CA before Chadwick LJ, Robert Walker LJ. 13th August 2002.

JUDGMENT : Lord Justice Chadwick:

1. The applications listed before this Court fall into two main groups. In the first group are (i) two applications (A2/2000/3026/A and A2/2000/3367A) for permission to amend the appellants' notices in two pending appeals from orders made by His Honour Judge Boggis QC, sitting as a judge of the High Court in Birmingham, in proceedings brought under section 459 of the Companies Act 1985 for relief in relation to the affairs of Ciro Citterio Menswear plc ("the company") and (ii) eight applications (A2/2002/0303-0310) for permission to appeal against other orders made by the judge in the same proceedings. The pending appeals, for which permission has been granted (A2/2000/3026 and A2/2000/3367), are themselves listed for mention. The company is now in administration under Part II of the Insolvency Act 1986. The orders from which permission to appeal has been granted, or is now sought, were all made before the administration order. The applications are made by the joint administrators. The second group comprises a single application (A2/2002/1055), made in proceedings brought by the company and the joint administrators against the shareholders, for permission to appeal against an order made on 8 May 2002 by Mr Justice Pumfrey.

The underlying facts

2. The company was incorporated under the Companies Acts 1948 to 1967, and was re-registered as a public limited company in 1989 under the Companies Act 1985. The issued shares comprise 300,000 preference shares of £1 each, held by the trustees of the company's pension fund, and 106,750 ordinary shares of £1 each held by four members of the same family. They are Rasiklal Lalji Thakrar, who holds 42.6% of the issued ordinary shares, Vinodkumar Lalji Thakrar (26.90, Kirit Lalji Thakrar (21.78%) and Nilesh Rasiklal Thakrar (8.620. For convenience - and in the hope that it will not be thought discourteous - I will refer to them respectively as Rasik, Vinod, Kirit and Nilesh. The first three are brothers; Nilesh is the son of Rasik. The four of them, with two others who were not shareholders nor members of the family, were directors of the company.

3. The company, as its name suggests, is or was engaged in the purchase and resale of men's clothing; in particular under the Ciro Citterio label. During the 1990's the company expanded dramatically, through the acquisition of retail shops formerly operated by Horne Brothers, Oakland Menswear and Dunn & Co. By 1998 the company owned or traded from 1'70 shops and had an annual sales turnover in excess of £80 million.

4. Sadly, by the end of 1998, Kirit and Rasik had fallen out to the extent that they felt that they could no longer work together. Kirit thought that, by November 1998, they had reached an agreement under which Rasik, who was the elder by some sixteen years, would retire as managing director, handing over day to day control of the company to him, Kirit. But, for whatever reason, Rasik was unhappy with the arrangement. The other two family members supported him. Kirit was told, by letter dated 8 February 1999, that he was no longer to work in the company.

5. It was in those circumstances that, on 10 June 1999, Kirit presented a petition for relief under section 459 of the Companies Act 1985. The respondents to that petition were the other three shareholders, Rasik, Vinod and Nilesh, and the company itself. The primary relief sought by the petition was an order that "the respondents or some of them be ordered to buy the shares of the petitioner at a price to be determined by [the Court]". The three individual respondents served points of defence, denying that the petitioner was entitled to any relief. The company, acting by the same solicitors and counsel, served its own points of defence. Paragraph 2 of the company's points of defence contains the following passage:
"Notwithstanding the production on its behalf of this Defence, the Fourth Respondent ("the Company") is not concerned and does not propose to take an active part in these proceedings by which one of its members, the Petitioner, complains about the conduct of its other members, the First to Third Respondents."

6. The response to that passage, in points of reply served on behalf of the petitioner on 17 September 1999, was this: *". . . the petitioner does not propose to reply to the Defence of the Fourth Respondent (the Company). The Company should play no further part, nor expend any monies, in these proceedings."*

7. The individual respondents made an open offer to buy Kirit's shares. When that offer was not accepted, they applied to have the petition struck out or dismissed on the grounds that it was an abuse of process for the petitioner to pursue it in the face of the open offer which had been made. In taking that step they may well have had in mind the observations of Lord Hoffmann in ***O'Neill and another v Phillips and others*** [1999] 1 WLR 1092,1107C. The application and the petition were listed for hearing before Judge Boggis on 20 January 2000.

8. Sensibly, the parties sought to agree, in advance of that hearing, terms for the purchase of Kirit's shares in the company. They reached some measure of agreement; and embodied the agreed terms in a document which became the schedule to an order which was made by consent on 20 January 2000. It is convenient to refer to those agreed terms as "the January agreement". Paragraph 2 of the January agreement provided that each party "(being for the purpose of this Schedule the Respondents jointly on the one hand and the Petitioner on the other)" should at its own expense in the first instance appoint an independent chartered accountant to prepare a valuation of Kirit's shares. Paragraph 3 provided for the shares to be valued as at 6 February 1999 on a *pro rata* basis without discount for the minority interest. The accountants were to seek to reach agreement; but, if they did not, there was provision for valuation by a single expert appointed by the President of the Institute of Chartered Accountants in England and Wales. Paragraphs 7 and 8 of the scheduled agreement were in these terms:

   The Respondents shall purchase the Petitioner's shares at the value so agreed or determined together with interest on such sum for such period and at such rate as is agreed or determined by the Court to be reasonable.

