

Case No: CHANF 1999/1281/A3  
CHANI 1999/0885/3)  
IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE CHANCERY DIVISION  
(His Honour Judge Moseley QC)  
Royal Courts of Justice  
Strand, London, WC2A 2LL  
Thursday, 10th February 2000

Before:  
LORD JUSTICE HENRY  
LORD JUSTICE ROBERT WALKER  
and  
MR JUSTICE SCOTT BAKER

THE ENVIRONMENT AGENCY      Appellant

- and -

PAUL CLARK  
(AS ADMINISTRATOR OF RHONDDA Respondents  
WASTE DISPOSAL LIMITED)

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(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 180 Fleet Street  
London EC4A 2HD  
Tel No: 0171 421 4040, Fax No: 0171 831 8838  
Official Shorthand Writers to the Court)  
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**Mr Stephen Hockman QC & Mr Stephen Moverley-Smith** (instructed by The  
Environment Agency for the Appellant)  
**Mr Stephen Davies** (instructed by Messrs Palser Grossman for the Respondent)

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Judgment  
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**MR JUSTICE SCOTT BAKER:**

1) These two appeals by the Environment Agency ('the Agency') are brought with his permission from decisions of His Honour Judge Moseley QC sitting as a Deputy High Court Judge of the Chancery Division on 5 July 1999 and 6 August 1999. On 5 July he held that the Agency required leave under Section 10 of the Insolvency Act 1986 ('the

1986 Act') to commence criminal proceedings against Rhondda Waste Disposal Limited (in administration) ('the Company') and leave to continue such proceedings under Section 11 of the same Act. On 6 August he refused leave. The issues on the appeals are whether (i) leave was required and (ii) if it was, the Judge was correct to refuse leave.

### **Factual Background**

2) The case involves a landfill site operated by the Company at Nant-y-Gwyddon in the Rhondda Valley pursuant to a waste management licence issued by the Agency. The site, which occupies some 24 hectares, has been problematic for a number of years and has caused great concern to local residents. The Company is a limited company and is wholly owned by a local authority namely the Rhondda Cynon Taff County Borough Council ('the Council'). It was formed in furtherance of the Government's policy of taking waste management i.e. the collection, keeping and disposal of waste out of direct local authority control and putting it into the hands of arm's length companies. The site became operational in 1988 and was developed and originally operated by the then Rhondda Borough Council. In March 1995 that Council, which was prior to local government reorganisation in 1996 the relevant council, granted the Company a waste management licence. Thereafter the Company had the benefit and obligation of managing the site under the terms and conditions of the licence. The licence permits the disposal of up to 300,000 tonnes per annum of household, commercial and industrial waste, excluding special wastes, with a monthly maximum total of 25,000 tonnes. The Company's income derived mainly from waste disposal contracts with the Council although waste was also received from waste disposal contractors. The Company also managed, under contract, four civil amenity sites; this included the transportation and disposal of waste. Between March 1995 and December 1998 the site was operated on behalf of the Company by 3 C Waste Limited of Chester under a management consultancy services agreement. This agreement also provided for environmental and technical support, marketing financial and accounting services. It was terminated by 3 C on 18 December 1998.

3) In 1996 the Agency took over waste regulation responsibility for the site from the Rhondda Borough Council. Between then and March 1997 it received over 200 complaints from local residents about obnoxious odours from the site. This figure had risen to 1500 by March 1999. In December 1996 a formal warning was sent to the Company complaining about lack of adequate cover of the operational areas of the site leading to problems with odour and leachate production. There were some improvements, but the Agency regarded them as inadequate. Consequently, in January 1997 it modified the conditions of the licence and required:

- (i) a technical review of the landfill gas and leachate management controls; and
- (ii) cessation of the deposit of calcium sulphate filtercake which, when it reacted with other waste, produced foul smelling hydrogen sulphide gas.

4) The Company appealed against the second condition to the Secretary of State under [Section 43](#) of the [Environmental Protection Act 1990](#) (the EPA) but later withdrew the appeal following the technical review which identified significant levels of hydrogen sulphide gas generation within the site. The problem became worse rather than better. Local residents picketed the site and there were demonstrations.

5) On 9 July 1997 the Agency wrote expressing concern that pollution control equipment was not operating. On 11 July 1997 the Agency modified the licence conditions for a second time. This modification required:

- (i) daily inspection of the integrity of the leachate collection and monitoring systems;
- (ii) the instalment of a whole site landfill gas collection system so as to prevent the uncontrolled migration or venting of landfill gas, with a purpose designed flare system;
- (iii) daily inspection of the integrity of the landfill gas collection and flaring systems.

6) On 21 July 1997 the Agency served an enforcement notice on the Company under [Section 42](#)(5) of the EPA requiring it to comply with the licence conditions. This was followed by an injunction in the High Court on 25 July 1997 to the same effect. That injunction apparently remains in force. Meanwhile the Agency had appointed consultants who reported in January 1998 that there were many deficiencies at the site and that the landfill gas and hydrogen sulphide, although well below a level likely to cause a danger to health, were the cause of unpleasant smells in the surrounding communities. On 8 May 1998 the Agency served a third notice of modification on the Company. This notice, which remains in force, requires:

- (i) capping of the existing tip area with a gas barrier to prevent uncontrolled emission;
- (ii) the design, construction and maintenance of a landfill gas management and control system, to be approved by the Agency;
- (iii) air quality monitoring within the site boundaries;
- (iv) a system of appropriate data storage and retrieval;
- (v) financial provision, acceptable to the Agency, sufficient to discharge the obligation to provide air quality monitoring;
- (vi) leachate management;
- (vii) risk assessment to assess the performance of the liner system in the untipped area of leachate and gas management;
- (viii) a moratorium on the deposit of waste in the untipped area until the liner system study is complete.

