconvenience or oppression on the part of ERL.
>
> 66. At the start of this judgment I highlighted two sub-paragraphs of the draft order that seek any legal advice or legal services provided by ERL's in-house lawyers "relating to 365 business" and any legal advice or legal services procured by ERL from NRF or any other person or entity "and relating 365 business" [sic]. As with the rest of the application, the relief sought is unjustified in its breadth or purpose, extending even to advice which may have been sought without 365Co's knowledge and in circumstances where 365Co itself might not have been entitled to the advice."

19. Paragraph 72, in a section dealing with the application as against NRF, demonstrates again that the judge was concerned about the failure to establish a reasonable requirement for the documents sought and refers to a privilege question which was in issue until a concession made by Mr Bayfield at the hearing (which dealt with at least part of the dispute), and the section ends with a paragraph which again makes clear the basis on which the judge decided the application against NRF:

> "78. Ultimately, regardless of the potential merits of any argument that could be raised regarding common or joint interest privilege, as with ERL, the breadth of the order sought against NRF is currently so wide and unsupported by any evidence to explain the Liquidators' reasonable requirement to see all the documents falling within it, that the application against NRF must fail."

The central issue on this appeal

20. There are 10 Grounds of Appeal, and in due course I will identify and deal with each of them, but at the heart of the argument was the question of what it was that the liquidators were obliged to demonstrate in an application under sections 235 and 236, and what their entitlement was. Ms Hilliard's case was:

> (a) Under the sections, the liquidators were entitled to information which enabled them to reconstitute the corporate knowledge of the company. They were entitled to that without having to establish a reasonable requirement for any particular information. That entitled them to ask in general terms for everything relevant without limitation of time (save, obviously, for the starting point which must be the incorporation of the company). In a shorthand phrase used at the hearing of this appeal, they were entitled to "everything forever". The broad request made in the opening words of the application notice was therefore justified and the judge below was wrong to reject it and to require, or expect, a narrowing by the concept of reasonable requirement and a more particularised approach to a request.
>
> (b) Alternatively, on the facts of this case, requiring "everything forever" was a reasonable requirement because the liquidators, when they took office, had no real information, and had no useful employees available for interrogation. That was because the entire administrative function was hived off into ERL under the Services Agreement so the liquidators were starting from scratch and hardly knew what specific requests they should make. They essentially had no useful documents available to them and they were entitled to seek to reconstitute the corporate information of 365 by a wide request.

21. These issues raise questions about the scope of the two sections, and an answer to them informs the answer to some of the Grounds of Appeal, so it will be useful to deal with these overall points first before addressing the detailed Grounds of Appeal.

What the liquidators have to establish to get their relief

22. As I have already indicated, at the heart of this appeal is the question of what the liquidators have to show in a case such as this where it is said that the liquidators are seeking to reconstitute the company's knowledge. Ms Hilliard submitted that she need show no more than that (reconstituting) in those circumstances - it was not necessary for her to show that the liquidators had a reasonable requirement for the documents ("everything forever"). Alternatively, if she had to show a reasonable requirement then the mere fact that she was seeking to reconstitute the company's knowledge as against a person with all the documents was itself, without more, a reasonable requirement so, again, she did not need to show more than that. The point arises because of the relatively unusual circumstances of this case where a third party, by arrangement with

the company, has all the company documents - in effect, and subject to what was in the directors' heads and perhaps what was in the heads of ERL employees who acted in 365 matters, that was the company's knowledge.

23. In my view Ms Hilliard's arguments fail. Liquidators have to establish a reasonable requirement for documents or information under both sections, and needed to do so in the present case. It may be that in some cases the circumstances are such that the liquidators can establish, on the facts, that their need to reconstitute the company's knowledge justifies a very extensive "everything forever" disclosure because, on the facts, it is a reasonable requirement, but they must do more than point to the fact that someone has extensive knowledge that they want - they must establish a reasonable requirement for what they seek. My reasons for that are as follows.

