

## TIME TO WIND UP *HOLLINGTON V HEWTHORN*?

### Abstract

Evidence, such as the content of reports produced by inspectors appointed by the Secretary of State for Business Enterprise and Regulatory Reform under statutory powers potentially falls within the ambit of two of the exclusionary rules of evidence, namely, the hearsay rule and the rule in *Hollington v Hewthorn*<sup>1</sup> (the latter rule, essentially, concerns the admissibility of findings made by a court, etc, in subsequent proceedings between different parties). Such evidence may, however, be admissible both in winding up proceedings and in directors disqualification proceedings under an implied statutory exception to both of the abovementioned rules. The implied exception appears to be largely, if not wholly, otiose as an exception to the rule against hearsay, due to the operation of the general hearsay exception that was created by section 1 of the Civil Evidence Act 1995. The implied exception continues to be of significance, however, to the extent to which such evidence consists of findings made by an inspector appointed by the Secretary of State, etc.

### Introduction

In *The Secretary of State for Business Enterprise and Regulatory Reform v Aaron*<sup>2</sup>, the Court of Appeal, in the context of directors disqualification, was concerned with the admissibility, for the Secretary of State, of evidence including findings and opinions in a Financial Services Authority's report and evidence of decisions made by the Financial Ombudsman Service, the relevant evidence comprising both hearsay evidence and, in part, evidence of opinion. Their Lordships held that evidence in the

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<sup>1</sup> [1943] 1 KB 587.

<sup>2</sup> [2008] EWCA Civ 1146.

Financial Services Authority's report was admissible under an implied statutory exception to the rule against hearsay and the rule in *Hollington v Hewthorn*<sup>3</sup> but that the evidence of decisions made by the Financial Ombudsman Service, not falling within the ambit of the implied exception, was inadmissible to the extent that it comprised findings of fact as opposed to mere hearsay evidence. The purpose of this article is to consider the nature of this implied exception.

### **The rule in *Hollington v Hewthorn*: nature, rationale and ambit**

The facts of *Hollington's* case were as follows. A motorist was convicted of careless driving following a collision between a car driven by the motorist, which belonged to the defendants, and another car, which belonged to the plaintiff and had been driven by the plaintiff's son at the time of the collision. The plaintiff brought civil proceedings in negligence against the defendants and, because his son had died prior to the civil trial, wished to adduce evidence of the careless driving conviction. The Court of Appeal held that evidence of the conviction was inadmissible. The basis of their Lordships' decision was that: the conviction was only evidence that the criminal court had considered that the motorist was guilty of the offence of careless driving; the issue in the criminal proceedings was not identical with the issue raised in the civil proceedings; the opinion of the criminal court (like that of a non-expert witness on an ultimate issue) was irrelevant in the context of the civil proceedings; subject to well established common law hearsay exceptions and statutory hearsay exceptions (none of which were applicable) the death of a witness did not render evidence admissible if the evidence would have not have been admissible if the witness had been alive; and

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<sup>3</sup> [1943] 1 KB 587.

(their Lordships adopting the words of De Grey CJ in the Duchess of Kingston's case<sup>4</sup>) it would be unjust to permit a judgment to be used to prejudice a stranger who could not enter a defence or examine witnesses in the earlier proceedings and who could not appeal against it.

Whilst the decision of the Court of Appeal in *Hollington* specifically concerned the inadmissibility of a previous conviction in subsequent civil proceedings, the courts have recognised that the common law rule in *Hollington's* case is of more general application and encompasses also: the inadmissibility in civil proceedings of findings that were made in earlier civil proceedings between different parties<sup>5</sup>; the admissibility in criminal proceedings of the verdict of an earlier criminal court<sup>6</sup>; and the admissibility in criminal proceedings of findings that were made in previous civil proceedings.<sup>7</sup> The ambit of the common law rule has, however, been reduced by a number of statutory provisions.<sup>8</sup> In the context of civil proceedings, the most significant express statutory exception to the rule in *Hollington's* case is section 11 of the Civil Evidence Act 1968, the effect of which is that relevant and subsisting previous convictions (though not foreign convictions) are admissible in civil proceedings and give rise to the rebuttable presumption that the person convicted committed the offence of which he was convicted.

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<sup>4</sup> (1776) 168 E.R. 175.

<sup>5</sup> See, for example, *Secretary of State for Trade and Industry v Birstow* [2003] 3 WLR 841, *Conlon v Simms* [2008] 1 WLR 484 and *Aaron* itself. It should be noted that where the parties to the earlier and later civil proceedings are the same, the position will be governed by the doctrine of estoppel by record (see para 5 of the Fifteenth Report of the Law Reform Committee (The Rule in *Hollington v. Hewthorn*) (1966-67 Cmnd. 3391)).

<sup>6</sup> Including either a conviction (see, for example, *R v Spinks* [1982] 1 All ER 587) or an acquittal (see, for example, *Hui Chi-ming v R* [1992] 1 AC 34).

