JUDGMENT : THE HONOURABLE MR JUSTICE PETER SMITH Ch.Div. 10th May 2005.

INTRODUCTION

2. This judgment arises out of a final determination of an application by Order made by Rimer J on 12 January 2005 being an application by the Claimant ("Fusion") to restrain the Defendant, Venture Investment Placement Limited, ("Pertemps") from appointing receivers in respect of the Fusion Debenture dated 5th September 2003 entered into between Fusion and Pertemps.

3. This is but one of several skirmishes between the parties. I have on a number of occasions expressed my dismay at the inability or unwillingness of the parties to address the various issues which currently affect their relationship. I went so far as ordering a stay for a three-week period on 25th February 2005 for the purpose of mediation. That was not successful. On 23rd March 2005 when this matter went part heard to the 19th April 2005 in circumstances which I set out below I further indicated that the parties really ought to resolve their disputes by mediation or settlement. That too appeared to be unsuccessful. I, of course, do not know whether and to what extent the mediations took place and to what extent and why they failed as those matters are not properly within my domain.

4. Nevertheless, the position remains that the resolution of this application by Order does not begin to address all the issues between the parties. Pertemps have issued two petitions for winding up of Fusion (Petition No 3072 of 2004 presented on 10th November 2004 in Birmingham and Petition No 7481 of 2004 presented on 6th December 2004 in London). In either of those petitions it would have been open to Pertemps to seek to appoint a provisional liquidator if there was any doubt about the way in which Fusion was currently operated or any serious doubts about its true insolvency. Further neither petition was a creditors petition yet neither petition contained an averment that Fusion was solvent and that there would be a surplus for shareholders. In the Birmingham petition a just and equitable dissolution was being sought because of deadlock. Technically Fusion still remains deadlocked because under the terms of a shareholders agreement dated 15th January 2003 a Mr Seear and Mr Hopkins who are the B Directors and B Shareholders and who have conducted this litigation on behalf of Fusion (to which more below) only have a 50% representation at shareholder and board level. The other 50% representation is controlled by Pertemps and they seek to deadlock matters. Thus they have not authorised the present proceedings on behalf of Fusion.

5. Although the second petition sought buyout orders or orders for sale it also sought an alternative just and equitable winding up and the appointment of an interim manager or alternatively independent non-executive chairman to the Board. No interim application was made to sustain that which is surprising if there is serious doubt about the financial position of Fusion and its continued de facto control by Messrs Seear and Hopkins. That failure on the part of Pertemps in my view is significant. Equally in the London petition Pertemps consented to the standard form of order under section 127IA 1986 permitting Fusion to continue making payments in the ordinary course of its business. Once again if there was any doubt about the financial position of Fusion one would have expected Pertemps not to give such consent but rather raise that and force a section 127 application.

6. Not to be outdone Fusion itself issued its own proceedings on 9th November 2004. The present application is a satellite part of those proceedings. The claim form issued on 9th November 2004 was wide ranging. Of immediate significance in this part are the Management Services Agreement dated on about 15th January 2003 whereby Pertemps, in exchange for a monthly fee, provided various management services to Fusion and the claim by Fusion to restrain action on the Debenture.

7. The Management Services Agreement is equally relevant in that the disputes which I have to determine flow from the allegation (which Pertemps deny) that Pertemps committed repudiatory breaches of that agreement which Fusion alleges it accepted thereby absolving itself from further performance thereunder. That acceptance thereby turning the repudiatory breach from being a thing in the water to an accepted repudiatory breach allegedly occurring with the issue of these proceedings.

8. The Board representatives of Pertemps not unsurprisingly did not consent to proceedings being brought against Pertemps. Accordingly on 3rd December 2004 Gateley Wareing LLP Pertemps' solicitors issued an application for the issue to be struck out or stayed and Messrs Seear and Hopkins be joined as defendants for the purpose of paying costs. The application was based on a contention that the

proceedings were not authorised by the Board of Fusion but had been commenced by Messrs Seear and Hopkins who had instructed Maxwell Batley solicitors without authority of the Board so that the actions were not properly constituted and that they therefore pay personally the costs of all the proceedings. On 10th December 2004 Mr Gabriel Moss QC sitting as a Deputy Judge of the High Court acceded to that application and stayed the proceedings save for service of evidence but gave either party on two clear days notice permission to come back before the Applications Court for hearing or further directions. The judge also expressed the strong view, as I understand it, that the parties should resolve their disputes otherwise than in Court. On the same day Mr Moss QC made an order transferring the Birmingham petition to London and adjourned that petition and the transferred petition generally but directed service of points of claim and defence. None of those proceedings is before me.

SUBSEQUENT PROCEDURAL MATTERS

9. On 12th January 2005 Maxwell Batley on behalf of Fusion issued an application lifting the stay to restrain Pertemps from appointing administrative receivers as threatened in its solicitors letter dated 31st December 2004. That came to be heard by Rimer J on 12th January 2005 and he made directions lifting the stay (limited to permission to make the application and up to the effective hearing of the application) and gave directions for the service of evidence with the application stood over to 20th January 2005 on a supposition that it was capable of being disposed of within two hours including pre-reading. By the time the matter came on before Rimer J on 20th January 2005 it was clear that the two-hour estimate was an optimistic one to put it mildly. Accordingly on that date he stood over the application to be an application by order with a direction for expedition. In so doing Rimer J also delivered a judgment on various issues to which I shall refer further in this judgment.

10. The adjourned application by order came on before me on 25th February 2005. By that time the issues that remained live ("the Issues") were:
    (a) whether payment of the sum of £23,500 referred to the evidence was tendered and/or made by cheque prior to 31st December 2004; and
    (b) whether time for payment of the same was in any event extended to 4th January 2005.

    That was on the basis that all other arguments for the grant of the injunction had failed.

11. In addition it was clear that the question of authority on the part of Messrs Seear and Hopkins to bring the present proceedings was also capable of being argued. A residual matter as to the balance of convenience and adequacy of damages as a remedy was also reserved but in the events that will not arise because there is no question of the Issues not being finally determined. If they are finally determined in favour of Fusion then there is no question of it having an interim injunction; it will be granted a final injunction as regards the Issues. If there are other bases for the appointment of a receiver then that will be covered by any further application that is made in respect of those Issues.