7) By a letter dated 24 December 1998 the Company sought an extension of time in which to appeal to the Secretary of State against the third modification. The normal period for appealing is six months. The appeal remains undetermined. It should be noted that the Company had been given six months to complete the modifications. Furthermore, the notice of modification specifically disappplied [Section 43](#)(4) of the EPA i.e. the terms of the modification are effective notwithstanding an undetermined appeal to the Secretary of State, and this has not been challenged by the Company. Just before the expiry of the six month period the Company wrote, on 26 October 1998, setting out the reasons why it was not going to be able to comply timeously with the modifications, saying that the work had been started and asking for an extension of the deadline. The Agency conducted a site inspection on 13 November. It showed the work had not progressed as promised. Most significantly capping, the most important of the modifications under the third variation, had not been effected. Consequently another enforcement notice was served requiring:

- (i) capping by 31 March 1999;
- (ii) a programme of air quality monitoring to be submitted by 28 February 1999;
- (iii) meteorological monitoring by 28 February 1999.

8) On 23 December 1998 the directors of the Company petitioned for an administration order to be made in relation to the Company. On 19 January 1999 the Agency laid an information before the Llwynypia justices alleging contravention of the capping condition (condition 108) imposed by the third modification of the waste management

licence. On 21 January 1999 an administration order was made by the High Court over the Company.

9) On 15 February 1999 the administrator applied to the Court for a direction whether the Agency required leave under [Sections 10](#) and/or 11 of the 1986 Act to bring or continue criminal proceedings. After various adjournments, the application was eventually heard on 17 May 1999, judgment being given on 5 July 1999, holding that leave was required.

10) The administrator records that the Company has been in financial difficulty for some considerable time. For the accounting years ending 31 March the Company's post taxation results have been:

1996 - (£71,000)

1997 - £4,000

1998 - (£578,000)

11) Draft management accounts for the nine months to 31 December 1998 show a further loss of £304,000 on a turnover of £1, 221,600. The trading losses had caused erosion of the Company's reserves and consequently the Company could not finance the work necessary at the site to satisfy the Agency and meet the licence conditions. There was said to be a shortfall of about £1.6m. Matters went as far as the issue of a winding up petition that was due to be heard on 9 July 1998 but, following discussions, the Council agreed to provide £1.1m of the £1.6m needed to carry out the remedial work and the petition was withdrawn. The administrator says that after the works were commenced in September 1998 technical difficulties were encountered and the estimate of the money needed increased from £1.6m to £2.6m. It was this that led to the administration order.

### **The Legislation**

12) Failure to comply with a condition of a waste management licence is an offence under [Section 33](#)(6) of the EPA.. The offence carries a penalty of a fine not exceeding £20,000 in the Magistrates Court and unlimited in the Crown Court. Imprisonment is available when the Defendant is an individual. Conviction carries consequences under [Section 74](#) from the viewpoint of holding a waste management licence in the future.

13) [Section 10](#) of the 1986 Act provides:

"(1) During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition:

- (a) no resolution may be passed or order made for the winding up of the company;
- (b) no steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire purchase agreement, except with the leave of the court and subject to such terms as the court may impose; and
- (c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as aforesaid.

(2) Nothing in sub-section (1) requires the leave of the court

- (a) for the presentation of a petition for the winding up of the company.
- (b) for the appointment of an administrative receiver of the company, or
- (c) for the carrying out by such a receiver (whenever appointed) of any of his functions."

The remaining provisions of the section are not relevant.

14) [Section 11](#)(3) provides:

"During the period for which an administration order is in force:

- (a) no resolution may be passed or order made for the winding up of the company;

(b) no administrative receiver of the company may be appointed;  
(c) no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire purchase agreement, except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose; and  
(d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid."

15) The criminal proceedings were commenced in the present case after the petition for an administration order but two days before the order was made and the question is whether those proceedings fall within the words *no other proceedings* in [Sections 10\(1\)\(c\)](#) and [11\(3\)\(d\)](#). The Company argued, and the Judge held, that the criminal prosecution could not be continued without the consent of the administrator or the leave of the Court. There is no authority on whether *other proceedings* in these sections includes criminal proceedings.

16) Mr Stephen Hockman QC for the Agency submits that upon their true construction these sub-sections are concerned only with proceedings to enforce rights relating to the recovery of money or property. The words *no other proceedings* should be construed narrowly with that in mind. Certainly, he contends, Parliament never intended to impose a filter for criminal prosecutions. The present case involves an alleged offence under Part II of the EPA which concerns waste, but if leave is required to bring or continue this prosecution the same must be true for all other criminal offences committed by corporations where an administration order has been made or applied for. Companies are capable of committing offences across a wide spectrum both by statute and at common law. Examples include manslaughter and offences under the health and safety legislation, and there are many others. It cannot be right that a prosecution should be dependent on the permission of the administrator or a judge of the Chancery Division.