<sup>7</sup> See, for example, *R v D* [1996] QB 283, *R v Levey* [2007] 1 Cr. App. R. 1 and *R v Hogart* [2007] EWCA Crim 338, though see, also, *R v Kordansinki* [2007] 1 Cr App R 17.

<sup>8</sup> See, for example, sections 11, 12 and 13 of the Civil Evidence Act 1968.

It is important to note that (other than in relation to findings of adultery and paternity<sup>9</sup>) the 1968 Act made no provision for the admissibility of previous civil judgments in later civil proceedings between different parties as evidence of the facts on which the judgments had been founded. This was in line with a recommendation made by the Law Reform Committee in their Fifteenth Report.<sup>10</sup> The basis of the Committee's recommendation was that a party to the later proceedings who had not been a party to the earlier proceedings should not be prejudiced by the way in which the case of a party to the earlier proceedings had been conducted and that a party to both sets of proceedings should be able to improve on the way in which the party's case had been prepared or presented in the context of the earlier proceedings. In contrast, the Committee<sup>11</sup> had recommended that previous domestic convictions should be admissible in civil proceedings as evidence that the person convicted was guilty of the relevant conduct. The Committee, whilst regarding the opinion of a court as being of a different nature to that of a private individual, had distinguished the opinions of criminal and civil courts on the basis that a finding of culpability in contested criminal proceedings was of higher probative value than one in civil proceedings because the standard of proof in criminal proceedings was higher than the civil standard, the prosecution were under a duty to adduce or disclose to the defence any material that tended to show that the accused was not culpable and the judge was under a duty to exclude prosecution evidence the probative value of which was outweighed by its prejudicial effect.

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<sup>9</sup> Which are dealt with by section 12 of the 1968 Act.

<sup>10</sup> In their Fifteenth Report (The Rule in *Hollington v. Hewthorn*) (1966-67 Cmnd. 3391) at para's 38 and 41(11).

<sup>11</sup> See para's 4 and 6 of their Fifteenth Report.

## The admissibility of hearsay evidence in civil proceedings

Whilst the decision of the Court of Appeal in *Aaron* was concerned with the operation of the implied exception as an exception to the rule in *Hollington's* case, it is submitted that in the cases in which the existence of the implied exception was recognised and in which its rationale and scope were determined, the courts were at least primarily concerned with its operation as an exception to the rule against hearsay rather than with its role as an exception to the rule in *Hollington's* case. Indeed, as is demonstrated below, it seems that the rule in *Hollington's* case was only referred to by the courts in two of the pre-*Aaron* cases<sup>12</sup>, one of those<sup>13</sup> being a case to which the Court of Appeal in *Aaron* did not even refer. As is indicated below, however, the Court of Appeal in *Aaron* did regard several of the winding up cases in which *Hollington* was not referred to as providing authority for the proposition that the implied exception encompasses not merely hearsay evidence but also evidence of findings and opinions and also regarded the courts in directors disqualification cases in which *Hollington* was not referred to as having approved the approach of the courts in the winding up cases.

The role of the implied exception as an exception to the rule against hearsay was of fundamental importance until January 1997, when the Civil Evidence Act 1995 came into force,<sup>14</sup> the effect of section 1 of the 1995 Act being that evidence will not be excluded in civil proceedings on the ground that it is hearsay evidence. Thus, as the

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<sup>12</sup> *Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 WLR 271 and *Secretary of State for Trade and Industry v Birstow* [2003] 3 WLR 841.

<sup>13</sup> Namely, *Gasco*.

<sup>14</sup> Civil Evidence Act 1995 (Commencement No. 1) Order 1996/3217.

courts have recognised in directors disqualification cases including *Aaron* itself<sup>15</sup>, once section 1 of the 1995 Act came into force, the mere fact that evidence fell within the ambit of the hearsay rule no longer prevented its admission in evidence either in winding up proceedings or in directors disqualification proceedings. The effect of section 14(1) of the 1995 Act is, however, that the Act does not prevent the exclusion of evidence on grounds other than its hearsay nature. Thus, since (as was demonstrated above) the existence of the rule in *Hollington's* case was not justified solely upon the basis of the hearsay nature of previous findings but, rather, was also justified upon the basis that such findings merely amount to the opinion of the earlier court, inspector, etc, it is submitted that section 1 of the 1995 Act does not render hearsay evidence admissible to the extent to which such evidence falls within the ambit of the rule in *Hollington's* case.

Whilst the role of the implied exception as an exception to the rule against hearsay in winding up and directors disqualification proceedings now appears to be superfluous, it is submitted that, technically at least, a distinction may be drawn between hearsay evidence that is admissible under the implied exception and hearsay evidence that is only admissible under section 1 of the 1995 Act. The basis of this distinction is that the effect of section 1(4) is that where hearsay evidence is admissible other than under section 1 (e.g. under some other statutory provision or under a preserved common law hearsay exception) the safeguards and supplementary provisions created by sections 2 to 6(which do apply where hearsay is admissible solely under section 1) do not apply. Thus, it is submitted that where hearsay evidence is admissible in civil proceedings under the implied exception, the safeguards and supplementary provisions contained

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<sup>15</sup> See also *Secretary of State for Trade and Industry v Baker (No. 3) (Re Barings plc)* [1999] BCC 146 (referred to in *Aaron* as (*No2*) [1998] 1 BCLC 590), *Secretary of State for Trade and Industry v Bairstow* [2003] 3 WLR 841.

in sections 2-6 of the 1995 Act are not applicable. Thus, for example, whilst under rules of court made under section 3 of the 1995 Act<sup>16</sup> a party to civil proceedings can apply for leave to call the maker of a hearsay statement for cross-examination, it is submitted that this safeguard does not apply to hearsay evidence that falls within the ambit of the implied exception.