8. The Petitioner shall co-operate with all the Respondents and shall make no objection if the purchase of the Sale Shares is effected by the Company purchasing its own shares or by a 3rd party purchasing the shares, subject to the Respondents indemnifying the Petitioner in respect of all and any liability whatsoever whether directly or indirectly arising out of such method of purchase whether under the Companies Act 1985 or relevant taxation legislation in force or howsoever arising."

9. It is plain that, whether or not the company was, or was intended to be, bound by the January agreement - the principal matter now in dispute - the individual shareholders (who, on any basis, were party to that agreement) contemplated that the company, itself, might be the purchaser of Kirit's shares. But the circumstances in which a company may purchase its own shares are closely circumscribed by provisions in Part V of the Companies Act 1985.

The legislative provisions

10. The starting point is section 143 ("General rule against a company acquiring own shares") in conjunction with section 151 ("Financial assistance generally prohibited") of the 1985 Act. Section 143(1) sets out the general rule that a company shall not acquire its own shares, whether by purchase, subscription or otherwise. Section 151(1) provides that, where a person is acquiring or proposing to acquire shares in a company, it is not lawful for the company to give any financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place.

11. Each of those general rules is subject to exceptions. Section 143(3) provides that:
   "A company limited by shares may acquire any of its own fully paid shares otherwise than for valuable consideration, and subsection (1) does not apply in relation to -
   (a) the redemption or purchase of shares in accordance with Chapter VII of this Part,
   (c) the purchase of shares in pursuance of an order of the court under ... Part XVII (relief to members unfairly prejudiced), . . ."

12. Section 153(3) contains a provision to the same effect: "Section 151 does not prohibit - (d) a redemption or purchase of shares in accordance with Chapter VII of this Part, .

13. Chapter VII of Part V of the 1985 Act contains provisions which are to be observed if a company is to purchase its own shares under the exception to sections 143 and 151- see section 162(1) of the Act. A

company (other than a private company) may only purchase its own shares out of distributable profits (or out of the proceeds of a fresh issue of shares) - see sections 160(1) and 162(2) of the Act. A company may not make an "off-market purchase" - that is to say, a purchase otherwise than on a recognised investment exchange - save under a purchase contract or a contingent purchase contract approved in advance by a special resolution in accordance with sections 164 or 165 of the Act. A company is not liable in damages in respect of any failure on its part to purchase any of its own shares; and a court shall not grant specific performance of a purchase contract against a company if the company shows that it is unable to meet the costs of purchase out of distributable profits - see section 178(2)(B). Distributable profits means profits out of which the company could lawfully make a distribution within the meaning of section 263(2) of the Act - see section 181(a).

Part XVII of the 1985 Act contains provisions for the protection of a company's members against unfair prejudice. Section 461(1) of the Act enables a court to make such order as it thinks fit for giving relief in respect of the matters complained of. That relief may take the form of an order providing for the purchase of the shares of any member by the company itself - see section 461(2)(d). But it could not be a proper exercise of that power (save, perhaps, in exceptional circumstances which I cannot envisage) for the court to make an order for the purchase by a company of its own shares without having regard to the interests of the creditors; in particular, it could not be a proper exercise of that power to make an order for the purchase by a company (other than a private company) of its own shares unless there were distributable profits available to fund the purchase.

The effect of the orders made prior to administration

14 An administration order was made by Mr Justice Hart, under section 8 of the Insolvency Act 1986, on 12 March 2001. It will be necessary to examine each of the orders made prior to that order – that is to say, the orders from which permission to appeal is sought in what I have described as the first group of applications. But the overall effect of those orders - and, in particular, of an order made on 13 December 2000 - that the company, as well as the individual respondents to the petition under section 459 of the 1985 Act, was required to purchase the petitioner's shares for a price, with interest, in excess of £8 million. The need to comply with the orders which the judge had made led to a position in which the company was unable to pay its debts as they fell due; as appears from the administration petition presented by the directors of the company on 12 March 2001 and the witness statement made by Rasik on that day. Further, it appears that the company is hopelessly insolvent. We have been told in the course of the hearing this morning the deficit as regards creditors is of the order of £25 million and that the likely dividend for unsecured creditors in an insolvent liquidation would be 11 pence in the pound.