24. Perhaps the most basic point is that section 235 expressly demands a reasonable requirement for the disclosure in question - see the words "such information … as the office holder may … reasonably require." That factor is therefore baked into the section. It is a statutory requirement or qualification. It would appear to be anomalous if the same requirement were not also required by section 236, which is capable of applying to third parties who were not linked to the company by office, employment or services and who were therefore more remote from the company, so it is no surprise that there are authorities which indicate that a "reasonable requirement" factor applies to section 236 as well. In *Re British & Commonwealth Holdings plc v Spicer & Oppenheim* [1993] AC 426 the House of Lords considered an application under section 236 which dealt with limitations on the powers under section 236, including whether reconstituting the company's knowledge was such a limitation. In the course of his speech, with which the other four Law Lords agreed, Lord Slynn said the following, which indicates that a reasonable requirement for the information has to be established:

> "At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved—on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned [p439D - my emphasis]
>
> …
>
> The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents ("reconstituting the company's state of knowledge") but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements" [p439G-H - again, my emphasis]

25. It is therefore apparent that a "reasonable requirement" is a necessity in an application under section 236. This was also found to be the case by Kitchin J in *Green v BDO Stoy Hayward LLP* [2005] EWHC 2413. That was an appeal from a District Judge who found that the liquidator had failed to establish such a requirement (para 26), and it would not seem that the need for such a thing was an issue in the case. Nonetheless Kitchin J summarised the relevant principles, including the following:

> "29. Nevertheless, it is for the liquidator to establish his case under s.236. He must show that he reasonably requires the documents sought. In this connection the view of the liquidator is normally entitled to a good deal of weight: Sasea Finance Ltd (Joint Liquidators) v KPMG [1998] BCC 216 at 220. It is also recognised that the liquidator is required to establish only a "reasonable requirement" for information, not an absolute need and that he is under no duty to make out the requirement in detail. The court ultimately has an unfettered discretion which it will seek to exercise in the interests of the winding up without being oppressive to the party the subject of the application. As Lord Slynn explained in British and Commonwealth Holdings at 439, the proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the liquidator's requirements."

This means that Registrar Briggs was quite right to say in *Re Corporate Jet Realisations Ltd* [2015] BCC 625:

> "22. Accordingly the court will need to be satisfied that the applicant in any case has a reasonable requirement for the material sought by the order, that the section is not been used abusively and that production does not impose an unnecessary and unreasonable burden on the respondents …
>
> 23. The requirement of reasonableness introduced into s.236 by the common law is expressly present in s.235(2) of the Insolvency Act 1986. The burden of proof lies with Mr Green to show that he reasonably requires the documents and records sought in his application."

26. That is not to say that reconstituting corporate knowledge is irrelevant, but its place has to be understood. The authorities make it clear that one of the underlying *purposes* of the sections is to reconstitute that knowledge, acknowledging, as they do, that an office-holder may well take up his/her office without some necessary knowledge because of the very nature of their position as incomers to the company.

27. There are various references to this factor in the authorities, and reliance was placed by Ms Hilliard on the factor in the judgment of Sir Nicolas Browne-Wilkinson V-C in *Cloverbay Ltd v BCCI Ltd* [1991] Ch 90 at p102D-E:

> "First, the reason for the inquisitorial jurisdiction contained in section 236 of the Act of 1986 is that a liquidator or administrator comes into the company with no previous knowledge and frequently finds that the company's records are missing or defective. The purpose of section 236 is to enable him to get sufficient information to reconstitute the state of knowledge that the company should possess. In my judgment its purpose is not to put the company in a better position than it would have enjoyed if liquidation or administration had not supervened. In many cases an order under section 236 may have the result that the company is in such improved position e.g. an order for discovery of documents made against a third party in order to reconstitute the company's own trading records may disclose the existence of claims which would otherwise remain hidden. But that is the result of the order not the purpose for which it is made."