### **The relevant winding up and directors disqualification legislation**

Section 124A of the Insolvency Act 1986 (which is derived from section 35 of the Companies Act 1972 which has itself replaced s.169(3) of the Companies Act 1948) provides that the Secretary of State may petition the court that a company be wound up, where it is thought expedient in the public interest. The evidence that may be relied upon by the Secretary of State in reaching this conclusion includes, for example, any report or information obtained under Part XIV of the Companies Act 1985 (excepting section 448A – protection in relation to breach of confidence following disclosure) and reports provided under provisions of the Financial Services and Markets Act 2000. The court is petitioned to order the winding up of the company on the ground that it is just and equitable to do so.

Under Part XIV of the Companies Act 1985, inspectors may be appointed by the Secretary of State to investigate the affairs of a company and produce a report following an application from the company itself or its members (the latter subject to a threshold in terms of the number of members required to make the application)<sup>17</sup>;

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<sup>16</sup> See CPR 33.4.

<sup>17</sup> Section 431 Companies Act 1985. An earlier version of section 431 of the 1985 Act was section 165(a) of the 1948 Act, which is referred to below.

following an order of the court to this effect<sup>18</sup> or if it appears to the Secretary of State that there is actual or proposed fraudulent or unfairly prejudicial conduct of the company's affairs, that the company was formed for a fraudulent purpose or that the members of the company have not been given sufficient information as to its affairs<sup>19</sup>.

Following the appointment of inspectors under either section 431 or 432 of the Companies Act 1985, officers and agents of the company are required to produce relevant documents, attend before the inspectors if required and generally assist them in their investigations<sup>20</sup>. The inspectors may examine any person under oath for the purposes of their investigation<sup>21</sup> and must make a final report to the Secretary of State on the conclusion of their investigation<sup>22</sup>. A copy of the inspectors report must be sent to the court if the inspectors were appointed following a court order<sup>23</sup>. The Secretary of State may publish the report and may, on request, send a copy of the report (amongst others) to any member or creditor of the company and anyone whose conduct is referred to in the report<sup>24</sup>.

Any answer given to a question put as part of an investigation under sections 431 and 432 may be used in evidence against the individual concerned, subject to an exception relating to criminal proceedings where the answer can only be used by the prosecution if evidence relating to it is used by the defence<sup>25</sup>.

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<sup>18</sup> Section 432 (1). An earlier version of section 432 of the 1985 Act was section 165(b) of the 1948 Act, which is referred to below.

<sup>19</sup> Section 432 (2)

<sup>20</sup> Section 434

<sup>21</sup> Section 434 (3)

<sup>22</sup> Section 437

<sup>23</sup> Section 437 (2)

<sup>24</sup> Section 437 (3)

<sup>25</sup> Section 434 (5) and (5A)



A copy of the inspectors report that has been certified as a true copy by the Secretary of State is admissible in any legal proceedings as evidence of the inspectors' opinions on any matters stated therein and, for the purposes of directors disqualification proceedings under section 8 of the Company Directors Disqualification Act 1986 (disqualification after investigation of the company), as evidence of any fact stated therein<sup>26</sup>.

Section 447 of the Companies Act 1985 allows the Secretary of State to give directions requiring a company to produce specified documents and information or to authorise an investigator to make the above requirements<sup>27</sup>. Any statement made in compliance with these requirements may be used in evidence against the person making it, subject to an exception relating to criminal proceedings where the statement can only be used by the prosecution if evidence relating to it is used by the defence<sup>28</sup>. This type of investigation is usually undertaken by the Companies Investigation Branch of BERR and is a more low key affair to the full blown and sometimes lengthy investigations conducted by inspectors appointed under section 431 or 432, where the companies involved tend to be plc's and the subject matter of the enquiry of significant public interest.

Investigations into the conduct of a company's business, or in relation to breaches of particular Financial Services and Markets Act 2000 provisions, may be carried out under sections 167 or 168 of the Financial Services and Markets Act 2000. Under section 167, investigators may be appointed if it appears to the "investigating authority" that there is good reason for doing so<sup>29</sup>. An investigator appointed under

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<sup>26</sup> Section 441

<sup>27</sup> Section 447 (2) and (3) Companies Act 1985

<sup>28</sup> Section 447A

<sup>29</sup> Section 167 (1) FSMA 2000

sections 167 or 168 Financial Services and Markets Act 2000 must make a report of his investigation to the investigating authority<sup>30</sup>. The phrase “investigating authority” covers the Financial Services Authority and the Secretary of State<sup>31</sup>

Under section 8 of the Company Directors Disqualification Act 1986, the Secretary of State may apply to the court for a disqualification order against a director if thought expedient in the public interest to do so following consideration of investigative material<sup>32</sup>. Investigative material in this context includes, for example, inspectors reports made under section 437 Companies Act 1985 (which would cover reports prepared following application under section 431 or following court order or decision of the Secretary of State under section 432), information or documents obtained under section 447 Companies Act 1985<sup>33</sup> and reports provided under provisions of the Financial Services and Markets Act 2000.