Proceedings in the administration

15. Joint administrators were appointed on 12 March 2001 to manage the affairs of the company for the statutory purposes set out under paragraphs (b) and (d) of section 8(3) of the 1986 Act; that is to say, the approval of a voluntary arrangement under Part I of the Act, and a more advantageous realisation of the company's assets than would be effected on a winding up. The joint administrators are licensed insolvency practitioners with the firm Kroll Buchler Phillips. On 14 December 2001 they sought and obtained directions from the court, under section 14(3) of the Insolvency Act 1986, to make what I have described as the first group of applications to this Court. Those directions were given by Mr Peter Leaver QC, sitting as a deputy judge of the High Court, on 20 December 2001.

The first group of applications

16. In order to address the applications in the first group it is necessary to set out in some detail the various orders made in the proceedings under section 459 of the 1985 Act and the circumstances in which those orders were made.

***The order of* 20 *January* 2000**

17. As I have said the petition and the respondents' application to strike out were listed for hearing before Judge Boggis on 20 January 2000. Immediately before that hearing - indeed, I think, within the precincts of the court - the parties, with the assistance of their respective counsel, agreed terms for the purchase of Kirit's shares in the company. The agreed terms were set out in the schedule to

which I have referred as the January agreement. Paragraph 7 provided for "the Respondents" to purchase the petitioner's shares; and paragraph 8 provided that the petitioner should make no objection if the purchase was effected by the company purchasing its own shares. It is, I think, of significance in the context of the dispute which has now arisen - that is to say, whether the individual parties intended that the company should be bound by those terms as a purchaser - (i) that there had been no special resolution under either section 164 or section 165 of the 1985 Act in advance of the hearing on 20 January 2000 and (ii) that the schedule containing the terms, as put before the judge signed by counsel, was signed by counsel for the respondents only on behalf of the first to third respondents. It is, I think, a proper inference that counsel, although instructed by the company to appear at the hearing on that day, did not sign the schedule on behalf of the company because he appreciated that, absent a special resolution under section 164 of the 1985 Act, the company could not enter into a contract to make an off-market purchase of its own shares.

18. The order of 20 January 2000 is the first of the orders against which the company, acting by the joint administrators, now seeks permission to appeal. The application has been given the reference A2/2002/3010 in this Court. In my view that application is misconceived and should be refused. The order of 20 January 2000 does not purport to make the terms embodied in the schedule to the order binding upon the company. The operative part of the order was limited to adjourning the petition and the application to strike out for further consideration on 27 July 2000, and reserving the costs. Nothing in the order of 20 January 2000 affected, or purported to affect, the question whether the company was bound, under the terms of the January agreement, to purchase Kirit's shares. That question turned on the terms of the agreement, construed in the light of the relevant statutory provisions, and on the effect of those provisions in the circumstances that the company had not been authorised by special resolution to enter into a purchase contract or a contingent purchase contract for the purchase of its own shares.

***The order of* 27July 2000**

19. The matter came back before Judge Boggis on 2'7 July 2000 - as he had directed by the order of 20 January 2000. The parties must be taken to have intended that the machinery provided by the January agreement would lead to the determination of a price for the purchase of Kirit's shares before the hearing on 27 July 2000. But it had not done so. For reasons which it is unnecessary to rehearse in this judgment, the machinery had broken down.

20. The order which the judge made on 27 July 2000 contains the following paragraphs:
"BY CONSENT IT IS ORDERED that the contract constituted by the provisions of the Schedule to the Order dated 10th January 2000 ("the Agreement") herein be specifically performed and carried into execution in accordance with the terms contained in the paragraphs of the said Schedule."
AND UPON the machinery in paragraph 6 of the Agreement having broken down, in order for the Agreement to be specifically performed"

21. The order went on to give directions for the steps to be taken in preparation for the determination of the purchase price payable under the January agreement "by the Court substituting its own machinery for the determination of the value of the Petitioner's shares in the Fourth Respondent". The determination was to take place at a hearing fixed to commence on 11 September 2000, with an estimated duration of eight days. The costs of the hearing on 27 July 2000 were reserved.

22. The order of 27 July 2000 is the second of the orders in the first group. The joint administrators' application for permission to appeal against that order has been given reference A2/2002/0309. In my view, that application, also, is misconceived and ought to be refused. If the company were not party to the January agreement then the order for specific performance of that agreement, made by consent, could not affect it. If the company were bound to purchasers of Kirit's shares, then that was a consequence of the January agreement; it was not a consequence of the order of 27 July 2000. The operative part of the order of 27 July 2000 imposed on "the Respondents" - which, for this purpose, I will assume included the company - obligations to make disclosure of documents and to exchange witness statements of fact limited to particular issues; but that part of the order is long since spent

and, in any event, the obligations were also to be performed by the individual respondents who, as I have said, were directors of the company.