28. It should be noted that the reference to reconstituting was not said to be a sufficient requirement; it was said to be the underlying purpose. Those two matters are different. The two statutory provisions are the means of achieving that purpose, and have their own limitations or qualifications. It is not sufficient to express the reconstituting purpose. Furthermore so far as section 236 is concerned, reconstituting is not even a necessary factor or limitation, as *British & Commonwealth* makes plain:

> "Although the passages to which I first referred support the conclusion reached by Hoffmann J. as to the effect of the judgment of the Court of Appeal, I do not think that reading the judgment overall such a limitation to "reconstituting the company's knowledge" was intended to be laid down in *Cloverbay*. In any event for my part I do not think that such a limitation exists. The wording of the section contains no express limitation to documents which can be said to be part of a process of reconstituting the company's state of knowledge. The words are quite general. Thus section 236(2)(c) refers to "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company," and by subsection (3) such a person may be ordered to produce "any books, papers or other records in its possession or under his control relating to a company or the matters mentioned in paragraph (c) of the subsection. [p437A-C]
>
> …
>
> "I am therefore of the opinion that the power of the court to make an order under section 236 is not limited to documents which can be said to be needed "to reconstitute the state of the company's knowledge" even if that may be one of the purposes most clearly justifying the making of an order." [p439C-D].

29. Those were cases which concerned applications by an office-holder to get information from persons outside the company who had or might have information which might be useful for the making of claims by the company, sometimes against the subjects of the application, so the information being sought would not necessarily be information which the company once had as its body of corporate knowledge, but nonetheless the section applied. They therefore do not directly concern the central point which arises in this case but nonetheless they put the "reconstituting" point in its correct place as part of the background circumstances as a purpose for at least some applications under sections 235 and 236, and provide no support for the proposition that that factor, by itself, is sufficient to found such an application to the exclusion of a "reasonable requirement" test.

30. The same applies to Ms Hilliard's alternative submission that reconstituting was itself a reasonable requirement, without more. If she were right it would seem that that would be position in every case, so that all an office-holder would have to establish is that single matter. That would not be consistent with the above authorities, or the express wording of section 235. There may be some cases where an officer-holder would be able to rely on just that, but he/she would have to make out, on the facts, that that reconstituting was, without more, a reasonable requirement.

The nature of the challenge on this appeal

31. There is one further over-riding matter which it is appropriate to deal with before considering the detailed grounds of appeal. It is common ground that insofar as the decision of the judge below was an evaluative one then the principles in *Re Sprintroom* [2019] BCC 1031 apply:

> "76. …on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.'".

32. I shall apply those principles where appropriate.

The Grounds of Appeal

33. I shall consider each of the grounds in turn. Because they are lengthy they are set out in the Appendix to this judgment, to which reference should be made as appropriate. It will be necessary to supplement some of the facts appearing above in order to understand some of the Grounds of Appeal.

Ground 1

34. Paragraph 60 of the judgment, with the preceding paragraph which provides its context, is set out above. Ms Hilliard's first point about this is that the judge was wrong because section 236 exists primarily to assist a liquidator to reconstitute the company's knowledge, not to relieve him of that task if the group operates in a way which makes the task more difficult. This point fails on the basis of my prior findings about what section 236 (and section 235) require. While those sections might exist to enable the reconstitution of knowledge to the extent appropriate, it does not give an office-holder a blank cheque in respect of the entirety of corporate documentation and information. Ms Hilliard expressed great concern that a failure to allow the liquidators to have "everything forever" in these circumstances would be an invitation to groups of companies to set themselves up in the same way as the 365/ERL relationship and render the court powerless to provide relief. I do not consider it likely that companies would structure themselves in this way particularly with that in mind, and in any event if they did it would be unsuccessful. The liquidators would have the two sections available to them; what they would need to do is to make out a proper case for what they wanted. The judge was not saying anything to the contrary. She expressed the view that the application "as framed" (ie its "everything forever" form) was misconceived. She was not saying that no application could succeed. She was merely saying that the liquidators were starting from the position they were in, that is to say with no documents (other than those previously provided, of course) and they could do nothing about that as a starting point. She was not saying that no application could succeed because the liquidators were stuck with the situation as they found it. Insofar as she was saying that the liquidators were not entitled, as of right, to "everything forever" she was correct. They were starting with what they had, and had to make a proper application from there.

35. Insofar as this ground seems to raise some sort of enhanced entitlement by virtue of the terms of the Services Agreement (which is not how Ms Hilliard put it in her submissions), that point is dealt with in the next two Grounds.