17) Criminal proceedings are normally brought in the public interest by the Crown or some other public body. They are wholly distinct from civil proceedings. Whilst they may affect the financial position of the person against whom they are brought (e.g. by the imposition of a fine) that is not their primary purpose. Their purpose is to uphold and enforce criminal law, punish the offender and deter others and, especially perhaps in pollution and health and safety cases, to mark down particular conduct as disapproved of by society. One should not, therefore, argues Mr Hockman, expect to see criminal offences generally brought under the umbrella of a requirement of leave in a statute dealing with insolvency. Also, it is perfectly possible that the administrator himself may be the perpetrator of a criminal offence while he is running the company and yet if leave to prosecute is required under [Section 11\(3\)\(d\)](#) it is he to whom the prosecuting authority must first go to seek consent. In these circumstances it is to be expected that Parliament would have used clearer language if the intention was to cover criminal proceedings.

Thus runs the argument for the appellant.

18) In my judgment the starting point is to look at the circumstances in which an administration order can be made. These are set out in [Section 8\(1\)](#) of the 1986 Act. The Court has to be satisfied a company is or is likely to become unable to pay its debts and to consider the making of an order would be likely to achieve one of the following

purposes:

- (a) the survival of the company and the whole or any part of its undertaking as a going concern;
- (b) the approval of a voluntary arrangement under Part I;
- (c) the sanctioning under Section 425 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that Section; and
- (d) a more advantageous realisation of the company's assets than would be affected on a winding up.

In the present case the order specified grounds (a) (b) and (d).

19) An administration order is therefore permitted for clearly and narrowly defined purposes only and there is a good reason why the legislation should prevent steps being taken which might thwart those purposes. This legislation is concerned with corporate defendants and not individuals. There is no similar filter for the prosecution of officers of a company in administration. In an appropriate case a prosecution could perfectly well be started or continued against a director of a company in administration or indeed the administrator himself. Also there is very limited power to stay a prosecution in either the Magistrates Court or the Crown Court and an untimely or inappropriate prosecution could torpedo an administration order.

20) While there is no direct authority upon whether [Sections 10](#) (1)(c) and [11](#)(c)(d) apply to criminal proceedings, there has been considerable debate about the ambit of these sub-sections. Mr Hockman relied strongly on *Air Ecosse Limited and Others -v- Civil Aviation Authority* (1987) 3 BCC 492, a decision of the Court of Session. Air Ecosse Ltd held air transport licences for the Aberdeen-Wick-Sumburgh air routes. British Airways applied to the Civil Aviation Authority under the Civil Aviation Act 1982 for its licences to be revoked and for new licences to be granted to them. Air Ecosse was in administration and the issue arose whether the British Airways application was within the definition of *other proceedings against the company*. Lord McDonald said at p. 494, having referred to Section 11(3):

"I have come to be of the view that these restrictions are directed against activities of creditors of the company which might otherwise be available to them in order to secure or recover their debts. The fact that an administration order has been made at all necessarily implies that the court is satisfied that the company is or is likely to become unable to pay its debts. This, in my opinion, excludes any possibility of a members' voluntary winding-up being included in para. (a) above. Such a process involves a declaration of solvency which the directors in this case would be unable to give. (Companies Act 1985, section 577: see now Insolvency Act 1986, sec 89). The resolution referred to must therefore be a resolution for winding up in a creditors' voluntary winding-up. The order referred to is an order for winding up by the court or subject to the jurisdiction of the court. These are all courses of action which are open to creditors generally but which are now restricted while an administration order is in force."

He continued at p.495:

"... sec 11(3) of the Act of 1986 is confined to the activities of creditors of a company subject to an administration order. It does not extend beyond that to courses of action which may be open to persons who are not creditors, e.g. competitors, under a different statute. It seems to me that sec. 11(3)(a)-(c) disclose a *genus*, viz. creditors of a company

subject to an administration order, whose rights as creditors are to be restricted, and the use of the word "other" in sec. 11(3)(d) is simply to bring within, that *genus* those *species* of creditor who complete the *genus*, but who have been omitted in the earlier, paragraphs."

Lord Robertson said at p.500:

"I agree with the conclusions of the Lord Ordinary and would refuse the appeal. On the narrow reading of sec. 11(3)(d) of the Act I think that the phrase "no other proceedings" in its context must be taken as *ejusdem generis* with subsec. (a)-(c) to refer to proceedings by creditors or in relation to actual assets or property of the company."

And a little later:

"I am not convinced that the hearing can be said to be "proceedings .....against the company or its property" within the meaning of sec. 11(3)(d). They are not in the strict legal sense proceedings against the company at all."