***The order of 5 September* 2000**

23. The order of 27 July 2000 had provided for a pre-trial review to be held on 5 September 2000, at which the judge would consider (amongst other things) any application by Kirit for an interim payment. Kirit served an application notice on 21 August 2000. On 5 September 2000 Judge Boggis made an order which contained further and detailed directions for the forthcoming hearing at which the price to be paid for Kirit's shares was to be determined. The order included, also, these paragraphs:

"AND UPON the Petitioner undertaking to take all necessary steps to transfer 1/loth of his shareholding in the 4th Respondent to the Respondents upon receipt of the sum of £500,000.00 as set out below

IT IS FURTHER ORDERED that

11. The Respondents do make an interim payment to the Petitioner in the sum of £500,000.00 by 12 noon on Tuesday 12th September, 2000;

12. The costs of the Petitioner's interim payment application be paid by the Respondents in any event, such costs to be subject to a detailed assessment if not agreed."

24. That order is the subject of an appellants' notice lodged on 11 September 2000 on behalf of Rasik, Vinod, Nilesh and the company. Permission to appeal was granted by this Court (Lord Justice Aldous) on 27 November 2000. The appeal has been given reference number 2000/3026. The appeal has been compromised as between the appellants Rasik, Vinod and Nilesh on the one hand and the respondent, Kirit, on the other hand, and is listed before us for mention for the purpose only of settling the order for disposal with consent. I shall return to that matter in due course. The application now before us (2000/3026A) is an application by the company (acting by the joint administrators) for permission to amend the appellants' notice. In my view that application should be granted. It is plainly arguable, to say the least, that no order for an interim payment should have been made against the company on 5 September 2000. First, if the company were not bound as a purchaser under the January agreement - which is, of itself, plainly arguable - there was no basis upon which the company could be ordered to make a payment on account of its own obligation as purchaser. Second, a payment made by the company on account of monies due, or to become due, from Rasik, Vinod or Nilesh in satisfaction of their obligations as purchasers would, at least prima *facie,* be the provision of financial assistance in contravention of section 151 of the Companies Act 1985.

***The supposed order of* 16 *October* 2000**

25. The hearing fixed for the determination of the price to be paid for Kirit's shares took place as directed. The judge reserved judgment. He fixed 17 October 2000 as the day on which judgment was to be handed down in writing. The parties' representatives were sent a draft of the judgment in advance. On the afternoon of 16 October 2000, counsel for the petitioner, Kirit, sought a freezing order in respect of the assets of Rasik, Vinod and Nilesh. The application was made without notice; and the judge refused it. He took the view that, if freezing orders were to be made in the circumstances of this case, those affected should have the opportunity to be heard. Application A2/2002/0308 is for permission to appeal against an order said to have made on 16 October 2000 against the company. It is misconceived. There was no such order. The application should be struck out.

***The order of* 17 *October* 2000**

26. The judge gave judgment on 17 October 2000. By his order, as sealed on 19 October 2000, he determined:

"1. The purchase price to be paid by the 1st to 3rd Respondents for the Petitioner's shares in the Fourth Respondent ("the Company") pursuant to the Agreement is £6,140,000 ("the Price")";

2. The reasonable rates and period of interest on the Price to be paid by the 1st to 3rd Respondents to the Petitioner pursuant to the Agreement are as follows:"

[and there are then set out rates, and amounts, of interest from 17 February 1999 to 17 October 2000 - amounting in all to £690,573.11 - and a rate of 2% above base rate from time to time thereafter on the balance of the Price for the time being outstanding.]

27. Paragraph 3 of that order adjourned the petition, and an application for freezing orders made by the petitioner by notice dated 16 October 2000, for further hearing on 13 November 2000. Paragraph 4 awarded additional interest on the amounts payable to the petitioner from 29 September 1999 under CPR 36.21; paragraph 5 awarded the petitioner his costs throughout, including costs from 29 September 1999 on the indemnity basis; and paragraph 6 awarded interest on costs from 29 September 1999 under CPR 36.21. Paragraph 8 ordered an interim payment on account of costs in the amount of £550,000. On the face of the order, as sealed on 19 October 2000, those awards of interest and costs were made only against the first to third respondents - Rasik, Vinod and Nilesh. Had matters remained there, there would, I think, have been no reason for the company to seek permission to appeal the order of 17 October 2000. There was nothing in that order (as sealed on 19 October 2000) which affected it adversely.

28. Nevertheless, an appellants' notice was lodged on 31 October 2000, on behalf of the company as well as on behalf Rasik, Vinod, Nilesh, seeking permission to appeal from the order of 17 October 2000. The recital of the order, in section 5 of the appellants' notice, includes a note in these terms:
*"**Note:** It should be noted that certain details of the Order remain to be agreed between Counsel or, in default, settled by the Court. Although the Order has been entered by the Court, this was an error as the Minute of Order was to be but had not yet been agreed between the parties."*

29. On 6 November 2000 the solicitors for the respondents to the petition - Rasik, Vinod, Nilesh and the company - applied for an order, purportedly under CPR 40.12, that the order which had been sealed on 19 October be varied so as to add the company as one of the respondents against whom the orders for payment had been made. The reason given in the application notice was that the minute of order had not been approved by counsel and had been sealed by the court in error. In an affidavit in support of that application it was said that, in preparing a draft minute of order, counsel for the petitioner, Kirit, wrongly and without agreement, had sought to restrict those liable to make the payments to the individual respondents.