12. On 25th February 2005 I directed that the Issues be adjourned to 22nd March 2005 with a time estimate of two days and for the service of further evidence with all the deponents to attend for cross-examination. In the interim Pertemps was restrained from appointing or seeking to appoint an administrative or other receiver in respect of Fusion over the final determination of those applications.

13. The matter accordingly came on to be heard by me on 22nd and 23rd March. During the course of closing submissions I indicated to Mr Collings, who represented Fusion, that it seemed to me his case was in great difficulty as regard the Issues given the fact that on his evidence both Mr Hopkins and an accountant employed by Fusion (a Mr Bennett) were the only people who were able to give direct evidence of the Issue in respect of the £23,500 cheque. The evidence relied on by Fusion at that stage was that of Mr Seear and his evidence was hearsay evidence based on what he had been told by Mr Bennett and Mr Hopkins. This was somewhat bizarre especially in the context of Mr Hopkins who had been present throughout the 2 days hearing. Accordingly Mr Collings applied for an adjournment to lead evidence of those first-hand witnesses. I granted that application but on severe financial terms. The Issues were therefore adjourned part-heard for me to consider the matters finally on 19th April 2005.

14. This judgment is the judgment in respect of the Issues and the evidence I heard over 22nd, 23rd March and 19th April 2005.

BACKGROUND

15. I have already set out above shortly the shareholding structure of Fusion. In addition to the shareholding structure and the shareholders agreement and the Management Services Agreement monies were advanced by Pertemps to Fusion under a loan agreement also dated January 2003.

16. In addition to the loan agreement, of course, Pertemps were entitled to remuneration under the Management Services Agreement (Clause 4) which provided for a base figure of £230,000 per annum exclusive of VAT, charged on a monthly basis. The dispute in respect of the Issues relates to payment of a sum of £23,500 (being £20,000 plus VAT) for management services provided by Pertemps to Fusion for the month of October 2004. Under Clause 4 Pertemps is required to issue an invoice on the last day of each month in respect of the service charge due for the previous month and such invoice is to be paid by Fusion within 28 days of receipt. Initially that would mean that the payment for the October services would fall due on 30th November 2004. In fact a practice developed which meant that the services were not actually payable for the month thereafter. It is accepted for the purposes of the satellite issues that the date of payment, in accordance with Clause 4, for the October services was 31st December 2004.

17. Merely by looking at the Management Services Agreement no calamitous failure would impact on Fusion if it failed to pay its monthly instalment in accordance with Clause 4. There is a disputes procedure in the Management Services Agreement but Fusion has not disputed that it is liable to pay for the management services of October 2004.

18. In this context I should say that there is a further potentially wasteful dispute between these parties in respect of the services that were provided for November 2004. Pertemps has already issued an invoice for 2004 services which ought to have been paid by 31st January 2005. It has not been paid. Fusion contends that in respect of November the Management Services Agreement had no effect because by the commencement of these proceedings on 9th November 2004 it had accepted a repudiatory breach. Pertemps denies there has been any repudiatory breach by it and, therefore, the November services were performed by it under the Management Services Agreement. Non-payment (which is accepted) will have the same consequences as non-payment of the October 2004 invoice. It concedes, of course, it performed no services on 29th and 30th November 2004. It contends that the reason it provided no services on those days is because wrongfully and in breach of the Management Services Agreement Fusion required its employees to vacate that part of Fusion's offices in Leeds that it occupied for the purposes of providing services. Mr Tamlyn for Pertemps contends that the failure to provide those two days arises from a breach (not accepted) by Fusion so that the liability for payment remains or alternatively that the failure to provide two days is de minimis. Alive to this difficulty Fusion has now requested a "quantum meruit" invoice for that period. It recognised belatedly that it could not seriously continue to take the benefit of Pertemps' services without having to pay for them in some way. It contends, however, that it has rights of set-off against any such quantum meruit claim.

19. This issue is not before me, but I view with dismay the fact that whatever the result of the present application there will be a further wasteful round of litigation between these parties over another invoice.

20. One would not ordinarily expect the invoice for £23,500 to attract such detailed litigation. The reason why it does is because of the wording of the Debenture. Clause 1 of the Debenture secures all present and future indebtedness of Fusion to Pertemps and without limitation all sums payable pursuant to the Loan Agreement. It also secures all other liabilities whatsoever of Fusion to Pertemps whether future, actual or contingent.

21. Under Clause 2 all monies secured are payable on demand unless otherwise agreed in writing from time to time. Thus under the Management Services Agreement monies due thereunder are secured but cannot be demanded under the debenture provided payment is made in accordance with the Management Services Agreement.

22. Under Clause 8 of the Debenture all of the monies due thereunder become forthwith payable and all rights of Fusion to deal with any asset cease upon (inter-alia) Fusion making defaults in payment on the due date of any money which may become due under the debenture or under any deed or document supplemental hereto or thereto. There are other provisions enabling payment to be made if there is

inability to pay debts or threatening to cease carrying on business. For the purpose of the Issues the only point was the consequence of failure to make payment on a due date. Finally Clause 16 of the Debenture provides:

"the monies hereby secured shall be paid and this Debenture shall be transferable without regard to any set off cost claim or equities between the Company and the original or any intermediate holder of this Debenture and the receipt of the sole holder or of joint holders shall be a good discharge to the Company."

23. I determined that Clause 16 of the Debenture referred to above meant that sums due under the Management Service Agreement were secured, payable on demand if not paid in accordance with any other agreement and that there was no right of set-off in respect of the management services payments for example in the case of breach allegedly committed by Pertemps.

24. It follows therefore that if the monthly instalment for October 2004 was not paid by 31st December 2004 all of the monies at the election of Pertemps secured under the Loan Agreement became payable. That would mean that (apart from allowing a short period for Fusion to obtain the finance to redeem the Debenture) it would have to repay all the indebtedness to avoid the appointment of receivers.