Grounds 2 and 3 - the Services Agreement

36. Paragraph 61 of the judgment below, on which these Grounds are based, reads:

> "61. Mr Deacock highlighted that the Services Agreement requires ERL to produce documents on 365Co's request. However, a review of the application and evidence reveals that the Liquidators' application has not been framed by reference to ERL's obligations under the Services Agreement or as an application for specific performance of those obligations. It is an application brought pursuant to both sections 235 and 236, supported by evidence referring to the Liquidators' unexplained need but considered entitlement to reconstitute all of 365Co's books and records."

37. The first observation to be made about Ground 2 (along with paragraph 38 of Ms Hilliard's skeleton argument) is that it makes a criticism which is not quite fair. ICCJ Burton did not conclude that the Services Agreement did not support the application. She was really pointing out the truism that the application was not based on enforcement of that Agreement - it was based on the statutory provisions. That is entirely accurate.

38. The gravamen of these two ground seems to be that the nature of the services supplied under the Services Agreement, and the nature of the obligations under it, were sufficient, without more, to establish a reasonable requirement to have all the documents "embraced by the Services Agreement", and that the judgment below failed to acknowledge and give effect to that.

39. In relation to that way of putting it, it is relevant to note that the form of application required disclosures which went beyond the provision of documents which are said to be covered by the Services Agreement. Clause 7.3 of the Services Agreement (set out above) referred to the retention and provision of "material" documents. The application was wider (or at least different) - all documents "relating to" the affairs of 365. It was therefore not couched as enforcement of the Services Agreement, was not presented in the evidence as being such, and went wider than the obligations under clause 7.3. The liquidators were therefore required to bring themselves within the statutory provisions on which they relied.

40. That means they had to establish a reasonable requirement for what they sought - see above. Of course, the Services Agreement would be a significant part of the background to establishing such a requirement and in relation to the balancing exercise as between the requirement and the interests of the holder of the documents which would follow that establishment, but insofar as the judgment proceeded on the footing that it was not the start and end of the inquiry then it was quite right to do so. The liquidators still had to establish that if they wanted "everything forever" (which they did and still do) then they had to establish that as a reasonable requirement. The

Services Agreement did not justify applying a "less exacting" test (in the words of Ms Hilliard's skeleton argument).

41. It is not clear that the application before the judge below was put on the basis that the Services Agreement itself gave rise to a reasonable requirement that all the documents ("everything forever") be produced, but it is apparent that the judge actually decided that more than the Services Agreement was required in order to establish entitlement, however the case was put. That is apparent from her section entitled "Documents held by ERL" starting at paragraph 23. She observed that it would be a rare case where liquidators required to see everything, and noted in paragraph 24 that that is what the liquidators were seeking. In paragraph 26 she found that the evidence did not provide information as to why such a wide-ranging request was being made and in paragraph 28 she observed that the purpose of the application under both sections was to obtain information which was reasonably required - the correct test. In the following paragraphs she found that the only explanation given was the "reconstitution" point and that compelling evidence would be required to justify that. Her determination, in essence, was that that case was not made out.

42. The judge read and considered all the evidence of what was sought from time to time, what was provided and of ERL's proper co-operation (as she saw it and found it to be). As part of her process of evaluation she held that the liquidators had not made out their case for "everything forever", whether based on the Services Agreement or not. That evaluative finding is not open to successful appeal for the reasons given above, and the Services Agreement is not a factor which points only one way.

43. These two Grounds therefore fail.

Ground 4

44. This Ground is said to flow from a finding in paragraph 26 of the judgment below:

> "26. Ms Matthews' witness statements and the copy correspondence in evidence that passed between the Liquidators and ERL provide almost no information to explain to the court <u>why</u> the documents in question are reasonably required. Ms Matthews provides instead, various examples of areas where, despite the documents already disclosed by ERL, the Liquidators consider:
>
> > "it is apparent that records provided are not a full set of records or, where they do provide records, all material and relevant content has been redacted so they are of limited use, such as the additional board

> meeting packs that were provided on 25 May 2023."" (the emphasis is ICCJ Burton's)