30. That application was to be heard on 13 November 2000. We have been shown the skeleton arguments prepared for that hearing. It is clear that counsel for the petitioner accepted that the court had, indeed, proceeded to seal the order at a time when it had been told that the parties, by counsel, were seeking to agree its terms. But it is also clear that counsel for the petitioner were contending that the order, as sealed, did, correctly, lay the obligations to make payments on the individual respondents to the exclusion of the company. Their skeleton argument drew attention to the provisions of sections 151, 164 and 165 of the Companies Act 1985; and pointed out that, even if the purchase contract or contingent purchase contract had been authorised by special resolution (which was not the case) the company could only pay the purchase price for the shares out of distributable profits - see sections 160(2) and 162(2) of that Act. It was pointed out, also, that the court could not make an order for specific performance of a contract by a company to purchase its own shares if the company showed that it did not have distributable profits available to meet the costs of purchase - see section 178(3) of that Act.

31 The order of 17 October 2000 was subsequently re-issued and sealed on 13 November 2000. In the re-issued form the order, on its face, makes no distinction between the individual respondents, on the one hand, and the company as a respondent, on the other hand. The effect is that paragraphs 1 and 2 of the order of 17 October 2000 now read:

> *"1. The purchase price to be paid by the Respondents for the Petitioner's shares in the Fourth Respondent ("the Company") pursuant to the Agreement is £6,140,000 ("the Price");*
>
> *2. The reasonable rates and period of interest on the Price to be paid by the Respondents to the Petitioner pursuant to the Agreement are as follows:"*

32. And the awards of interest and costs under paragraphs 4, 5 and 6 - and the interim payment order on account of costs under paragraph 8 - are now made against the company as well as against the

individual shareholders. It is not at all clear, how the order came to be re-issued and sealed in that form. The outcome of the hearing on 13 November 2000 is described in a witness statement (her third) made subsequently, on 7 December 2000, by the petitioner's solicitor. At paragraph 7 she said this: *"At the conclusion of the hearing on 13th November 2000 the Respondents' Leading Counsel informed the Petitioner's Counsel that he would prepare and send to the Petitioner's counsel a draft of an appropriately worded resolution under section 164 of the Companies Act 1985 which would preserve the Respondents' position that the Agreement in the Schedule to the Order of loth January, 2000 complied with the provisions of the Companies Act 1985 and would address the Petitioner's concern that it may not do so."*

33. There is nothing to suggest that the judge ruled upon the submissions that had been made to him on 13 November 2000 in the skeleton argument prepared by counsel for the petitioner Kirit. Nor is it clear how it could have been thought that the variation which was made to the order as originally sealed fell within CPR 40.12 (correction of errors in judgments and orders). The suggestion made in the note to the appellants' notice of 31 October 2000 - to which I have referred - that the question whether or not the company was bound to make the payments to be made under that order was a matter of detail which remained to be agreed is - to my mind - startling. There is nothing in his judgment of 17 October 2000 - in which the judge analysed the evidence as to value in some detail - which suggests that the judge was directing his mind, at all, to that question. The question whether the company was bound by the January agreement was fundamental to the order which the judge was said to have made; and it is, I think, significant that, when the order of 17 October 2000 was first sealed by the court, it was sealed in the form it had been drawn on the basis that the company would not be under obligations to make payments. If the company was not, prior to 17 October 2000, under an obligation as purchaser, there is nothing in the judgment of 17 October 2000 to explain how such an obligation had arisen.

34. Limited permission to appeal from the order of 17 October 2000 was granted on paper by this Court (Lord Justice Aldous) on 2'7 November 2000. The permission was limited to the issues raised under paragraphs 20 to 28 of section 7 in the appellants' notice - that is to say, a challenge to the award of interest under CPR 36.21. Permission was refused in respect of the issues raised in paragraphs 6 to 19 of the appellants' notice - which challenged the multiplier adopted by the judge in valuing Kirit's shares. A renewed application for permission to appeal in respect of those valuation issues was refused by this Court (Lord Justice Henry and Lord Justice Buxton) on 20 February 2001. The appeal from the order of 17 October 2000 has been given reference number 2000/3367. That appeal, also, has been compromised as between the appellants Rasik, Vinod and Nilesh on the one hand and the respondent, Kirit, on the other hand, and is listed before us for mention for the purpose only of settling the order for disposal with consent. I shall return to that matter, also, in due course. The application now before us (2000/3367A) is an application by the company for permission to amend the appellants' notice of 31 October 2000. In my view - unless the point has become academic as a result of the next order, made on 13 December 2000 - that application should be granted. As I have said, I find it impossible to see how the order of 17 October 2000 came to be re-issued and sealed on 13 November 2000 in the form in which it now is.