DEMAND

25. On 30th December 2004 Fusion received a demand from J E Baring & Co solicitors on behalf of Pertemps Investment Ltd demanding £129,407.78. That included the sums due for the services provided in October 2004. This letter was referred to by Mr Seear in his fourth witness statement dated 18th February 2005 (paragraph 20) but not exhibited. It was produced for the hearing on 19th April 2005. Upon receipt of that demand Fusion's accounts personnel checked to see (inter-alia) whether the £23,500 cheque had cleared its bank account with The Royal Bank of Scotland. It had not. Accordingly the Directors authorised a payment on 31st December 2004 which was transferred to Pertemps bank account on 4th January 2005, the next working day.

26. The J E Baring letter says:

"*We have been given instructions to write to you to give your (sic) four working days notice that unless our clients overdue account in the sum mentioned above is paid to them within that period then we have instructions to proceed with the presentation of a petition for the compulsory winding-up of your company which step we do not wish to take if it can possibly be avoided.* "

27. This letter goes to the second issue, namely whether an extension of time was given. If that letter is a valid extension of time for the payment, then payment on the 4th of January 2005 (on the unchallenged evidence that the letter was only received on 30th December 2004) is within time.

FURTHER DEMAND

28. On 31st December 2004 Gateley Wareing on behalf of Venture Investment Placement Limited (formerly known as Pertemps Group Limited) served a detailed and comprehensive letter seeking £53,392.74 being a balance said to be due of a sum of £96,958.47 giving credit for a payment of £40,825.25. Once again that figure includes the £23,500 for the October services.

29. However, in this case the letter carried on "*our clients therefore take the view that on the terms of Clause 8 of the Debenture having become effective your clients are now due to repay forthwith the entire amount outstanding to VIPL both under the terms of the Loan Agreement and otherwise. The loan now stands at £1,071,000 and that together with the amount due in (i) above constitutes the amounts due for payment.*

Unless this payment is received no later than close of business on Tuesday 4th January 2005 our clients will take steps to secure the appointment of administrative receivers."

30. It is accepted that for the purpose of this demand, as I have set out above, the only issue is as to the sum of £23,500. According to the Management Services Agreement, as varied, that should have been paid on 31st December 2004. The Loan Agreement monies are only triggered by reason of that non-payment by 31st December 2004. As I have set out above payment was only effectively made on 4th January 2005. Accordingly, Pertemps argue that the loan agreements have become due and that they had to be paid by 4th January 2005 to avoid the appointment of receivers. No such payment has, of course, been paid (as Fusion cannot at this stage repay the Loan Agreement) so that Pertemps submit that it is entitled to appoint in the absence repayment of the entirety of the indebtedness secured by the Debenture.

31. The collapse of the house of cards flows entirely from the non-payment of the sum of £23,500 accordingly.

RIMER J's JUDGMENT 20TH JANUARY 2005

32. In paragraph 9 of the judgment Rimer J made the (regrettably) oft repeated cri de coeur from judges in this Division dealing with interim applications in respect of the late delivery of skeleton arguments. The authority point was taken late by Pertemps without notice either to Fusion or the Judge. That sabotaged the hearing date. Rimer J expressed a provisional view (paragraph 15) that Maxwell Batley had authority to act for Fusion for the purposes of the present proceedings. He also expressed a provisional view (paragraph 16) that no event of default was established under 8.4 and 8.6. That has been the position further as the result of the hearing before me.

33. Finally he addressed the question as to whether or not there was an acceleration under Clause 8.1. In paragraph 20 he expressed the view that he doubted the correctness of Mr Collings' argument about the inter-relation between Clause 1 and Clause 16 but was not prepared to say there was not at least an arguable case on construction that Mr Collings was correct. He accordingly granted the injunctive relief.

34. Both parties accepted that Rimer J's views were provisional. I determine the construction issue against Mr Collings on the 23rd February 2005 despite Rimer J's tentative view. The authority issue remains open and I determine that further in this judgment below.

THE ISSUES

35. There are, as I have said, in effect three issues to be determined:(
    1. Did Pertemps receive the payment of £23,500?
    2. Was time for payment extended to 4th January 2005?
    3. Are the present proceedings on behalf of Fusion authorised?

36. By far the most difficult issue to determine is 1. That is where the bulk of the evidence and the submissions were concentrated. I will deal with that last in this judgment.

ISSUE 2 . EXTENSION OF TIME

37. I do not accept that the letter of 31st December 2004 can be construed as giving Fusion time to make the £23,500 payment until close of business on 4th January 2005. It is quite clear in my view that the phrase "***unless this payment is received …***" refers to the sums due under the preceding paragraph. All of those sums are sums where the payment is accelerated by reason of the failure to make the payments due under other arrangements. If one refers back to item (i) that refers (by implication) to the £23,500 sum due on 31st December 2004. The letter after the three enumerated claims then said that Clause 8 had become effective and they are due to repay forthwith the entire amount. That is only correct, as regards the Loan Agreement, if the 31st December 2004 deadline in respect of the £23,500 passes without payment. It seems to me plain that the letter is giving notice that the money has to be paid on that day, in events that have happened, and if it is not so paid then the trigger will bring into play the Loan Agreement and that sum, and all other outstanding sums, are not paid by 4th January 2005 then the receivers can be appointed.

38. Conversely, in the events that have happened, if the sum of £23,500 has been paid it is plain there can be no residual entitlement to appoint receivers as the £23,500 debt has been paid on its due date and there can, therefore, be no acceleration.

39. I therefore reject the contention on the part of Fusion that the letter of 31st December 2004 gave an indulgence to the 4th of January 2005.