21) The Lord Justice-Clerk said the vital question was whether the words in sec. 11(3)(d) were to be given a wide meaning or a restricted meaning but his approach was rather different. He said at p.502:

"Mr W M Campbell for the first respondents and Mr MacLean for the second respondents argued for the application of what was in effect the *ejusdem generis* rule. Although the matter is not without difficulty, I have come to the conclusion that the submission for the respondents is well founded. I agree with Mr McEachran that the matters referred to in sec. 11(3)(a)-(c) do not relate solely to rights of creditors. In so far as the Lord Ordinary appears to accept that they do, I am of opinion that he was in error. Section 11(3)(a) refers first of all to a resolution being passed for the winding up of the company. This is a clear reference to a members' voluntary winding-up, and in such a situation there is no question of insolvency, and the remedy is not a remedy available to a creditor. Nonetheless the remaining matters in (a) and in (b) and (c) all relate to steps which are available to persons who are in some sense creditors of a company. In my opinion the whole flavour of sec. 11 (3)(a)-(c) is that it is dealing with steps which may be taken by a creditor against a company. In my opinion, this colours the interpretation which falls to be placed upon the words, "no other proceedings .....may be commenced or continued .....against the company," where these appear in (d). The situation might have been different if the word "other" had not appeared, since (d) would then have contained a clear prohibition against any proceedings being taken against the company. However, the word "other" does appear and effect must be given to it. The whole basis of the *ejusdem generis* rule is that the word "other" falls to be read as if it meant "similar". (Quazi -v- Quazi [1980] AC 744, per Lord Diplock). In my opinion the word "other" in sec. 11(3)(d) falls to be read as if it meant "similar". That being so it is plain that what is prohibited by (d) is any proceedings against the company which are similar to those described in (a), (b) and (c). This would confine the prohibition to proceedings which might be taken by someone such as a creditor against the company and which was in some way related to a debt due by the company. That interpretation would be entirely consistent with sec. 8(3) which describes the purposes for which an administration order may be made: In my opinion, however, the prohibition in (d) does not extend to proceedings such as those which were before the first respondents on 23 April 1987. The hearing before the first respondents on 23 April 1987 may have constituted proceedings against the petitioners in the wide sense of these words, but, in my opinion, it did not



amount to proceedings similar to those described in sec. 11(3)(a)-(c)."

22) The Judge examined the judgments in Air Ecosse Ltd with great care. He pointed out that while the three judges were unanimous in their conclusion that an application by another airline to the civil aviation authority for revocation of an air transport licence was not *other proceedings* for the purposes of section 11(3)(a) of the 1986 Act their reasoning differed. What the Court plainly did not consider was whether *other proceedings* included criminal proceedings. I therefore agree with the Judge that Air Ecosse is not authority for the proposition that a criminal prosecution falls outside the ambit of the term *other proceedings* in section 11(3)(d) of the 1986 Act.

23) It is unnecessary for present purposes to explore in any more detail the judgments in Air Ecosse. Suffice it to say that neither Harman J in Re Paramount Airways Limited [1990] BCC 130 nor Ferris J in Biosource Technologies Inc -v- Axis Genetics Plc (in administration) 2 November 1999 5707/1999 (unreported) considered the *ejusdem generis* rule applied to construction of *other proceedings* in sections 10 and 11 of the 1986 Act. Indeed Ferris J pointed out at p.12 that nothing was said by Sir Nicolas Browne-Wilkinson VC in Paramount Airways (also referred to as British Airport Plc -v- Powdrill) [1990] Ch.744. on appeal from Harman J to suggest that he regarded the *ejusdem generis* rule as applicable. This Court differed from Harman J in concluding that the proceedings in question had to be either legal proceedings or quasi legal proceedings such as arbitration. But there is a passage in the judgment of the Vice Chancellor (with whom the other members of the Court agreed) that bears on the construction of sections 10 and 11. At p.758F he said:

"Before dealing with the issues summarised above, it may be helpful to state what, in my opinion, is the correct approach to the construction of the provisions dealing with administrators contained in Part II of the Act. The judge was very much influenced in his construction by the manifest statutory purpose of Part II of the Act. I agree with this approach. The provisions of Part II themselves, coupled with the mischief identified in the Cork Report, show that the statutory purpose is to install an administrator, as an officer of the court, to carry on the business of the company as a going concern with a view to achieving one or other of the statutory objectives mentioned in section 8(3). It is of the essence of administration under Part II of the Act that the business will continue to be carried on by the administrator. Such continuation of the business by the administrator requires that there should be available to him the right to use the property of the company, free from interference by creditors and others during the, usually short, period during which such administration continues. Hence the restrictions on the rights of creditors and others introduced by sections 10 and 11 of the Act. In my judgment in construing Part II of the Act it is legitimate and necessary to bear in mind the statutory objective with a view to ensuring, if the words permit, that the administrator has the powers necessary to carry out the statutory objectives, including the power to use the company's property.

On the other hand, however desirable it may be to construe the Act in a way calculated to carry out the parliamentary purpose, it is not legitimate to distort the meaning of the words Parliament has chosen to use in order to achieve that result. Only if the words used by Parliament are fairly capable of bearing more than one meaning is it legitimate to adopt the meaning which gives effect to, rather than frustrates, the statutory purpose."

24) That passage suggests to me that the Vice Chancellor did not regard a narrow



construction of sections 10 and 11 based on the principle of a *ejusdem generis* as appropriate or applicable. While he did not refer specifically to criminal proceedings, there is no reason to believe he thought sections 10 and 11 should be construed so as to exclude them.

25) Next comes Carr -v- British International Helicopters Limited [1993] BCC 855. This was a decision of the Employment Appeal Tribunal sitting in Scotland presided over by Lord Coulsfield. An employee claimed re-instatement following alleged unfair selection for redundancy by an administrator. The Tribunal held that complaints and applications to industrial tribunals as a whole fell within the description *other proceedings* in section 11(3)(d) and were subject to the conditions and limitations laid down by the section unless they could be excluded by some other argument. The Tribunal then went on to consider Air Ecosse and said it was unable to find a *genus* in section 11 which was capable of definition and excludes industrial tribunals. Lord Coulsfield said at p.862: "It seems to us that there is no way of construing section 11 so as to exclude from its scope claims under the employment protection legislation ....."