***The order of* 13 *December* 2000**

35. Following the hearing on 13 November 2000, Kirit's solicitors were waiting to receive a draft resolution under section 164 of the Companies Act 1985; as the witness statement of 7 December 2000, to which I have referred, makes clear. The witness statement was made in support of an application, lodged that day, for an order declaring that, by virtue of the provisions of section 143(3)(c) of the Companies Act 1985 - alternatively, the unanimous participation of all the shareholders - the company was bound by the orders of 20 January and 27 July 2000 to purchase Kirit's shares in the company. That, as it seems to me, reflected a change in the position which Kirit had, through his counsel, adopted in the skeleton argument lodged for use at the hearing on 13 November 2000. In the further alternative, Kirit sought an order requiring the respondents to take the steps necessary to pass a special resolution under section 164 of the Act approving a contract, in the form of a draft annexed to the application notice, for the purchase of his shares by all four of the respondents - that is to say, Rasik, Vinod, Nilesh and the company.

36. On 7 December 2000 new solicitors instructed by the respondents wrote to Kirit's solicitors explaining that their clients were in no position to pay the sums to be paid under the order of 17 October 2000. The letter contains the following sentences: *"We have stated to you on the telephone that in our view if the company were now to admit that it was indebted in the sum of 8 million pounds this would render it insolvent."* and
"Perhaps you would confirm to us whether you agree with our analysis that the company's inability to pay the order of 3 million pounds on the 29th December will constitute an act of insolvency under Section 123(e) of the Insolvency Act 1986."

37. I should add, by way of explanation, that, at the hearing on 13 November 2000, the judge had ordered the respondents to pay £3.55 million on account of monies due by 29 December 2000. There is no appeal against that order.

38. It was in those circumstances that Kirit's application came before the judge on 13 December 2000. The judge made the order sought in these terms: *"IT IS DETERMINED AND DECLARED that:*
    1. *The obligation of the 4th respondent pursuant to the Orders made herein on l0th January and 27th July jointly and severally with the 1st and 3rd Respondents to purchase the Petitioner's shares in the 4th Respondent is, by virtue of the provisions of section 143(3)(c) of the Companies Act 1985, and alternatively by virtue of the unanimous participation therein by l00% of the shareholders in the 4th Respondent, binding on the 4th Respondent Company."*

39. There is no record of the reasons which led the judge to make an order in those terms. It is said, in the skeleton argument prepared for use by the joint administrators at this hearing that, at the hearing on 13 December 2000, the company had no separate legal representation, no argument appears to have been advance and no judgment was delivered on the question of the company's liability. Further, that the court does not appear to have considered the financial position of the company or the impact of its orders on the company and its creditors. The judge was not told that the effect of his order would be to render the company insolvent. Plainly he it should have been.

40 The declaration made on 13 December 2000 is open to criticism in at least four respects. First, the orders of 20 January 2000 and 27 July 2000 imposed no liability on the company to purchase the petitioner's shares. If the company was under such liability, that was because it had agreed to accept liability as purchaser under the January agreement. The two orders did not affect the position - for the reasons which I have already explained. Second, because the orders did not, themselves, impose liability on the company to purchase the petitioner's shares, section 143(3)(c) of the 1985 Act had no application; there was no purchase "in pursuance of an order of the court under Part XVIV of the Act, unless it be a purchase ordered by the order of 17 October or 13 December 2000. Third, as a matter of construction, it is difficult, (if not impossible) to read paragraph 7 of the January agreement - in the light of paragraph 8 of that agreement and the need for a special resolution of the company in advance of a purchase contract or contingent purchase contract - as imposing liability on the company as a purchaser of the petitioner's shares. Fourth, even if that were held to be the intention of the parties, the better view is that the need for a special resolution, imposed by sections 164 and 165 of the 1985 Act, cannot be overridden by the unanimous consent of all the shareholders, given informally - see ***In re Peak (Kings Lynn) Ltd*** [1998] 1 BCLC 193, approved by this Court in ***Wright and another v Atlas Wright (Europe) Ltd*** [1999] 2 BCLC 301, at 315-6.

41 It follows that, subject to the question of delay, I would think it right to accede to application 2002/0307 and grant to permission to appeal from the order of 13 December 2000. But, it is necessary to ask whether the fact that the application was not made until fourteen months after the date of the order should lead to the application being refused. In my view, the delay in making this application is excusable and ought to be excused. Until 12 March 2001, when the administration order was made, the company was under the control of Rasik, Vinod and Nilesh in whose interests it was to ensure that liability for the purchase of Kirit's shares should be borne by the company (rather than by themselves individually). It was at their instigation that the order of 17 October 2000 was amended to achieve that end. It would not be right to allow the interests of the creditors of this insolvent company to prejudiced by the action or inaction of the individual respondents who