40. The J E Bearing letter, however, is an entirely different matter. Although it is addressed as coming from a different company in the Pertemps Group it makes a claim in respect of the same debt. Equally as Mr Tamlyn pointed out in his closing submissions it referred to the threat to present a winding-up petition. However, the winding-up petition is clear on the face of the letter as only being presented on the basis that the monies have not been paid by 4th January 2005. It follows that that letter, upon its receipt, could only have given the impression that provided the monies the subject matter of that demand are paid by the 4th of January 2005 no further action would be taken. As I have said that included the sum of £23,500. If Fusion is given until 4th January to make the payment of £23,500 and it does so, I do not see it can be

said to be an event of default for the purposes of the Debenture. It would be bizarre in the extreme, in my view, if Pertemps gave with one hand and took away with the other. It does not work when one looks at the Debenture. Under Clause 2 of the Debenture all monies secured thereunder (including the Management Services Agreement as I have set out above) are due and payable on demand unless otherwise agreed in writing from time-to-time. It is plain to me that the letter of J E Baring is an agreement in writing enabling Fusion to have until four working days from the service of that letter to make the payment. Having made that payment there is no right to make that sum payable on demand on 31st December 2004. Upon the sum being paid in accordance with the letter there is no default under the Management Services Agreement and there is, therefore, no right to make any accelerated demands for any other sums secured under the Debenture.

41. It follows, therefore, that I am of the view that Fusion had four working days to make that payment from 30th December 2004 and they did so.

42. This in my view is a just result. The parties were in extensive dispute prior to the demands. Fusion's application to restrain the appointment of a receiver was stayed by the Order of Mr Moss QC. The service of a demand of the complicated nature set out in the letter of 31st December 2004 was plainly an oppressive exercise designed to cause the maximum amount of confusion and put pressure on Fusion. There was no urgency at the time to justify the appointment because, as I have said earlier in this judgment, if Pertemps had any serious doubts about the financial standing of Fusion it has ample scope to make protective applications in the existing proceedings. This was a device designed to pressurise Fusion not in the expectation of obtaining any payment but on creating a false acceleration of the loan and thereby bring about a precipitous receivership. This would of course be beneficial to Pertemps because it would be in a position, presumably, to seek the acquisition of Fusion's assets at a proper price, of course, but it would not have to pay anything for Fusion shares because Fusion shares would have plummeted in value given the receivership. One cannot feel but despair at such tactics. By 31st December 2004 Fusion was faced with two previous petitions, a threat for another one, a stay on its protective application to prevent enforcement of the Debenture and finally two late delivered demands from different solicitors, in respect of differing amounts, with a threat of a further petition or receivership. All of these latter items occurred in the Christmas holiday when it would be expected by those serving the documents that people would be on holiday and access to the Courts would be restricted. This is not the kind of stance that people in the modern world of litigation should take.

43. Accordingly, I determine Issue 2 in favour of Fusion namely that by the wording of the letter from J E Baring Fusion was given four working days from the 30th of December 2004 to make its payment and such payment was made in accordance with that letter so there was no breach of the Management Services Agreement and no consequential acceleration of the Loan Agreement and no right to appoint receivers under the Debenture.

44. That is enough to dispose of the issues but it is essential, given the willingness of these parties to lock horns, that I also determine as many issues as possible.

ISSUE 3 . AUTHORITY

45. There is no doubt that Fusion's Board did not expressly authorise the commencement of proceedings.

46. Fusion's shares are owned 55% by managing director Mr Seear, (45%) Mr Hopkins (5%) and a Mr Butcher (5%). These are all "B shares". The remaining 45% "A shares" are held by Pertemps. The B shareholders are entitled to appoint, and have appointed, two directors (Messrs Seear and Hopkins, "B Directors"). The A shareholder (Pertemps) is entitled to appoint two directors and has appointed Tim Watts and Nigel Bacon ("A Directors"). There is no provision for appointment of a chairman or any director with a casting vote. The rights of the shareholders are governed by the Shareholders Agreement.

47. It is therefore clear that only the Board may resolve to commence proceedings in the absence of any delegation of authority. (***See Mitchell & Hobbs (UK) Ltd v Mill [1996] 2 BCLC 102***). Nor does Mr Seear as managing director have authority in the absence of any delegation to commence such proceedings (see ibid).

48. There has been no Board resolution and self-evidently Messrs Bacon and Watts will not agree to commence any action against their company Pertemps.

49. This is of course bizarre. If Pertemps have behaved wrongly their appointed directors prevent Fusion from rectifying the wrong it will suffer caused by two of its own directors. There are of course ways to circumvent this. First the other shareholders and directors Messrs Seear, Hopkins and Butcher could present a section 459 petition and seek relief to protect Fusion's position in that petition. It could have been done by counter-application in existing petitions. Second they could have brought a ***Foss v Harbottle*** application and sought appropriately a ***Wallersteiner v Moir*** order to protect the costs. I adverted to this in the two previous hearings and suggested this was a matter of resolving the authority issue. No such applications have been made and Mr Collings boldly in his final submissions before me on 19th April 2005 said "Fusion stands on its position on authority" (albeit reserving the right if the draft judgment was against him to try and cure the position afterwards).

50. It must be borne in mind, in my view, that blocking of a legitimate cause of action Fusion might bring by Messrs Bacon and Watts given their conflict would in my view be a breach of the fiduciary duty of directors that they owe to Fusion. It cannot be right that they take advantage of their own breach of duty in blocking a legitimate challenge against a company in which they are also interested. The Courts will not allow such a position to happen.

51. It seems to me plain that Pertemps acknowledged there would be people who would represent Fusion defensively in the proceedings that it brought. That was despite there being no Board resolution.

52. For the present proceedings equally it seems to me clear that it was contemplated that somebody would represent Fusion to fight the issues. This much is plain for example from the letter of 31st December 2004 which has given rise to the issues. It is not sent to Fusion; it is sent to Maxwell Batley. In that letter Fusion is described as "***Your clients***". In the final paragraph the letter goes on to refer to the position if payment wasn't made and a challenge was to be made to the power to appoint. The letter says:
"*In view of the Christmas period, we propose to extend the period of notice to 10 am on Tuesday 11th January 2005 [i.e. the notice to keep the appointment]. Should you advise your clients that they are in a position to seek to prevent our clients exercising their rights, we believe this gives you sufficient time to take whatever steps you deem appropriate. Please note however that any application to injunct our clients from exercising their rights should be issued on notice to us as we require to be in attendance before the Court on the hearing of any such application.*"

53. In my judgment nothing could be clearer. The indulgence granted there is in contrast, as I have said above, to the indulgence not given in respect of the payments. Nevertheless, the recipient of that letter could only conclude that Pertemps' solicitors expected a response (if necessary) by litigation by Maxwell Batley's clients i.e. Fusion.