26) In my judgment it is therefore now clear that sections 10 and 11 of the 1986 Act do not fall to be construed in the narrow manner suggested by some passages in the judgments of the Court of Session in Air Ecosse. The correct approach is that outlined by the Vice Chancellor in the passage I have cited. The critical factors are the ordinary meaning of the words used and the statutory objectives of the sections.

27) Having concluded that *ejusdem generis* has no place in the construction of these sections I turn to the natural meaning of the words. It seems to me that they have a plain and clear meaning. The words:

"No other proceedings and no execution or other legal process may be commenced or continued .....against the company or its property"

cover on their face all judicial and quasi judicial proceedings. There is no qualification to *other proceedings*. The sections do not say *no other civil proceedings*; nor is there any reference to excluding any particular category of proceedings e.g. criminal proceedings. The words used are entirely apt, submits Mr Davies for the Respondent, to include all judicial proceedings. There are other sections in the 1986 Act that specify offences by a company e.g. section 30. It is to be inferred that the draughtsman intended that proceedings for such offences should fall under the umbrella of *other proceedings* in sections 10 and 11 otherwise they would have been expressly excluded.

28) Furthermore, as Mr Davies pointed out, it is not as if there is nowhere in the Act mention of criminal proceedings. (see section 219(3)). Likewise there are references to family proceedings in section 281. There are various instances in the Act where the draughtsman uses the word *proceedings* compendiously to include all proceedings and this lends support to the contention that sections 10 and 11 mean what they say i.e. all proceedings including criminal proceedings. See e.g. section 219(1) and 311(1). Looking at the Act as a whole therefore there are indicators that where as in sections 10 and 11 the draughtsman used the words *no other proceedings.....or legal process* he was using an all encompassing description intended to cover all forms of legal proceedings.

29) Given that the words on their natural construction are in my judgment entirely apt to include criminal proceedings is there any convincing reason why they should not be so construed? Nothing is to be found in any of the cases to which we have been referred to suggest there is anything inherently wrong in the Chancery Court acting in appropriate

circumstances as a filter for the criminal process. Indeed if anything the reverse is the case. Some help is to be found in looking at the comparable situation on a winding up.

30) R -v- Dickson [1991] BCC 719 was concerned not with administration but with section 130(2) of the 1986 Act which reproduces section 231 of the Companies Act 1948 and reads:

"When a winding up Order has been made or a provisional liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against the company or its property, except by leave of the Court and subject to such terms as the Court may impose."

31) There were before the Court of Appeal (Criminal Division) two appeals against conviction on counts of supplying goods to which a false trade description was applied. The defendants were directors of a company and all were convicted on the same counts, the directors on the basis that they had connived at or consented to offences committed by the company. The defendants submitted that because the Official Receiver had been appointed provisional liquidator of the company leave was required to bring criminal proceedings. The trial judge held that section 130(2) related to civil proceedings only. The Court of Appeal dismissed the appeal on the basis that the presence of the company at the trial was a notional presence only and made no material difference to the conduct of the case against the defendants. However the Court proceeded on the basis of assuming that section 130(2) covered criminal proceedings. The basis for this assumption was the decision of Slade J in Re J Burrows (Leeds) Ltd [1982] 1WLR 1177.

32) Mr Hockman pointed out that the decision in Dickson did not depend on whether section 130(2) included criminal proceedings and that not only was Dickson concerned with a different statutory provision but also the decision in Burrows followed a concession by Counsel. However Dickson does, in my view, illustrate that a filter through the 1986 Act on criminal proceedings is in certain circumstances appropriate.

33) Mr Davies also referred to observations by Millett J in Re Olympia and York Canary Wharf Ltd. American Express Europe Ltd and Others -v- Adamson [1993] BCC 154 at 156H which suggest he thought the compendious expression *proceedings* in sections 10 and 11 was apt to denote criminal as well as civil proceedings.

34) Approaching sections 10 and 11 purposively it is helpful to bear in mind what this court said in Re Atlantic Computer Systems Plc [1992] Ch 505 at 528 namely that administration is intended to be only an interim and temporary regime. There is to be a breathing space while the company under new management in the person of the administrator seeks to achieve one or more of the purposes in section 8(3). There is a moratorium on the enforcement of debts and rights, proprietary and otherwise, against the company, so as to give the administrator time to formulate proposals and lay them before the creditors. Such a purpose would be hindered were all prosecutions to be allowed to proceed without the possibility of restraint and whatever the circumstances.

35) Mr Hockman submits it is against public policy that criminal process should be restricted by a filter through a Court considering the administration of a defendant company. Whilst such a restriction may at first sight seem surprising, on examination there do seem to be convincing reasons. First the restriction applies only to a corporate defendant, and secondly only to a limited class of corporate defendant i.e. those cases where administration or insolvency is involved. The number of cases is likely to be small. Also the ambit of criminal offences that may be committed by corporations is very wide,

ranging from very grave e.g. manslaughter at one end of the scale to the quite trivial at the other. Sometimes the fact that a company is in administration will be of little or no significance when weighed against the public interest in proceeding with the prosecution. But in others the interests of the creditors, for example, may be the critical consideration. There may be a very good reason for not proceeding with a prosecution during the administration as the consequence may be to tip the company into irretrievable insolvency. Also, as was pointed out in argument, refusal of leave is not necessarily permanent; the court could entertain a further application. The court dealing with the administration is in my judgment particularly well placed to weigh up the arguments for and against granting leave. When the public interest so dictates, leave to pursue criminal proceedings ought readily to be given but that will not be every case.