were directors and shareholders at the time acting in their own interest. It may be said that it took the joint administrators from 12 March 2001 until 14 December 2001 to apply for directions in the administration proceedings authorising them to make the applications which they now make. But, having regard to the complexity of the administration which they were appointed to manage and the difficulties which (in the light of the history of this litigation) they may be expected to have encountered in ascertaining relevant facts, I do not think that that should be seen as excessive delay. We were told - and it is common ground - that, from June 2001, Kirit was under notice that the question whether or not he was a creditor of the company in respect of the orders made by Judge Boggis was under consideration by the joint administrators. In so far as Kirit incurred costs after June 2001, he did so in the knowledge that there was a risk that the administrators would challenge the orders which had been made. The period between March and June 2001 seems to me immaterial in the context of this administration. And, having obtained directions on 20 December 2001, these applications were issued within a period of some six weeks, which included the Christmas break. In my view, the interests of the creditors of this company outweigh any possible prejudice caused to Kirit by such delay as there has been. Further, it is, I think, pertinent to have in mind that the points which the administrators now seek to take on appeal were points first identified by Kirit's counsel in their skeleton argument prepared for the hearing on 13 November 2000. And Kirit received substantial sums of money from the company already which the administrators do not (it seems) seek to receive from him. I would extend time and allow the application for permission to appeal.

***The orders of* 22 *December* 2000, *7,14 and* 26 *February* 2000**

42 The applications for permission to appeal from these orders (2002/0306, 2002/0305, 2002/0304 and 2002/0303) can be considered together. These orders were made by way of enforcement of the liability of the company as purchaser of Kirit's shares which the judge had held to exist. On 13 December 2000 the judge had made an order to show cause why 33 of the company's properties should not be charged to secure payment of £3.55 million payable on 29 December 2000 under the order of 13 November 2000. On 7 February 2001 he made an order for completion of the purchase of the shares on 16 March 2001; and ordered that the petitioner's costs of the hearings on 13 November and 13 December 2000 and 25 January and 7 February 2001 should be paid by the respondents. On 14 February 2001 he made an order to show cause why the whole of the monies payable by the company on completion (£6,488,123.77) should not also be charged on the company's 33 properties; and, on 26 February 2001, he made that charging order absolute. It is plain that, if the orders of 17 October and 13 December 2000 cannot stand, the subsequent orders made for the purpose of enforcing the company's liability as purchaser of Kirit's shares cannot stand either. I would give permission to appeal in respect of the four orders made after 13 December 2000.

***Application* 2002/1055**

43 On 28 September 2001 the joint administrators (and the company acting by the administrators) issued an originating application in the administration proceedings seeking a declaration that property at 39 Farquahar Road, Edgbaston, purchased in the name of Nilesh, was held upon trust for the company. The basis of the application was that the purchase had been funded by the misapplication of the company's monies. Kirit was a respondent to that application. He had obtained a charging order over that property on 26 February 2001, at the same time as he had obtained the charging order over the company's properties to which I have already referred. That application came before Mr Anthony Mann QC, sitting as a deputy judge of the High Court. On 27 February 2002 he dismissed the application and ordered that the joint administrators pay Kirit's costs. Kirit applied, formally by notice dated 1 March 2002, for a declaration that the costs incurred by the joint administrators' in making the application of 28 September 2001, and the costs payable to him by the joint administrators under the order of 2'7 February 2002, should not be treated as an expense of the administration or otherwise paid out of the assets of the company.

44 Kirit's application of 1 March 2002 was heard in March by Mr Justice Pumfrey, together with an application made by Kirit, by notice dated 29 January 2002, for a review of the order which Mr Leaver QC had made on 20 December 2001- to which I have already referred. Mr Justice Pumfrey

held that the order of 20 December 2001 -insofar as it authorised the joint administrators to treat the costs of what I have described as the first group of applications before the Court today as costs in the administration in priority to all other creditors - should be discharged. By his order of 8 May 2002 the judge ordered the administrators to pay 80% of Kirit's costs of the hearing before him; but declined to direct that those costs should be paid by the administrators personally, as distinct from treating them as expenses of the administration. But he gave Kirit permission to appeal from that part of his order. That appeal (2002/1056) is pending; but it is not before this Court today. Mr Justice Pumfrey went on to dismiss Kirit's application of 1 March 2002 and to refuse permission to appeal from that order. He made no separate order for the costs of that application; those costs having been taken into account in the order that the administrators pay 80% of the overall costs of the hearing.

45 By application 2002/1055 Kirit seeks permission to appeal from Mr Justice Pumfrey's order of 8 May 2002, dismissing his application of 1 March 2002. The issue which would be raised on that appeal (if permission were granted), as it seems to me, is closely related to the issue which this Court will be asked to decide on appeal 2002/1056, for which permission has been granted. Put shortly, the issue is whether a person who is interested, or potentially interested, in a fund under the control of administrators should have to bear (as an expense charged against that fund) the costs of unsuccessful litigation brought against him in another capacity by the administrators (or the costs of an unsuccessful defence by the administrators to a claim brought by him against them). The point is, I think, of some general importance. It will arise in appeal 2002/1056 from one of the orders made by the judge on 8 May 2002. It seems to me that Kirit should have permission to raise it in an appeal from the related order made on the same day.