Under section 7 of the 1986 Act, the Secretary of State (in the context of determining whether to apply for a disqualification order) may require an office holder (liquidator, administrator or administrative receiver) to furnish him with information relating to a person’s conduct as a director and produce/permit inspection of records relevant to that conduct.

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<sup>30</sup> Section 170 (6) FSMA 2000

<sup>31</sup> Section 167 (1) FSMA 2000

<sup>32</sup> Section 8 (1) Company Directors Disqualification Act 1986

<sup>33</sup> Section 8 (1A)

## **The implied exception: nature, development and scope (the winding up cases and *Gasco*)**

As early as 1897, in *In re Grosvenor and West End Railway Terminus Hotel Co Ltd*<sup>34</sup> the Court of Appeal was required to consider the admissibility in civil proceedings of a report of inspectors appointed by the Board of Trade to conduct an examination into the affairs of a company. The inspectors had been appointed under section 56 of the Companies Act 1862, section 59 of the Act requiring the inspectors to report their opinion to the Board and section 61 rendering a copy of their report admissible in legal proceedings as evidence of their opinion. Their Lordships held that the report was not evidence of its factual content but was merely evidence of the inspector's opinion. In coming to this conclusion, their Lordships recognised that, under the scheme of the 1862 Act, the board was not empowered to do anything on receipt of the report.

In 1962, Buckley J, in *In re ABC Coupler and Engineering Company Ltd*<sup>35</sup>, was required to consider the admissibility of reports produced by inspectors appointed by the Board of Trade under section 165 of the Companies Act 1948 to investigate and report on the affairs of three companies. The issue arose in the context of a petition to wind up a company which the Board had presented under section 169(3). The report had been exhibited to the affidavit of a Board of Trade official, the company relying on the affidavit of a director. His Lordship held that, in the circumstances, the evidence on which the Board had relied was not sufficient to persuade him to exercise his discretion so as to make a winding-up order. In reaching this decision, his

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<sup>34</sup> [1895-9] All ER Rep Ext 1836.

<sup>35</sup> [1962] 1 WLR 1236.

Lordship did not, however, exclude the possibility that the court might be prepared to make a winding up order on the basis of hearsay evidence in circumstances in which such evidence was the only evidence that the petitioner had available.

In March 1967, in *Re Travel and Holiday Club*<sup>36</sup>, the Board of Trade presented a petition to wind up a company under section 169(3) of the 1948 Act. The report of inspectors who had been appointed by the Board under section 165 was exhibited to their affidavit. The company did not appear, did not adduce any evidence and did not address any arguments to the court. Pennycuick J, declining to follow the decision of Buckley J in the *ABC* case, held that, upon a proper construction of section 169(3), he was entitled to rely upon the findings in the inspectors' report and, on the basis of those findings, was entitled to make a winding up order in the absence of any other evidence. The basis of his Lordship's decision was, essentially, that the intention of the section was that the court was entitled to consider and act upon the report of inspectors appointed under the 1948 Act unless the report was challenged by evidence adduced by the company.

In April 1967, Pennycuick J, in *In re SBA Properties Ltd*<sup>37</sup>, followed his earlier decision in the *Travel and Holiday Club* case. In reaching his decision, his Lordship distinguishing the decision of the Court of Appeal in *Grosvenor* upon the basis that the 1862 Act, unlike the 1948 Act, had not empowered the Board of Trade to take any steps in consequence of the inspectors' report and, in particular, had not empowered the Board to present a petition to wind up a company upon the basis of such a report.

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<sup>36</sup> [1967] 1 WLR 711.

<sup>37</sup> [1967] 1 WLR 799.

In July 1967, in *In re Allied Produce Co Ltd*<sup>38</sup>, Buckley J was provided with an opportunity to explain his decision in the *ABC* case, which his Lordship distinguished, his Lordship applying the decisions of Pennycuik J in the *Travel and Holiday Club* and *SBA* cases. His Lordship distinguished the facts of *ABC* from those of *Travel and Holiday Club* and *SBA* upon the basis that in *ABC* the company had appeared and had been supported by creditors whereas in the latter cases the companies had not appeared. His Lordship indicated that the basis of his decision in *ABC* had been that hearsay evidence would not suffice where the allegations upon which the petition was based were contentions.