54. On the hearing before Rimer on 20th January 2005, as I have set out above, the question of authority was tentatively considered by him in favour of Fusion. Whilst there was a consent order made on 12th January 2005 dealing with a lifting of the stay (paragraph 2) I do not see that as being a general acknowledgement on the part of Pertemps that the authority issue was by that consent a dead letter. It is the type of consent on an interlocutory basis that is not contractual as set out in the well-known decision of the Court of Appeal in ***Siebe Gorman & Co Ltd –v- Pneupac Ltd [1982] 1 WLR 185 at page 189 per Lord Denning MR***.

55. Nevertheless in addition to the letter of 31st December 2004 there are significant matters in the correspondence which show that it was plainly contemplated that Maxwell Batley should be allowed to receive instructions to raise a point on behalf of Fusion. As Rimer J observed it cannot be right to allow Pertemps to blow hot and cold on the issue. Having considered that Maxwell Batley were Fusion's solicitors for the purpose of the letter of 31st December 2004 and that letter itself having contemplated an injunctive application to prevent it being implemented, it can only have been on the basis that they well know that Fusion would continue to instruct Maxwell Batley, through the instructions of Messrs Seear and Hopkins, to ensure Fusion was given a fair opportunity to challenge Pertemps' actions.

56. This is demonstrated by the fact that I have determined against Pertemps the extension of time issue. Had Messrs Seear and Hopkins not instructed Maxwell Batley and had the present application to

restrain action on the letter not been taken Fusion would now be in administrative receivership when it would be quite wrong for it to be in that state of affairs. As such state of affairs would have been procured by breaches of fiduciary duty of two of its directors blocking any action it cannot be right that Pertemps should be advantaged by such actions. I cannot believe, therefore, that Pertemps did not expect Fusion to be able through Maxwell Batley to fight this issue.

57. I therefore accept Mr Collings' submission that proceedings were properly authorised as against Pertemps to challenge to the letter of 31st December 2004.

58. As regards to the future it seems to me that Pertemps' points are well met from a procedural point of view but should not be used as obstacles to prevent legitimate claims that can and should be brought on behalf of Fusion. The way forward, in my view, hereafter is for Messrs Seear and Hopkins to seek to bring either a derivative action or 459 or other relief complaining about the actions of Messrs Bacon and Watts in blocking legitimate challenges to issues raised by Pertemps.

59. Accordingly issue (3) is also determined in favour of Fusion.

ISSUE 1 . PAYMENT

60. As I have said above this took up the bulk of the time at the hearings before me.

61. Its resolution involves a consideration of the procedure for paying of bills. Under the Management Services Agreement amongst other things the paying of bills (including the sums due for the services themselves provided) fell to the team provided by Pertemps to Fusion. That team was headed up by Stephen Mogano who was the finance director designate for Fusion under the terms of the Management Services Agreement until the dispute over the termination of that agreement arose in November 2004. That team occupied part of the open plan offices of Fusion's Leeds premises until their vacation on 29th November 2004. On that day one member of staff attended for one hour (Mr Neil Packer). Working under and reporting to Mr Mogano were Neil Packer and Robert Daniel. In respect of Pertemps' invoices its head office in Meriden would raise invoices for monies due to Pertemps from Fusion and post them to Fusion's offices at Leeds. Prior to September 2004 Mr Mogano personally raised the invoices for management services only, thereafter (in effect in September and October invoices only) they were raised by Meridan.

62. The procedure for raising cheques was the same for all creditors (including Pertemps) as follows:(

1. Invoices from all suppliers received by Fusion were entered on the purchase ledger which was maintained in an alphabetical account.
2. Towards the end of the month following the month in which the invoices were received cheques and remittance advices were raised mostly by Robert Daniel in alphabetical order, as per the purchase ledger. However Mr Mogano would deal with the Pertemps Monthly Services Agreement payments. All the cheques would be filled in either by Mr Daniel or Mr Mogano and the cheque stub filled in at the same time and sent to Fusion's office in Horsham on the same day or perhaps later depending on the number of cheques and the number of envelopes.

63. When Mr Mogano raised a cheque he would write on the invoice the words "Pay" or "Paid" along with the cheque number and the date of the cheque to avoid the cheque being raised for the same invoice a second time. It is clear, however, that he did not necessarily put on the cheque stub the date he was filling out the cheque but rather put the date he expected the cheque to be paid. Thus the £23,500 due for the October 2004 services the invoice in question for the October 2004 services is No SIJ/052. A number of copies were in the papers before me. One copy had handwritten on it "***pd chq 12396 30.11.04***". As Mr Mogano said in his evidence he wrote that on that copy invoice when he raised the cheque. Confusingly a further copy of the invoice was also produced. That had the words "***paid 28/10/04***" on it but crossed through and instead "***paid 4/1/05***". Mr Mogano's evidence at the trial of the issues showed that he wrote these on these invoices for the purpose of the proceedings. Mistakenly he put 28/10/04 as part of a sequence of marking invoices for the purpose of the hearing but corrected his mistake on 4th January 2005 being the date when the final payment was received. The cheque was signed by Mr Seear and Mr Hopkins but it was completed by Mr Mogano and dated by him 30th November 2004. He filled it in and dated it either on 22nd or 23rd November in anticipation of being absent on the 24th and following for

surgery. He therefore anticipated that the cheque would come back from Horsham duly signed for sending out on 30th November 2004. The cheque number is No 12396.