36) It is true, and the point was made on behalf of the Agency, that the Agency and other prosecuting authorities make decisions whether or not to prosecute under a well established code and that proceedings can in inappropriate cases be stayed for abuse of process. But the prosecutor will not have the detailed financial information about the company that will be in the hands of the administrator and the Court. Furthermore there is no restraint on prosecuting directors or officers of the Company who can be proceeded against quite apart from the Company when it is appropriate to do so.

37) My conclusion on the first appeal is that *other proceedings* in sections 10 and 11 of the 1986 Act includes criminal proceedings. Such a construction accords both with the literal wording of the sections and the statutory purpose of Part 11 of the Act as described in the passages of the judgments of this Court in Paramount Airways at 758F and Atlantic Computers at 528 to which I have referred.

### **Discretion**

38) When the Judge came to exercise his discretion on 6 August 1999 he said that the difference between this case and what he described as the normal run of case in which a company operating a waste disposal site is in breach of its obligations under a waste management licence was that in the present case the company was insolvent. He observed that any fine that might be imposed could only be paid at the expense of the creditors. He said that although the company could pay, it could only do so out of assets available for distribution to the creditors. He referred to the principle in bankruptcy cases that leave should only be given to pursue civil proceedings if there is no prejudice to the creditors or to the orderly administration of the bankruptcy. He also referred to the observations of Morritt LJ in *Re Celtic Extraction Ltd* [1992] 4 All ER 684 (para 39) where he said that the polluter pays principle should not be applied so as to require that the unsecured creditors of the polluter pay to the extent of the assets available for distribution amongst them.

39) It is true the Judge mentioned he had before him an Affidavit from Mr Weare setting out the reasons why the Agency felt there should be a prosecution of the company, but he made no specific reference to those reasons nor did he say what if any weight he gave to any of them. The only comment he made was that there was no explanation why the directors had not been prosecuted.

40) Mr Weare's reasons why the Agency sought leave were:

- (1) it has a published policy as to the circumstances in which it will bring criminal proceedings for breach of the terms of a waste management licence;
- (2) it was concerned the company's liability for its criminal conduct was not evaded by

the institution of insolvency proceedings;

(3) it had to be seen to be acting fairly in its policy of prosecuting those who act in breach of the terms of waste management licences;

(4) the Company had been in consistent breach of the terms of its licence and the breach sought to be prosecuted was a sample breach only;

(5) there was considerable local concern about the harm caused to the environment and the Agency wished to be seen to be acting effectively;

(6) in the event of the Company's conviction those who were officers at the time of the offence could be precluded from holding a licence in the future as could any company of which they were an officer (see sections 40(4) and 74).

41) Mr Weare made the point that often companies which commit offences under the EPA are those who through poor management have inadequate financial resources to comply with their obligations.

42) In my judgment the Judge was in error in the exercise of his discretion. He should not have regarded the interests of the creditors of the Company as trumping all other considerations. He failed to take into account and give due weight to the evidence of Mr Weare. Furthermore, in the event of conviction, there is a statutory obligation on the court fixing the amount of any fine to take account of all the circumstances including the financial circumstances of the company (see sec 18(3) [Criminal Justice Act 1991](#)).

43) I consider there were compelling reasons why leave should have been given in this case. The purpose of licensing is to ensure that the disposal of controlled waste does not give rise to:

(i) pollution of the environment;

(ii) harm to human health and;

(iii) serious detriment to the amenities of the locality.

44) These are collectively known in the waste management industry as "the three evils". The case was a bad one involving the first and third of the above. Also the breach of licence had continued over a long period and the Agency was well justified in having in mind the consequences of a conviction from the viewpoint of [section 74](#) of the EPA.

45) As the Judge failed to exercise his discretion properly it is open to this Court to exercise the discretion afresh. This should be done on the facts as they are today. As to this the evidence is sparse. We are told that ultimately the negotiations have been successful and the waste management licence has been transferred to a third party. The Company, it is said, remains little more than a shell, although there are said to be some personal injury claims outstanding against it. Mr Davies points out that the Agency has sanctioned the transfer of the licence, but I am not impressed that this should weigh against a prosecution. What else was the Agency to do to ensure that the licence conditions were met? The administration is now complete. This was a serious breach of licence and I can see no reason why the Agency should not have been given and now be given leave to prosecute. Whether in all the circumstances they now chose to proceed with the prosecution is, of course, a matter for them.

46) Accordingly I would dismiss the first appeal but allow the second appeal and grant the Agency leave to prosecute.

**LORD JUSTICE ROBERT WALKER:**

47) I agree that the first appeal (as to the point of statutory construction) should be dismissed and that the second appeal (as to the judge's exercise of discretion) should be

allowed, in each case for the reasons stated by Scott Baker J, whose judgment I have had the advantage of reading in draft. I add some comments of my own only because we are differing from the views expressed by the Inner House of the Court of Session in Air Ecosse v Civil Aviation Authority (1987) 3 BCC 492. That was one of the earliest reported cases on administration under Part II of the Insolvency Act 1986, which came into force on 29 December 1986. The administrators of Air Ecosse were appointed on 17 February 1987 and the judgment of the Court of Session was delivered on 3 July 1987.