45. In order to measure the criticism against the paragraph it is necessary to understand what the judge was saying in her paragraph 26. In part the criticism in Ground 4 makes it look as though the judge was saying there was no evidence of the need for documents in specific areas, whereas the evidence showed areas of need. That element of the criticism takes the paragraph out of context, because the judge was saying something else. The "documents in question" in paragraph 26 were not documents relating to specific areas of investigation. They were the "everything forever" documents. That is apparent from the preceding paragraphs. In paragraph 23 the judge pointed out that "It would be a rare case indeed where a liquidator needed to see everything, but they can pick and choose what they require …" Then in paragraph 24 she pointed out that "In this application the Liquidators are asking the Cort to exercise its power … to deliver up all documents "relating to 365Co which ERL holds"" (the emphasis is again hers). In paragraph 25 she highlights two generalised descriptions of documents containing legal advice like the "far-reaching scope of the first paragraph of the proposed order". So when she said what she said in paragraph 26 the "documents in question" were the "everything forever" category, and she was pointing out that the liquidators had not said why they required those documents. They had not established a reasonable requirement for their far-reaching request.

46. With that in mind one then turns to the terms of Ground 4. It refers to the evidence "generally" and gives specific examples of areas of investigation. So far as it does the latter that does not really advance the debate because the judge was not referring to the absence of reasons for seeking material about certain specific matters, and the reference to certain specific matters does not justify a request for "everything forever". So far as the evidence generally is concerned, the judge below presumably formed the view that that did not go so far as to establish why the widely framed request was justified. That would be a matter of assessment and judgment from which only a limited appeal would be allowed (*Sprintroom*) and it does not seem to me that the challenge falls within those principles. Ms Hilliard took me to some of the evidence, and other than the bare reconstitution point, which is not enough on the facts of this case (as the judge apparently found), there would seem to be nothing else which justifies the widely expressed demands of the liquidators. The judge herself drew attention to the distinction between the particular and general in her reasons for refusing permission to appeal:

> "Whilst Ms Matthews' evidence provided details of some areas of the Company's business that the As wish to investigate (the "Interest List"), it still failed to explain why they reasonably required the non-exhaustive list of pretty much every document held by the Rs that had ever been created "in relation to" the Company (i.e. as noted at paragraph 56 of my judgment, seemingly extending beyond the Company's own books and records) for the purposes of those investigations. The provision of

> the Interest List was consequently insufficient to meet the Reasonable Requirement Test."

47. The judge's finding that the evidence was insufficient for what she was being asked to do was one she was entitled to reach. This Ground therefore fails.

Ground 5

48. The answer to this Ground appears from my decision above as to the sufficiency of the reconstitution point by itself and from a proper approach on this appeal to findings below. I have already determined that a desire to reconstitute the knowledge of the company is not, by itself and without more in any individual case, a sufficient reason to seek "everything forever".

49. Ms Hilliard's skeleton slightly gives the game away on this point when it says:

> "The learned Judge should have held that the JLs' desire (and duty) to reconstruct 365's knowledge by itself constituted to a reasonable requirement for the documents sought in the Application (or, at the very least, a large proportion of them)." (my emphasis)

There is a sort of admission of the possibility that not all the wide class would be required, and that would seem to me to be right. But if it is right then it behoved the liquidators to identify the "large proportion" which was justified, but that does not seem to have been done as such (although there was a specification of limited classes, that was not as a separate alternative application – see below).

50. This Ground therefore fails.

Ground 6

51. This Ground flows from the following sentence in paragraph 29 of the judgment:

> "A review of the various requests made of ERL for documents, and the responses received, fails to persuade me that, as asserted by Ms Matthews, an application to court was necessary. The pattern seen in the extracts from correspondence that follows, is that during the first three years of the liquidation, ERL responded in a cooperative manner to all focussed requests for documents."

52. It then goes on to say that particular requests were satisfied, but when the wide category of documents were sought ERL resisted and urged an approach based on more tailored requests, which were not forthcoming. What the judge seems to be saying is that an application was not necessary to get what the liquidators were entitled to because ERL was co-operating, or seeking to co-operate, in dealing with more focused requests. In the light of her determination that the liquidators were not entitled to "everything forever" and on the basis of her consideration of what was provided over time, that is a logical finding. There is nothing in this Ground so far which would entitle a review of the decision of the judge below

53. In fact Ms Hilliard's skeleton argument does not really go down that route. It complains only that the application could be shown to be necessary because one of the reasons for resistance to disclosure was a privilege claim which was in part abandoned at the hearing itself. This privilege point comes up again under a later Ground and I will consider it further there, and for the moment will say that that factor does not make the whole application necessary, and the judge was not really dealing with that point there. She was dealing with the overall application and referring to co-operation, as I have just pointed out. The judgment at this point it does not have anything to do with the separate privilege point issue to which it is said to go.