In 1972, in the context of two winding up petitions which had been filed by the Secretary of State for Trade and Industry, Megarry J, in *Re Koscot Interplanetary (UK) Ltd*<sup>39</sup>, was required to consider the admissibility of material that had originated in the United States of America. The material, exhibited to the affidavit of a Department of Trade and Industry official, comprised a letter from an attorney in the Bureau of Consumer Protection in the Federal Trade Commission of Washington DC and a document forming part of a report by the Council of Better Business Bureaus Inc which the attorney had also provided. His Lordship held that the letter and the document were both inadmissible. In the course of reaching his decision, his Lordship considered the *ABC*, *Travel and Holiday Club*, *SBA* and *Allied Produce* cases but held that whilst these authorities had established that inspectors reports made under the 1948 Act had a “special status”, there was nothing in these authorities that supported the view that there was an “open licence” to admit hearsay in winding up cases.

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<sup>38</sup> [1967] 1 WLR 1469.

<sup>39</sup> [1972] 3 All ER 829.

In 1975, in *In Re Armvent*<sup>40</sup>, the Secretary of State for Trade and Industry, having received a report from inspectors appointed under s.165 of the 1948 Act, presented a petition to wind up a company, the report being exhibited to the affidavit of a Department of Trade official. The petition was opposed but no evidence was given to challenge the material parts of the report. Templeman J, having read the report, made the winding up order. In reaching his decision, his Lordship, relying upon the decision of Pennycuik J in the *Travel and Holiday Club* case and referring also to the decisions in *SBA*, *Allied Produce* and *Koscot*, understood the reluctance of a court to rely on a report in the absence of other evidence in circumstances in which the conclusions in the report were challenged by other evidence but held that since the report had not been challenged, his Lordship was entitled to regard it as prima facie evidence of the conclusions that the inspectors had drawn. Indeed, his Lordship was of the view that even where a report was challenged, the report should still be treated as prima facie evidence of the inspectors' conclusions, it being for the court to determine on the basis of the report and the other evidence before it whether the winding up of the company was just and equitable. His Lordship recognised that the inspectors' report "machinery" had been "evolved" to enable the Secretary of State to present a petition where this was in the public interest, his Lordship indicating that it would have been "unfortunate" if the court had been required to proceed as though no inspectors had been appointed.

In 1981, Dillon J, in *In re St. Piran Ltd*<sup>41</sup>, was required to consider a petition to wind up a company which had been presented by another company (which held shares in the former company) as a contributory. The Secretary of State for Trade had

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<sup>40</sup> [1975] 1 WLR 1679.

<sup>41</sup> [1981] 1 WLR 1300.

previously appointed inspectors to investigate the affairs of the former company, under sections 165 and 172 of the 1948 Act but, whilst the inspectors had invited the Secretary of State to petition the court under section 35 of the Companies Act 1972 (which had replaced s.169(3) of the 1948 Act) the Secretary of State had declined to do so. The petition that the latter company had presented was, however, largely based on the inspectors' report. One of the issues that Dillon J was required to determine in *St Piran* was whether it was only the Secretary of State who was entitled to rely on the findings in an inspectors' report in support of a petition or whether other petitioners, suing as creditors or contributories, were entitled to do so. His Lordship, with reference to the *Travel and Holiday Club* and *SBA* cases, held that the petitioner had been entitled to rely upon the report. The basis of his Lordship's decision was that even though the Secretary of State had not presented a petition, the inspectors had still been acting in a statutory capacity. His Lordship recognised that inspectors are not only appointed in order that the Secretary of State can protect the public interest but may also be appointed to protect the interests of minority shareholders, his Lordship indicating that it would largely defeat the object of the inspectors' inquiry if the inspectors' report could not be relied upon where a petition was presented by a minority shareholder. In relation to those circumstances in which the findings in an inspectors' report are challenged by evidence adduced on behalf of the company, his Lordship, having considered the relevant aspects of the decisions in *Travel and Holiday Club* and *Armvent*, recognised that where such evidence is adduced, the judge, prior to deciding whether to make a winding up order, should consider all of the material before the court, including the inspectors' report. His Lordship also indicated, however, that where a company does not file evidence to challenge a report, the company may still assert that even if the inspectors' findings are correct, the

findings are not sufficient to persuade the court that the winding up of the company is just and equitable.

Finally, in 1983, in *Savings & Investment Bank Ltd. v Gasco Investments (Netherlands) BV*<sup>42</sup>, Peter Gibson J was required to consider the nature of the relationship between the rule in *Hollington v Hewthorn* and the case law concerning the status of inspectors' reports from *Grosvenor* to *St Piran* in the context of interlocutory proceedings in which the inspectors' report from *St Piran* was exhibited by the plaintiff. His Lordship accepted that the rule in *Hollington's* case remained a general principle of the common law and indicated that the winding up cases had established that the contents of such reports, being mere opinions, were inadmissible in the absence of the "statutory justification" under which the court could act upon them in winding up proceedings where they were not challenged.

### **The implied exception: nature, development and scope (the directors disqualification cases)**

*In Re Rex Williams Leisure Plc. (In Administration)*<sup>43</sup> concerned an application to the court, under section 8 of the Company Directors Disqualification Act 1986, by the Secretary of State, for the disqualification of two directors, the application following an investigation into the company's affairs which the Secretary of State had authorised under section 447 of the Companies Act 1985. The evidence filed by the Secretary of State in support of the application included an affidavit sworn by the accountant who had carried out the section 447 investigation, the accountant

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<sup>42</sup> [1984] 1 WLR 271.