48) All three members of the court construed the reference to "other proceedings" in s.11(3)(d) of the Insolvency Act 1986 as limited to "steps which may be taken by a creditor against a company" (as Lord Justice-Clerk Ross put it at p.502). They reached that conclusion by applying the rule of construction known as the *ejusdem generis* rule ("of the same kind"). The rule was described as follows by Lord Diplock in Quazi v Quazi 1980 AC 744, 807-8 (a case on the meaning of "judicial or other proceedings" in s.2(a) of the Recognition of Divorces and Legal Separations Act 1971),

"As the latin words of the label attached to it suggest, the rule applies to cut down the generality of the expression "other" only where it is preceded by a list of two or more expressions having more specific meanings and sharing some common characteristics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are. The presumption then is that the draftsman's mind was directed only to that genus and that he did not, by his addition of the word "other" to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity."

49) The rule should not be applied in a mechanistic fashion, since (except in the simplest cases) the recognition of expressions as "sharing some common characteristics" may involve the exercise of judgment. Nor should the rule exclude other matters which may help to indicate the legislative purpose.

50) In this case there is ample material indicating that the general legislative purpose of Part II of the Insolvency Act 1986 is, as Nicholls LJ put it in Re Atlantic Computer Systems [1992] Ch 505, 528,

"an administration is intended to be only an interim and temporary regime. There is to be a breathing space while the company, under new management in the person of the administrator, seeks to achieve one or more of the purposes set out in section 8(3). There is a moratorium on the enforcement of debts and rights, proprietary and otherwise, against the company, so as to give the administrator time to formulate proposals and lay them before the creditors, and then implement any proposals approved by the creditors."

51) So the primary aim is to provide a company with a breathing space from pressure from its creditors, either in the hope of its surviving as a going concern, or for one of the other purposes specified in s.8(3) of the Insolvency Act 1986. But that primary aim does not automatically exclude other considerations. Nicholls LJ went on to say, in a passage which is relevant to both the appeals before this court,

"Parliament must have intended for instance, that, in appropriate circumstances, and for a strictly limited period, ... a lessor or owner of goods [occupied or used by the company in administration] might not be given leave [to enforce his rights] if giving leave would cause disruption and loss out of all proportion to the loss which the lessor or the owner of

goods would suffer if leave were refused. Indeed, Parliament must have intended that when exercising its discretion the court should have due regard to the property rights of those concerned. But Parliament must also have intended that the court should have regard to all the other circumstances, such as the consequences which the grant or refusal of leave would have, the financial position of the company, the period for which the administration order is expected to remain in force, the end result sought to be achieved, and the prospects of that result being achieved."

52) Although the Court of Session was (in my respectful view) plainly right in discerning proceedings or other actions by creditors, to establish or enforce their claims, as much the most important subject-matter of paragraphs (a) to (c) of s.11(3), it was wrong to regard such proceedings as the only subject-matter of those paragraphs. In particular, paragraph (a) applies to every sort of resolution or order which may be passed or made for the winding up of a company. It is true that in order to be in administration at all, a company must be (or be likely to become) unable to pay its debts, so that a members' voluntary winding-up is in practice excluded. But a creditors' voluntary winding-up is brought about by a resolution of the company in general meeting and can hardly be described (as Lord McDonald appears to have done at p.495) as a course of action open to creditors. Moreover s.11(3)(a) would bar a petition for the winding-up under what is now s.124A of the Insolvency Act 1986, on grounds of the public interest, of a company which might be in administration but still carrying on some potentially harmful business. An administrator is of course an officer of the court and ought not consciously to carry on any business which is against the public interest. But the facts of the appeals now before this court show that even the most responsible administrator may find himself involved in a situation where the implications of continuing a company's business are not limited to purely financial matters, but may affect the health and welfare of the community. When this point was raised in the course of argument Mr Stephen Davies (for the administrator) pointed out, against his client's interest, that so long as an administration continues the court has no power to give any permission overriding the prohibition on winding-up in s.11(3)(a). That is so, and the same is true of s.11(3)(b). But that has no bearing on whether the courses of action referred to in s.11(3)(a) to (c) have the common characteristic of being courses of action available to creditors (and not to others).

53) These points raise doubts as to whether there is, in s.11(3)(a) to (c), sufficient homogeneity to enable the court to conclude that the scope of s.11(3)(d) is restricted. In the light of the decision of this court in Re Atlantic Computer Systems, Mr Stephen Hockman QC (appearing with Mr Stephen Moverley Smith for the Environment Agency) modified his support for Air Ecosse by widening the category of claims by creditors so as to let in claims by landlords, hire-purchase companies and others with proprietary claims. In Re Celtic Extraction [1999] 4 AER 684, this court has held that a waste management licence granted under the Environmental Protection Act 1990 is property for the purposes of s.436 (and moreover can be disclaimed as onerous property). Re Celtic Extraction underlines the importance of Mr Hockman's concession, since the Environment Agency clearly has a very close interest (if not what would normally be described as a proprietary interest) in the waste management licence which it granted to Rhondda Waste Disposal Limited.