Grounds 7 and 8

54. These Grounds are raised in the context of paragraph 2 of the draft order sought in the application notice which is a claim for documents and other materials from NRF. Paragraph 2 is set out above, and it should be noted that it is in similar broad terms to the claim against ERL. As recorded above, NRF advised group companies about legal matters, and those matters included the affairs of 365.

55. It is important to understand what ICCJ Burton decided about the application made against NRF. The evidence and the judgment show that in the course of dealings between the liquidators and NRF the latter asserted that ERL, not 365, was the client, and the judge noted that no proposals were made for challenging that position by cross-examination. She also recorded submissions made by Mr Deacock for the liquidators about joint interest privilege, observing that he was unable to point to any specific

category of documents to which privilege might apply. In paragraph 76 she recorded that ERL recognised that insofar as advice was given by NRF for the benefit of 365 then ERL could not assert privilege against the liquidators. She does not record where and when that concession was made. It was in fact not made until the hearing before her, when Mr Bayfield made it orally during the course of submissions "in relation to legal advice obtained pursuant the Services Agreement for the benefit of 365". It was not made in the evidence, and privilege would seem to have been an area of dispute until the concession during the course of the hearing. (It would seem to me that the concession, which would seem to be plainly correct, ought to have been made rather earlier.) Having recorded ERL's position, the judge recorded that it was submitted that she should exercise caution in determining whether there was joint privilege, and she did not decide the point, confining herself to remarking that it seemed to her, on the authorities, that the fact that 365 might have been the subject of advice was not sufficient to give rise to joint interest privilege.

56. Having not decided the point, in paragraph 78, as set out above in the section outlining the decision below, the judge found that the order sought against NRF was, like the order sought against ERL, too wide and did not establish a reasonable requirement to see all the documents falling within the description in the draft order. In other words, the application against NRF suffered from the same vice as that against ERL.

57. In the light of the judge's conclusion that a reasonable requirement had not been made out for the wide category of documents sought, and the concession, it is not apparent why it was necessary, or even appropriate, to decide the disputed privilege point. It would have been necessary if disclosure of a narrower category, for which there was an established reasonable requirement, was resisted on privilege grounds, but that would have provided a proper context for the sort of factual analysis which would be necessary to decide the privilege dispute. Short of that, the privilege debate would take place in an abstract environment which would not provide the necessary factual and principled background to enable a useful (or probably any) decision to be reached. A complaint that the judge did not decide the point is therefore unjustified.

58. Ms Hilliard's arguments focused on what she said was clear documentary evidence demonstrating advice for the purposes of 365 which demonstrated that any privilege was common or joint interest privilege such that it could not be asserted against 365, and she submitted that the judge was wrong not to have held that the liquidators had a reasonable requirement for the documents referred to in the material cited. She may have a strong case for refuting any claim for privilege which might be asserted against her clients in respect of some matters, but that does automatically mean that there is an established reasonable requirement for all such documents. The reasonable requirement still has to be established and the judge held that, in general terms, it had not been. Success on the privilege point does not establish a reasonable requirement for the documents - indeed, the liquidators would have to establish their reasonable requirement before the privilege point becomes relevant.

59. So far as Ground 8 is concerned, that again fails for the reasons of generality referred to above. So far as it alleges that the judge below should have adjudicated on the particular matters raised by Ms Matthews in evidence, that fails for want of an alternatively formulated and argued alternative claim as amplified in the next section of this judgment.

60. In all the circumstances the judge did not err in the manner suggested in these Grounds, and they therefore fail.

Grounds 9 and 10

61. The essence of these two Grounds of Appeal is that even though the judge decided that no reasonable requirement had been shown for the wide category of documents described in the opening words of paragraph 1, she should have considered the more limited categories set out in paragraph 1.4 where there was a time limit and where categories of documents were particularised.