<sup>43</sup> [1994] 3 W.L.R. 745.



exhibiting notes of statements that had been made to him by directors and employees of the company. The company asserted that the notes of the interviews of the employees were inadmissible under the hearsay rule (the statements made by the directors being admissible as admissions under a common law exception to the hearsay rule<sup>44</sup>).

At first instance<sup>45</sup>, Sir Donald Nicholls V-C, having referred to *ABC, Travel and Holiday Clubs, SBA Properties, Allied Produce, Koscot. Armvent* and *St Piran*, regarded the analogy between a report prepared by inspectors who had been appointed under section 431 of the 1985 Act and explanations that had been collected under section 447 of the 1985 Act as “compelling”. In reaching his decision that the notes of the interviews of the employees were admissible, his Lordship recognised that where inspectors appointed under section 431 made a report under section 437, whilst one consequence of such a report might be the presentation of a winding up petition by the Secretary of State, another possible consequence might be the making of an application for a disqualification order thereby. In relation to the admissibility of the contents of such a report in directors disqualification proceedings, his Lordship was of the view that the approach that the courts had adopted in the context of winding up proceedings was equally applicable where an application for a disqualification order was founded on an inspectors’ report because in both cases the intention of Parliament must have been that the Secretary of State would be able to found the case that was presented in court upon the information in the report. In relation to the position where the Secretary of State, rather than relying on an inspectors’ report, relied on

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<sup>44</sup> The common law hearsay exception to the hearsay rule under which admissions were formerly admitted in civil proceedings has since been abolished by section 7(1) of the Civil Evidence Act 1995, admissions now being admissible in civil proceedings under the general exception to the hearsay rule which section 1 of the 1995 Act created.

<sup>45</sup> See [1993] 3 W.L.R. 685.

information that had been obtained under section 447 of the 1985 Act, his Lordship indicated that Parliament had envisaged that the consequences relating to the use of information in an inspectors' report and information obtained under section 447 would be similar, his Lordship indicating that the court could distinguish between the "less formal and less elaborate" section 447 investigation and an investigation conducted by inspectors appointed under section 431 when determining the weight of the relevant information.

When *Rex Williams* reached the Court of Appeal<sup>46</sup>, Hoffman LJ (with whose judgment the remainder of their Lordships agreed), held that the judgment of Sir Donald Nicholls at first instance had been "entirely right". His Lordship (who also referred to *Grosvenor* and *St Piran*) relied upon *Koscot* as having provided recognition of the fact that section 169(3) of the 1948 Act and its successors had "created an implied statutory exception to the hearsay rule"<sup>47</sup> and upon *Armvent* as having made clear that where an inspectors' report was challenged, the report continued to be admissible as prima face evidence under the implied exception. In relation to the submission, made on behalf of the Secretary of State, that if the implied exception applied to public interest petitions for winding up under section 124A of the Insolvency Act 1986 it should also apply to disqualification applications under section 8 of the Company Directors Disqualification Act 1986, his Lordship agreed with the Vice Chancellor at first instance that the analogy was "a powerful one". Moreover, whilst his Lordship accepted that disqualification applications and public interest petitions for winding up could be distinguished upon the basis that in the former context the Secretary of State was required to prove facts showing that the director

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<sup>46</sup> See [1994] 3 W.L.R. 745.

<sup>47</sup> See p.365.

was unfit whereas in the latter context all that had to be established was that the winding up of the company was in the public interest, his Lordships view was that these were distinctions that went to the weight of the evidence rather than to its admissibility.

In *Secretary of State for Trade and Industry v Ashcroft*<sup>48</sup>, the Secretary of State for Trade and Industry sought disqualification orders under section 7 of the Company Directors Disqualification Act 1986. The issue for the Court of Appeal was whether a judge had properly ordered that passages in an affidavit sworn by a liquidator be struck out, the relevant passages consisting of hearsay evidence. Millett LJ (with whom Hutchinson LJ and Hirst LJ agreed) held that the passages should not have been struck out. The Civil Evidence Act 1995 had not been in force at the time when the application was made and the basis of their Lordships' decision (applying *Rex Williams* and *Armvent*) was that the "implied hearsay exception" was applicable. The judge at first instance had held that *Rex Williams* did not apply to applications under section 7 of the 1986 Act but only applied to applications under section 8, but the Court of Appeal held that no material distinction could be drawn between an application based on information gathered by the Secretary of State's officials and an application based on information supplied to the Secretary of State by an office holder.

*Secretary of State for Trade and Industry v Baker (No. 3) (Re Barings plc)*<sup>49</sup> concerned an application to strike out an originating summons in the context of directors disqualification proceedings, Evans-Lombe J being required to consider the

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<sup>48</sup> [1997] 3 WLR 319.