54) But even that widened category does not give s.11(3)(d) its full force. Air Ecosse has now been consciously departed from in three first-instance decisions in England and

Wales: Re Paramount Airways [1990] BCC 130 (Harman J), the decision now under appeal, and the decision in Re Axis Genetics (2 November 1999, in which Ferris J approved and followed the decision now under appeal). It was cited in Re Barrow Borough Transport [1990] Ch 227 but Millett J made no comment on it; it received only a passing and neutral mention when the Paramount Airways case came to this court (as Bristol Airport v Powdrill: see [1990] Ch 744, 752); and it was distinguished by the Employment Appeal Tribunal in Carr v British International Helicopters [1993] BCC 855. In my view the decision in Air Ecosse, based as it is on the *ejusdem generis* rule, should not be followed, and [s.11\(3\)\(d\)](#) should be given its wide natural meaning so as to include criminal proceedings.

55) In the exercise of his discretion the judge, having correctly held that the range of proceedings relevant to [s.11\(3\)](#) was not limited to steps taken against a company by its creditors (or others with proprietary claims against it), then misdirected himself by limiting his attention to the interests of the company's creditors. He paid insufficient attention to the wider public interest in the prosecution of what may be proved to have been serious offences arising out of operations which have, for three years or more, plagued the lives of many residents in this part of the Rhondda.

**LORD JUSTICE HENRY:**

56) I agree with the judgments of Lord Justice Robert Walker and Mr Justice Scott Baker, and wish merely to add a word on the Paramount Airways case, Bristol Airport plc -V- Powdrill [1990] 1 Ch 748 (CA).

57) In that case the Court of Appeal, presided over by Sir Nicolas Browne-Wilkinson V-C, dealt with an airport authority's statutory claim under Section 88 of the Civil Aviation Act, 1982 for the detention and sale of the aircraft of an airline, in administration but still operating commercially, in satisfaction of unpaid airport charges. The Court there found that the statutory right of detention was a "... lien or other security ...", and its exercise constituted a "[step] taken to enforce [a] security" within the meaning of Section 11(3)(c) of the Act. Accordingly, the leave of the Court was required.

58) That was the ratio of the Court's decision on that issue, and so it was not strictly necessary for them to go on to consider the second point, namely whether that leave would equally have been required under Section 11(3)(d), but they expressly did so at page 265. The submission was that same statutory detention required the leave of the court as being "other proceedings ... against the company or its property". The Vice-Chancellor, with whom the other judges agreed, said:

"I have no hesitation in rejecting that view. In my judgment the natural meaning of the words 'no other proceedings ... may be commenced or continued' is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. ... Further, the reference to the 'commencement' and 'continuation' of proceedings indicates what Parliament had in mind was legal proceedings. The use of the word 'proceedings' in the plural together with the words 'commence' and 'continue' are far more appropriate to legal proceedings (which are normally so described) than to the doing of an act of a more general nature."

59) So the thinking was that the act of detention was not part of any legal proceedings, but was a statutory act of self-help, a "step to enforce a security" as referred to in Section 11(3)(c), and not a legal proceeding as, say, an application for an interim injunction would be.



60) While we are not strictly speaking bound by the Court's finding that under Section 11(3)(d) "proceedings" are restricted to legal or quasi-legal proceedings (and so would include criminal proceedings), as that finding was clearly carefully considered, so it should be given proper weight. But the question of what weight it should have with us is crucially dependent on whether the Court intended the meaning of "legal proceedings" to be restricted to "civil legal proceedings". In my judgment, that was not their intention, and there is nothing to suggest that it was. Indeed, everything points to the fact that they had specifically in mind the possibility of criminal prosecution coming within that definition.

61) First, for reasons set out by Scott Baker J, the internal construction of the Act points strongly to "other proceedings" including criminal proceedings.

62) Second, sub-sections (5) and (7) of Section 64 of the Civil Aviation Act, 1982 are offence-creating sections, and it clear from the judgment at page 774H that the Court had in mind the possibility of the airline or its employees committing a criminal offence.

63) Third, Lord Justice Woolf at page 771D considered what he regarded as a parallel case, namely In re Smith (a Bankrupt) ex parte Braintree District Council [1990] 2 AC 215. That case concerned Section 285 of the Insolvency Act, and dealt with the courts' power to stay

"... any action, execution, or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt."

The issue was whether Section 285 gave jurisdiction to stay proceedings under Section 102 of the General Rate Act, 1967 as amended, for the committal of the debtor to prison for 60 days following breach of a suspended committal order. The Council's printed case contended that Section 285 should be construed as not including "... criminal or quasi-criminal proceedings" (p 218G), and their case was that committal proceedings for non-payment of rates were not civil but criminal or quasi-criminal (p 229F). Their Lordships rejected this submission, and concluded that the words "or other legal process" in Section 285 covered the proceedings in magistrates' court for committal despite the fact that they were punitive.

65) For those reasons it seems to me to be clear that the Court in the Paramount Airways case had criminal proceedings well in mind, that they intended to include criminal proceedings in "legal proceedings", and that accordingly their construction should be followed by us.

66) Accordingly, the first appeal will be dismissed, and the second allowed.

**Order: First Appeal - appeal dismissed; Respondents awarded costs. Second Appeal - appeal allowed; Appellants awarded costs. Order does not form part of approved judgment.**