62. It would be open to a judge hearing an application such as that before ICCJ Burton in this case to decline to order the more generally described category of documents but to consider whether a case had been made out for a more limited category even if the possibilities were not set out expressly as alternatives (which they were not in the present case). However, a decision as to whether to do that or not is in the nature of a case management decision, and an appeal on such a decision faces the hurdle for such appeals identified in the White Book at paragraph 52.3.11. That paragraph refers to the high threshhold in getting permission to appeal on such points, and athough this is a case where permission to appeal has been granted (albeit without this particular Ground, at the end of a long line, having been particularly identified as being a case management matter) the high threshhold still exists because of a heightened reluctance, on an appeal itself, to interfere with case management decisions. The hurdle therefore applies here.

63. Ms Hilliard would have enough difficulty surmounting this hurdle even if the prospect of an alternative lesser order had been properly raised before the judge below, but in fact in this case it was not even clearly raised as an alternative. It is not couched as an alternative in the draft order, and Mr Deacock's skeleton argument below seems mostly to be concerned with privilege, with limited pages at the end given to the principle of the application. The transcript of the hearing is in the appeal bundles, and it is apparent from that that in oral submissions Mr Deacock's submissions on what was needed were focused on the need to see everything because the liquidators had nothing. The only

reference to an alternative lesser order appears on page 32 (to which Ms Hilliard herself drew my attention) when Mr Deacock said:

> "Judge, there may be some scope, as I say, for questions about whether something slightly more limited might be required but it cannot, in my submission, it simply cannot -- it must follow, as night follows day, once one understands the overwhelming importance to the company, as recognised in its October board minute and corresponding with the DfT, for example, it must be the case that the company needs to understand what the correspondence is that has been entered into on its behalf, because otherwise it just simply cannot understand what decisions have been taken coming out of that."

64. That appears to be all that was said and it does no more than float a possibility. It does not seek to go into a lesser order and justify that in terms of a proper focus on what documents are required, and why they were reasonably required. It is true that the lesser form of order has some reflection in the evidence of Ms Matthews for the liquidators (albeit in the context of requests to NRF rather than ERL), but there was no real attempt at the hearing to go into the merits of a lesser, more focused, form of order. In those circumstances the judge below can hardly be blamed for addressing the main claim ("everything forever"), of which the limited forms are expressed in the draft order to be part of what was required, not an alternative. It would have been open to her to have considered the possibility of considering the lesser order, and perhaps giving the parties an opportunity to consider and advance such a case, but she was not obliged to do so and it is not surprising that she did not. She was entitled to address the case made to her, and that is what she did.

65. These Grounds therefore fail.

Conclusion

66. It follows that all Grounds of Appeal fail. ERL has advanced a respondent's notice, but in the light of my decision on the appeal it is unnecessary to deal with it, and I shall not do so.

67. I therefore dismiss the appeal.

APPENDIX - THE GROUNDS OF APPEAL

1. The learned Judge was wrong to conclude (Judgment at [60]) that the Applicants were not entitled to be in the same position that they would have been in if 365 had held its own records because "that was not how the ERL Group operated. They must work within the confines of the circumstances of the company to which they have been appointed". The learned Judge should have held that the circumstances of 365 to which the Applicants were appointed were such that ERL was obliged and/or was reasonably required by the Applicants to deliver 365's records at ERL's own cost even if that task was difficult by reason of ERL's practice of not separately filing, storing or segregating 365's documents (Judgment at [6]) having regard in particular to the fact that:

1.1. The whole or substantially the whole of 365's records were held by ERL;

1.2. The arrangement relating to 365's records being held by ERL was set up as part of a group relationship which included common group legal services, common management structures and common directors supplied by ERL;

1.3. 365 had in practical terms and in substance access to those records prior to liquidation through its common group relationship, common group decision making structures and common directors; and

1.4. The Services Agreement required ERL to keep and maintain all records prepared on 365's behalf and to make them available to 365.

2. The learned Judge was wrong (Judgment at [61]) in her apparent conclusion that the Applicants' reference to the Services Agreement did not support the Applicants' application under IA 86, sections 235 and 236 because the Applicants' application had not been framed by reference to ERL's obligations under the Services Agreement or as an application for specific performance of those obligations. The learned Judge should have held that in light of the obligations in the Services Agreement, the Applicants had established a reasonable requirement for all documents embraced by the Services Agreement.