<sup>49</sup> [1999] BCC 146 (referred to in *Aaron* as (*No2*) [1998] 1 BCLC 590).

admissibility of hearsay evidence contained in the affidavit of Mr Taylor, an accountant whom the Secretary of State had instructed to collate information that was contained in a variety of documents. The documents included a report of the Banking Supervision Enquiry into the collapse of Barings, a report of inspectors appointed by the Ministry of Finance of Singapore and transcripts of interviews, on behalf of those bodies, of officers of the Barings group. The respondents submitted that the implied exception did not apply both because the information had not been provided by an office holder (i.e. Mr Taylor was not a liquidator, administrator or receiver) and because Mr Taylor had not obtained the information in the exercise of statutory powers. Evans-Lombe J, with reference to *Rex Williams and Ashcroft*), was of the view, in relation to the operation of the implied exception, that no valid distinction could be drawn between the role that Mr Taylor had performed and that performed by an office holder. In relation to the respondent's second submission, his Lordship found nothing in the judgments in *Rex Williams and Ashcroft* which indicated that the courts had prescribed that only evidence that had been gathered in the exercise of statutory powers fell within the ambit of the implied exception. Thus, his Lordship held that the evidence upon which the Secretary of State relied was admissible. His Lordship recognised, however, that if the respondent challenged the Secretary of State's evidence with direct evidence and the Secretary of State did not adduce direct evidence to back up the hearsay evidence, the Secretary of States case might be weakened or might even fail.

*In Re Barings plc and others Secretary of State for Trade and Industry v Baker and others (No 5)*<sup>50</sup>, Parker J, in the context of the directors disqualification proceedings to

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<sup>50</sup> [1999] 1 BCLC 433.

which Evans-Lombe's decision had also related, was required to consider both the admissibility of and, if admissible, the weight to be attributed to material in the report of the Banking Supervision Enquiry into the collapse of Barings and in the report of inspectors appointed by the Ministry of Finance of Singapore. His Lordship was not required to rule on the admissibility of evaluative judgments or express criticisms of the directors contained in these reports because the Secretary of State did not rely on them on the basis that the court was on a position to reach its own conclusions on the primary evidence. Thus, his Lordship only found it necessary to rule on the admissibility of pure hearsay statements (e.g. what witnesses had told the inquiries) and of findings of primary and secondary fact contained in the reports. His Lordship (with reference to *Rex Williams*, to *Ashcroft* and to the decision of Evans-Lombe that was considered immediately above) held that the implied exception did not only encompass "pure hearsay statements" but also encompassed findings of fact. His Lordship indicated, however, that it was for the court to determine the weight that should be attached to such evidence.

In *Baker v Secretary of State for Trade and Industry*<sup>51</sup>, an appeal against a disqualification order that Jonathan Parker J had made in *Barings*, the Court of Appeal did not find it necessary to expressly consider either the ambit of the implied exception or the case law via which the implied exception developed. In relation to Jonathan Parker J's decision in *Barings* concerning the admissibility of the hearsay evidence and the findings of primary and secondary fact, however, Morritt LJ, delivering the judgment of the Court of Appeal, indicated that their Lordships did not doubt the validity of Jonathan Parker J's conclusions.

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<sup>51</sup> [2001] BCC 273.

In *Secretary of State for Trade and Industry v Bairstow*<sup>52</sup>, Mr Bairstow, the former chairman and joint managing director of a company, brought unsuccessful proceedings for wrongful dismissal against the company, Mr Bairstow's appeal being dismissed. The Secretary of State then sought a disqualification order against Mr Bairstow under section 8 of the Company Directors Disqualification Act 1986 and Pumfrey J ordered that neither the Secretary of State nor Mr Bairstow were entitled to challenge the findings made in the unfair dismissal proceedings, they both being bound thereby. The Court of Appeal, allowing Mr Bairstow's appeal, held that the findings made by Nelson J in the wrongful dismissal proceedings were not admissible in the directors' disqualification proceedings and it was not an abuse of process for Mr Bairstow to require the Secretary of State to relitigate the issues that had been determined in the wrongful dismissal proceedings. With regard to the admissibility of hearsay evidence in directors disqualification proceedings, Sir Andrew Morritt V-C (with whose judgment Potter LJ and Hale LJ agreed) recognised that evidence in civil proceedings could no longer be excluded on the ground that it was hearsay, his Lordship indicating that, so far as the admissibility of hearsay evidence is concerned, the conclusion of the Court of Appeal in *Rex Williams* had been "overtaken" by the 1995 Act. In relation to the operation of the rule in *Hollington v Hewthorn*, Sir Andrew recognised that the Court of Appeal in *Hollington* had ruled that the conviction was inadmissible both because the opinion of the criminal court was not relevant and because the evidence was hearsay evidence. Whilst Sir Andrew also recognised that the 1995 Act had made hearsay evidence generally admissible in civil proceedings, his Lordship held that the rule in *Hollington's* case continued to be

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<sup>52</sup> [2003] 3 WLR 841.

authoritative. Thus, since counsel for the Secretary of State had accepted that no exceptions to the rule in *Hollington v Hewthorn* were applicable on the facts of *Bairstow*, his Lordship held that the findings and conclusions that Nelson J had made in the wrongful dismissal proceedings were not admissible in the directors disqualification proceedings.