46. I would grant permission to appeal on application 2002/1055 and direct that that appeal be heard with appeal 2002/1056.

***Appeals* 2002/,3026 *and* 2002/,3,367**

47. As I have said these appeals are listed for mention so that the Court could make orders disposing of them, with consent, as between Kirit on the one hand and Rasik, Vinod and Nilesh on the other hand. We were handed this morning a minute of order which records, amongst other things, the dismissal of those appeals as between Rasik, Vinod, Nilesh and Kirit. But, the minute of order goes on to provide that all further proceedings in the appeals 3026 and 3367 - 0482 and in two other appeals 1171 save to the extent that 0482 comprises claims between the company and the administrators and Surbhi Thakrar, the wife of Nilesh be stayed except for the purpose of carrying terms of compromise into effect.

48. The terms of compromise are set forth in the schedule. We were told that they are terms negotiated in the course of mediation between Kirit, on the one hand, and the administrators on the other; and that they have been approved by a creditor's committee in this administration.

49. The terms record, at paragraph 2, that it is agreed that the company owes and will pay Kirit an outstanding figure of £1,200,000, pursuant to the orders and secured by the charging orders of His Honour Judge Boggis. It is acknowledged that £418,703.66 of that sum is immediately to be discharged by the operation of this order. £418,703.66 is the proceeds of the sale of the Farquhar Road property over which Kirit has a charging order. But, on any basis, there is some £800,000 to come from the company, secured by the charging orders made over the companies properties, if effect is given to the terms of compromise. Kirit is to be treated as a secured creditor in respect of £800,000, for the supposed purchase of his shares by the company; in the circumstances that the shares are shares in an insolvent company the unsecured creditors of which can expect to receive no more than 11 pence in the pound in satisfaction of their claims.

50. We declined to make an order staying proceedings in order to effect a compromise in those terms. It seemed to us, for the reasons which I have set out, very unlikely that a court, if asked to address the question whether directions should be given to the administrators to pay to Kirit £800,000 ahead of the unsecured creditors, would think that an appropriate order to make. That is not, of course, to prejudge any order that a court dealing with such an application would make, on the material then available to him. But it is to indicate that, on the material before us, there appears to be a high risk

that no court would give directions approving an agreement of compromise in the terms of the schedule. If those terms would not be approved by a Court - either on the administrators themselves seeking directions under section 14(3), of the Insolvency Act 1986, or on a challenge under section 27 of that Act, by an aggrieved unsecured creditor - then to make an order staying all proceedings in order that those terms should be carried into effect would simply be to postpone the decisions that we would otherwise make on the applications for permission to appeal listed for hearing this morning.

51 It may be that, nothwithstanding our judgments today, the creditors will still take the view that it is expedient to compromise this litigation by paying Kirit £800,000, in addition to the £400,000 which he is to receive from the Farquhar Road property; in which case it can be explained to a judge in the administration proceedings why that is a view which he should endorse. If that view is taken and endorsed then, of course, nothing that we may say this morning will prevent such a compromise taking effect. But, we have been concerned that our apparent approval to a compromise in the terms proposed might be misconstrued as approval of the payment of £800,000 to Kirit, ahead of the unsecured creditors. He took the view that a court which had to consider the matter in the administration proceedings ought to have the benefit of our views as to the true position.

52. I would approve the proposed minute of order to the extent of dismissing the appeals in 3026 and 3367 as between Rasik, Vinod and Nilesh and the respondent; but no further than that.

53. **LORD JUSTICE ROBERT WALKER**: I am in full agreement with my Lord's orders and directions which he proposes.

Order: Costs of today's applications are costs in the appeals.

54. **LORD JUSTICE CHADWICK**: We wish to give some directions for the further progress of these appeals, if they are going to progress. Do counsel want to address us on that or would you prefer to put it in writing?

55. **MR MARSHALL**: It would be sensible if we spoke and put it in writing.

56. **LORD JUSTICE CHADWICK**: Let me indicate, as a guidance, that it must be sensible that 3026 and 3367 are heard together with 0303-7. The point is very much the same in all of them. Half a day should be ample to decide. The only point that arises in those matters. That point should be decided sooner rather than later, so this administration can come to some conclusion. Unless the parties seek to urge otherwise, I would hope that could be dealt with in the course of the October term, on the basis of half a day.

57. There seems to be no reason why the other appeals, which are 0155, 0156 and 0428 should be heard with the first group; although it would properly be convenient if they were heard by the same constitution who then would be familiar with the background. What I would have in mind is a direction which brought those appeals on together before the same constitution, perhaps a week or so later.