3. The learned Judge failed to have any or sufficient regard to the importance of ERL's status as service provider under a contract for services within the meaning of IA section 235(3)(c) when considering the reasonableness of the Applicants' requirement for documents in the application.

4. The learned Judge wrongly concluded (Judgment at [26]) that the Applicants had provided almost no information to explain why the documents in question were reasonably required and that, therefore, the Applicants had not satisfied the reasonable requirement test. The learned Judge should have held that the Applicants had satisfied the reasonable requirement test by reference to the matters set out in the evidence of Carla Matthews generally and by identifying the Applicants' areas of investigation at paragraph 47 of Matthews 1 and as repeated and further illustrated at paragraph 22 of Matthews 3 namely:

4.1. The re-leasing opportunities for the 365 fleet in 2018 (as referred to in the 365 board minutes) and the ability of 365 to continue to trade as a going concern whilst those opportunities were pursued;

4.2. The financial position of 365 throughout the relevant period;

4.3. The steps taken by the 365 Directors once it became apparent that re-leasing opportunities for the Class 365 fleet were no longer achievable;

4.4. Payment of creditors and other financial and commercial dealings of 365 in the period prior to its entry into insolvent liquidation; and

4.5. The steps taken to put 365 into liquidation.

5. In any event the fact that the Applicants needed to reconstitute 365's knowledge and that ERL held all 365's records themselves gave rise to a reasonable requirement for 365's books and records and the learned Judge should have so held and/or the learned Judge misdirected herself as to the evidential threshold for a liquidator to establish a reasonable requirement for such documents (Judgment at [30]).

6. The learned Judge should (contrary to Judgment at [29]) have concluded that an application 1 to Court had been necessary and should have concluded that the documents required in the application including each of the categories set out therein were reasonably required, having regard to:

6.1. The Respondents' limited and delayed provision of documents pre-Application;

6.2. The Respondent's significant but incomplete disclosure of documents following issue of the Application which should have been disclosed before;

6.3. The presence within those documents of numerous examples which the Respondents must have known were reasonably required by the Applicants;

6.4. The wrongful assertion of privilege in respect of legal advice provided by NRF for the benefit of 365 and/or pursuant to the Services Agreement with the evident result that documents which should have been provided had been wrongly withheld by the Respondents.

7. 2 The learned Judge wrongly held that the Applicants were not entitled to copies of legal advice obtained by ERL on behalf of 365 in circumstances where leading counsel for ERL expressly acknowledged during the hearing that ERL could not assert privilege against 365 in relation to legal advice "obtained pursuant to the services agreement for the benefit of 365 Co". The learned Judge should have held in light of that acknowledgement that ERL could not assert privilege as against 365 in relation to legal advice obtained by ERL from NRF for the benefit of 365 including such advice in connection with any of the matters identified at sub-paragraphs 4.1-4.5 above and the other matters identified in subparagraphs 22.1 to 22.6 of Matthews 3; alternatively that any privilege was necessarily waived by reason of clause 7.3 of the Services Agreement; or in the further alternative that legal advice was obtained by ERL as agent for 365 notwithstanding that the Services Agreement purported to expressly exclude agency in circumstances where it was clear that the substance of the relationship between ERL and 365 was one of agency.

8. The learned Judge should have held that legal advice obtained for ERL's benefit including any advice relating to the matters set out in the above sections of the evidence of Carla Matthews was reasonably required by the Applicants.

9. The learned Judge wrongly held (Judgment at [30]) that no temporal limitation was proposed in relation to any category of document sought. The learned Judge should have held that paragraph 1.4 of the Revised Order was temporally limited in relation to documents in the period 1 January 2017 to the date of the liquidation of 19 August 2019.

10. The learned Judge wrongly asked only whether a reasonable requirement had been made out for each and every document falling within the opening words of paragraph 1 of the updated draft order in the hearing bundle and failed to consider whether a reasonable requirement had been made out for some of them. The learned Judge wrongly failed to consider the reasonableness of the Applicants' requirement as regards each of the categories of document set out in paragraphs 1.1 to 1.4.8 of the draft order. Had the learned Judge done so she would and should have concluded that they were all or that each of them were reasonably required.