64. This cheque was never presented. The dispute between the parties was as to why this cheque was never presented. It was Fusion's case that the cheque was duly completed by the signatures of Mr Seear and Mr Hopkins and returned to Fusion's offices in Leeds for processing by the Pertemps staff no later than 26th November. It was Fusion's case that after the termination of the occupation by Pertemps of that part of the offices on Monday 29th November 2004 they found that part of Fusion's offices to be in a shambolic state. I will refer to this in more detail below. As part of that exercise they found this cheque in a bundle of papers behind Mr Daniel's desk on 7th January 2005. It is their case that they did not realise that the cheque had not been presented until late December following the receipt of the solicitors demands referred to above.

65. Pertemps' case is that the cheque was either never received back from Horsham before 29th November 2004 or if it was and was left there it was not sent out at the time but was deliberately held back by Fusion because they did not wish to make that payment to Pertemps.

66. The only possible reason put forward by Pertemps as to why Fusion would not make this payment which was admittedly due was because Fusion had issued proceedings on 9th November 2004 claiming (inter-alia) damages for breach of the Management Services Agreement and repayment of a sum in excess of £400,000. In those circumstances Pertemps suggest that Mr Seear (and it can only be Mr Seear in the light of the evidence) had made a deliberate decision to withhold the payment because he did not wish to make any more payments to Pertemps because he believed that in fact Pertemps in fact owed Fusion money even taking into account sums over which there was no dispute. Thus Pertemps say a set-off was proposed to be exercised in respect of this payment in ignorance of the no set-off provision contained in the Debenture.

67. The flaw in this argument is how Fusion dealt with claims for monies from Pertemps after November 2004. In a course of increasingly acrimonious e-mails passing between Messrs Seear and Hopkins on the one part and Nigel Bacon on the other Mr Seear in his e-mail of 15th December 2004 confirmed the stance taken in an earlier letter that they would pay for services other than those disputed and asked for the documentation supporting such entitlement which he would then expedite. Mr Bacon replied by e-mail dated 16th December 2004 enclosing a schedule of outstanding invoices with the words "*if you have any issues, please let me know otherwise can you please ensure that payment is made by return*".

68. The total sought in this schedule was £112,671.80 including the October services invoice. On 17th December 2004 Mr Bacon requested a date by which payment could be expected as Pertemps had engaged solicitors and were not prepared to wait. On 20th December 2004 he returned to that theme (no payments having been made) with the statement at the end of his e-mail "***I have not been advised that we received any money this morning, so non payment may end up determining matters***".

69. Mr Seear passed the statement on to Mr Bennett. He was an accountant engaged on a temporary basis by Fusion to sort out their accounting procedures following the removal of the Pertemps staff. He had no real connection with Fusion although it is true he knew Mr Seear from the past. Mr Tamlyn attempted to make much of the fact that when Mr Bennett attended Fusion's offices in Leeds on 29th and 30th November 2004 he stayed at Mr Seear's flat in Leeds. I can see nothing in this point. Mr Bennett would have been paid £20 an hour plus expenses and staying in the flat is clearly a way of avoiding expenses of hotel accommodation which otherwise would be payable. There is nothing significant in the point.

70. Mr Bennett then examined the schedule having received it from Mr Hopkins on 21st December 2004. He telephoned Pertemps accounts department seeking copies of the invoices and later on that day he telephoned Mr Seear to discuss the queries. In the light of the queries they decided that a payment of £40,825.25 should be paid to Pertemps by bank transfer, and that was done. Mr Watts (the other "A" Director) was notified of that payment by an e-mail from Mr Hopkins dated 22nd December 2004.

71. The simple point is that if it was Fusion's position that it did not wish to pay the £23,500 because it believed it had extant set-offs substantially in excess of that it would not have paid the £40,825.25 either. I should also say that it is not suggested that non-payment arose out of an inability of Fusion to make the

payment. If it wanted to make the payment it had sufficient funds so to do and did so on 31st December 2004 as soon as it discovered the cheque had not cleared.

72. It was suggested that the non-payment of the £23,500 arose from Mr Seear's letter of 26th November 2004. In that letter he referred to the particulars of claim issued on 9th November 2004. By the letter he stated that he regarded the Management Services Agreement as at an end and that no further payments would be made by Fusion to Pertemps in that regard although the letter made it clear that in addition to requiring Pertemps staff to leave Fusion's premises by close of play on 1st December 2004 various payments would be made under the Management Services Agreement. In the light of that letter Pertemps removed the staff as I said on 29th November 2004 as set out in Mr Bacon's letter of that date.

73. There is force in that observation. There are also other oddities about Fusion's stance in respect of the cheque payment. First, whilst the cheque stub showed a cheque having been issued on 30th November 2004 an examination of Fusion's bank accounts with Bank of Scotland for December 2004 would show that cheque had never been presented. I should say that Fusion received daily bank statements. The evidence of Mr Bennett explained the Sage accounting system which operated. When a cheque was raised and allocated and sent out the cheque would be entered in the relevant ledger for the relevant customer with the date it was sent out. The Sage entry when looking at that part does not necessarily show that the cheque has cleared. The bank statement is checked daily and the Sage updated accordingly. As part of that exercise it would be necessary to enter a different part of the Sage programme to look at the reconciliation of the customer invoice register against the reconciliation with the bank statement. It is not a difficult exercise to do and as I have said, on a daily basis, anybody checking the reconciliation with the bank statement would see that the cheque purportedly issued for the October services had not cleared Fusion's bank account.

74. Mr Bennett in his evidence says that he told Mr Seear on 21st December 2004 that the October invoice had been paid. He deduced this from looking at the cheque stub and the Sage entry but did not perform a reconciliation exercise. His excuse for that was that that would not be normal to do when faced with a large number of invoices. That is a surprising observation given the clear significance of this particular series of invoices as between Fusion and Pertemps. It might well be that he was not aware of the potential significance but he appears to have wrongly told Mr Seear the account had been paid.

75. However, doubts do not remain there. A surprising point is that if Fusion believed the bill had been charged that they did not tell Pertemps that that was their stance. Even the detailed letter from Maxwell Batley dated 7th January 2005 failed to make that point (although by that time Mr Bennett had discovered on 31st December 2004 that the cheque had not cleared Fusion's bank account). It is a surprising omission as it would have presented Fusion with a perfect opportunity to demonstrate the inadequacy of Pertemps services when they make a claim for a bill which has already been paid. Equally surprising is the fact that Mr Bennett on 22nd December 2004 raised queries over two other items but never explained that the October invoice was not being paid because it had already been paid.

76. Mr Seear on 1st December 2004 wrote a letter complaining about the state of the part of the premises occupied by the Pertemps employees. In that he stated that Fusion cheques totalling approximately £100,000 which had been returned for distribution some days ago were found stuffed in a filing cabinet buried by other papers. He also asserted that they had since received a complaint from a key client concerning late payment. The latter related to a customer Newsquest. In fact the Newsquest issue had been raised on 25th November 2004 over the telephone while Mr Seear was travelling by train up to Leeds. It did not occur then (ie "***since***" as said by Mr Seear) as it already had happened. His explanation was "***since***" was used in a different way when he wrote letters which is hardly an explanation. Equally the number of clients' cheques not paid was one for £110,000 for Preciado. In fact the arrangements were for this cheque at the request of that client to be paid in to the bank. That would have occurred on 29th November 2004 but for the exclusion of the Pertemps staff. Both Mr Packer and Mr Daniel referred to this in their evidence and I accept their evidence. Mr Bennett's evidence contradicted Mr Seear's evidence because he said there were no signed cheques found in a filing cabinet.

77. Mr Seear gave evidence at the first part of the Issue trial and, as I have said, he had no direct evidence as to the circumstance of the finding of the cheque. His letter of 1st December 2004 was plainly inaccurate

and an exaggeration of the state of the premises in my view. It was put to him by Mr Tamlyn that he was lying and that the whole finding of the cheque story was made up for the purpose of the case. With the arrival of Mr Bennett on the second stage of the hearing Mr Tamlyn was forced to make the same point to him. He and Mr Seear denied that.

MR BENNETT

78. Mr Bennett gave evidence before me on 19th April 2005. He was forced to acknowledge his inadequacy in not checking the reconciliation with the bank statement on 21st December 2004. He was forced in cross-examination to retract his statement in paragraph 7 that the Newsquest cheque had evidently never been sent to Newsquest. It was plainly sent to Newsquest as the unchallenged evidence of Mr Lester and Miss Jennifer Taft-Kirkhope employees of Newsquest shows. Their evidence is that the Newsquest cheque was received on 1st December 2004. However, as a bank transfer had already been agreed with Mr Seear on 29th November 2004 the cheque was returned on 1st December 2004. She drew two lines across the cheque and wrote "void" on it. It follows also that the cheque from Newsquest could not have been bundled up by Mr Bennett when he was at Fusion's Leeds offices on 29th and 30th November 2004 because by then it had not arrived at those offices. Mr Bennett finished his work around mid-day on 1st December 2004. At best he could lamely say the cheque must have arrived in later paper work.

79. The key point in Mr Bennett's evidence, however, is in respect of the October services cheque. Mr Hopkins in his evidence said that on 6th January 2005 (having been absent for most of the time from early December) returned to Fusion's Leeds offices. He noticed behind Mr Daniel's desk a pile of paper work. How this had been overlooked in the previous four weeks nobody on behalf of Fusion was able to explain satisfactorily. He packaged the documentation up and sent it down to Horsham. It might be because it was underneath an empty box which had previously contained photocopy paper and was thus missed. He noticed there was at least one Bank of Scotland cheque but did not investigate it, nor was he able to explain why he did not notice that when he went to the Leeds premises immediately before Christmas. That package was opened by Mr Bennett the next day and he found the Pertemps cheque No 12396. As I have said he previously on 31st December 2004 told Mr Seear (having for the first time done a bank reconciliation) that the cheque did not appear to have been paid. No mention was made of this in the letter of 7th January 2005 from Maxwell Batley but once again that is an issue as to timing.

80. At that time Mr Bennett crossed the cheque void. He had done a similar operation earlier to the cheque stub and he realised the cheque had not been paid. Somewhat surprisingly he took no steps to countermand the cheque on 31st December 2004 something he also admitted was an oversight.

81. There are therefore some unsatisfactory aspects of Mr Bennett's evidence. It must be borne in mind that it is not being said that Mr Bennett made a mistake. In his evidence he frankly admitted to mistakes as to his practise and his submission of facts. He was however quite firm in his evidence that he found the cheque on 7th January 2005. In effect he was being accused of perjury. I found no reason why he would come to Court to lie on this matter. He has no significant interest in the matter and faces considerable risks is he is disbelieved. No convincing reason was put forward by Mr Tamlyn either. I remind myself of the need to approach evidence carefully and not to penalise witnesses when they make mistakes and to avoid applying hindsight on a careful analysis of documented events at trial when the reality is matters can be explained by mistakes. In this context I refer to my summary of the treatment of witnesses in the Case of ***EPI v Symphony [2004] EWHC 2946 (Ch)*** and in particular paragraphs 66 and following. I also remind myself of the observations of Lord Nicholls in ***Re H (Minors) [1996] AC 563 at 586-587*** referred to in paragraph 71 of that judgment. I cannot see any reason why I should disbelieve Mr Bennett. He may have made mistakes but I found him credible on the key point about finding the cheque.

82. I accordingly accept Mr Bennett's evidence that he found the cheque for the October services on 7th January 2005.

PERTEMPS WITNESSES

83. Of the witnesses called by Pertemps by the time the issue was finalised the only relevant evidence was that of Mr Packer and that of Mr Daniel. Mr Mogano was not on the scene at the time.

84. It is clear that there was time for the cheque to have been sent to Horsham and returned in the post on 25th November 2004. Mr Tamlyn by reference to an analysis of some of the invoices for the various cheque runs in November when compared with the dates that the cheques cleared suggests that an inference could be drawn that cheques for the latter period (including the Pertemps cheque) might well not have been sent out by 26th November 2004 which was the last day that Pertemps employees worked. I did not find the analysis reliable, as there are so many imponderables. The first of those is that it would not be right to start it by reference to the date stamp on the invoice. Mr Mogano himself dated the Pertemps invoice with the date 30th November 2004 on the 22nd or 23rd. Mr Daniel in his evidence showed that he date stamped all the invoices he received on the 26th with the date 25th November 2004 by mistake. Cheques might well all have been sent out on 26th November 2004 but attempting to draw an inference from the date that cheques cleared the bank account is dependant on the post and the clearing system of a different number of banks. I can see no clear conclusion can be drawn from this pattern to suggest that the Pertemps cheque with others of the latter part of the run remained at Horsham.

85. Mr Packer's evidence was to the effect that he did not recall any cheques left in Fusion's offices but he did not usually deal with the cheques. As Mr Daniel had to leave early, he sent out all the cheques which had been prepared by Mr Daniel. Not surprisingly he did not recall seeing the Pertemps cheque but believed that had it been received it would have been sent to Pertemps. Significantly, however, Mr Packer had no role in that task and was performing the mechanical task of sending out the paperwork Mr Daniel had prepared. Nevertheless he acknowledged in cross-examination that he did not check what Mr Daniel did and if Mr Daniel had not given him the cheque he would not have processed it or seen it.

86. Mr Packer's evidence, therefore, provides me with no assistance in reality as to whether or not the October services cheque had found its way into the hands of Mr Daniel.

87. Mr Daniel's evidence was slightly confused. He changed paragraph 5 of his witness statement and acknowledged he could have received a mix of cheques on 26th November 2004 beyond the creditor letter K or L. It was possible, therefore, that he could have received the Pertemps cheque. In his witness statement he said he did not recall seeing the cheque but said that if it had been received it would have been sent to Pertemps. He would also have date stamped it 25th November 2004. On it being pointed out to him that that would be very odd because the invoice already had "paid 30th November" on it and the cheque was dated 30th November 2004, he said he most probably would have left it until Monday. On further re-examination by Mr Tamlyn he then said that he never saw the invoice and the cheque and if he had have done he would have sent it out. He said he was 100% sure that it did not come in on Friday. This of course contradicted his earlier stance. I found his evidence, therefore, unsatisfactory and unclear on this vital aspect. I do not accept that he would routinely have stamped this invoice with 25th November and sent it out on the 26th. Had he done so it would have been received. However, I do not accept that he did not necessarily receive it. I believe that he has no clear recollection of that invoice but having seen it with Mr Mogano's date handling on it in all probability left it on the floor for treatment on the following Monday. It was then overlooked and found by Mr Bennett. I do not criticise Mr Daniel because when he processed this document it had no significance whatever. His instinctive reaction on being reminded of the date seems to me to be the more probable one, namely that he would have left it for Mr Mogano (who usually dealt with these invoices) to consider in the following week. Mr Daniel's evidence therefore does not contradict Mr Bennett's.

88. It is not suggested that Mr Bennett was set up by Mr Seear or Mr Hopkins to "find" the document.

89. Accordingly I conclude on the balance of probabilities that the October invoice cheque was signed by Mr Seear and Mr Hopkins and returned so that it was at Fusion's Leeds office no later than 26th November 2004.

LEGAL CONSEQUENCES IN RESPECT OF CHEQUE FINDING

90. Mr Tamlyn in his written submission for the hearing on 22nd March 2005 (paragraph 11) submitted that even if the cheque was sent by Fusion before Pertemps staff were removed on 29th November 2004, nevertheless, that was not a sufficient discharge of the October services invoice.

91. He supplemented this by a further note. The position, to my mind, is relatively clear. First, payment by cheque is generally regarded as being the equivalent to cash (see ***Nova (Jersey)Knit v Kammgarn [1977] 2 All ER 463 HL***).

92. Acceptance of a cheque by a creditor is not a final acceptance; it is a conditional acceptance on the basis that the underlying debt is suspended until the cheque is either honoured upon payment or dishonoured (see generally Chitty on Contracts, 29th Edition, paragraph 21-704). This does not with respect to Mr Tamlyn seem to address the point. The cheque was, on my finding, in the possession of Pertemps employees. There was nothing more for Fusion to do as it was received by the Pertemps staff for the purpose of processing and onward transmission. If it was not due to be paid Mr Seear would not have signed the cheque and it would not have been returned for the processing. On the evidence I have found that Fusion were not aware that the cheque had not been sent until 7th January 2005. It follows, therefore, that the only reason why the cheque was not paid in was because, on 29th November 2004, when the Pertemps employees vacated the premises they did not take the cheque with them. Mr Packer, for reasons which I have set out in this judgment, may well have overlooked it. Mr Daniel was not there on 29th January 2005 nor was Mr Mogano. Nevertheless, the cheque had been in the possession of Pertemps employees and the only reason, on my findings, why the cheque was not presented was because they left it behind. In those circumstances it seems to me that the suspension implied by the acceptance of a cheque continues until the cheque is presented for payment. Fusion believed, on reasonable grounds, that the cheque was in the possession of Pertemps. It left Pertemps possession because they left it behind in the premises. The suspension therefore continued right up until the alternative method of payment made on 31st December 2004.

93. To allow Pertemps to rely on that is to take advantage of the failure of their own employees to take the cheque away. If the issue of the cheque had been raised with Fusion there is no doubt in my mind that Fusion would have said that the cheque was to be taken.

94. It follows therefore that I conclude the first Issue in favour of Fusion.

CONCLUSION

95. I therefore conclude that there is no basis for appointing receivers in respect of the cheque for the October services. As there is no issue to be tried I will grant a final injunction against Pertemps restraining it from purporting to appoint receivers by reason of the dispute over the October services invoice. The reason is self evident, namely that the debt has been paid within time so that no entitlement to appoint arises and there is no consequential acceleration of the loan monies.

95. I reiterate again the need for these parties to sit down and resolve the disputes. This exercise has been costly and any further litigation is, in my view, to be firmly resisted. I have already directed mediation and that apparently has been unsuccessful. There is little else I can do except to record my disappointment (to put it mildly) that these parties seem to be intent on fighting issues unnecessarily in the Courts.

Matthew Collings (instructed by Maxwell Batley) for the Claimant

Lloyd Tamlyn (instructed by Gateley Wareing) for the Defendant