Finally, in *Aaron* itself, the issue before the Court of Appeal was whether material including findings and opinions in a Financial Services Authority's report (which had been made under section 170 of the Financial Services and Markets Act 2000 by investigators who had been appointed under sections 167 and 168 of the 2000 Act) and decisions made by the Financial Ombudsman Service were admissible for the Secretary of State in the context of directors disqualification proceedings which had been brought under section 7 of the Company Directors Disqualification Act 1986. The Financial Services Authority's report included statements made to the investigators by witnesses, findings of fact that the investigators had made and the conclusions that the investigators had reached. Thomas LJ (with whose judgment Keane LJ and Buxton LJ agreed) recognised that it was common ground both that the statements that the witnesses had made to the investigators were admissible under the Civil Evidence Act 1995 and that the findings of fact and the conclusions that the investigators had reached would ordinarily be inadmissible under the rule in *Hollington v Hewthorn*. His Lordship held, however, that whilst the rule in *Hollington's* case remained "a clear rule of evidence", the findings and conclusions were admissible under the implied exception. In reaching this decision, his Lordship (with reference to the decisions in *Travel and Holiday Club*, *Armvent* and *St Piran*, which his Lordship regarded as having been approved in *Rex Williams and Ashcroft*,

and having also considered the decisions of Evans-Lombe, Jonathan Parker J and the Court of Appeal in the *Barings* litigation) recognised that the implied exception had not merely operated as an exception to the rule against hearsay but, rather, that it also encompassed findings and opinions. His Lordship did not regard the decision of the Court of Appeal in *Bairstow*, which had concerned findings made in ordinary civil proceedings, as authority for the proposition that the implied exception was only an exception to the rule against hearsay. Thus, his Lordship regarded it as clearly established that an implied exception to the rules against hearsay and opinion evidence and to the rule in *Hollington's* case existed in the context of disqualification proceedings, the basis of the implied exception being that:

“...Parliament must have intended that a court should have regard to the materials produced under clear statutory procedures on which the Secretary of State had relied in bringing the proceedings.”<sup>53</sup>

Whilst his Lordship recognised that the admissibility of hearsay evidence no longer depended upon the implied exception, his Lordship indicated that it remained necessary to rely on the implied exception, as an exception to the rule in *Hollington's* case, in relation to findings of fact and conclusions. His Lordship, reaffirming the existence, scope and good sense of the implied exception, regarded the evidence that fell within the ambit of the implied exception as “plainly relevant” and indicated that it should be considered with the other evidence and given the weight that it deserved, it being “absurd to suggest” that the judge would “meekly follow” the investigators’ views. Thus, his Lordship, recognising that the statutory scheme had been

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<sup>53</sup> Thomas LJ at para 29.



“broadened” to include provisions of the Financial Services and Markets Act 2000, upheld the decision at first instance that the Financial Services Authority’s report was admissible, though his Lordship recognised that the court might place “little, if any” weight on the report when determining contested issues and that the defendant would be entitled to assert that it would be unfair to rely on some or all of the report in the absence of other evidence.

His Lordship then considered the admissibility of other materials, including the decisions made by the Financial Ombudsman Service. The Secretary of State submitted that this issue had been determined by the decisions of Evans Lombe J and Jonathan Parker J in the *Barings* litigation whereas the defendants submitted that the first instance decisions in *Barings* could not stand following the decision of the Court of Appeal in *Bairstow*. The Deputy Judge at first instance in *Aaron* had distinguished *Bairstow* on the basis that it concerned section 8 of the 1986 Act whereas *Aaron* concerned an application under section 7 of the 1986 Act for an order under section 6. Thomas LJ, however, with reference to *Ashcroft*, held that there was no reason to distinguish between these two sections and that the reasoning of the Deputy Judge had, thus, been incorrect. Moreover, his Lordship was not prepared to hold that material relied on by the Secretary of State that fell outside the statutory scheme was admissible in directors disqualification proceedings. Consequently, his Lordship held that the other materials that the Secretary of State had sought to rely on in *Aaron* did not fall within the ambit of the implied exception, though his Lordship also indicated that it was unnecessary for the parties to attempt to excise those parts of the documents that infringed the rule in *Hollington’s* case and did not fall within the ambit of the implied exception (i.e. those parts of the documents which contained

findings as opposed to mere hearsay, which was admissible under the Civil Evidence Act 1995) as the trial judge would simply ignore the relevant parts. In relation to the material that had been admitted in *Barings*, his Lordship recognised that it was arguable that investigative reports produced by regulators or under statutory authority in other jurisdictions were admissible by analogy, his Lordship recognising that, in the absence of amendment of the Company Directors Disqualification Act 1986, this was a matter that the court would have to determine when it arose.

## **Conclusion**

The decision of the Court of Appeal in *Aaron* has confirmed that the implied statutory exception to the hearsay rule that developed in the context of winding up and directors disqualification cases continues to be of significance as an exception to the rule in *Hollington v Hewthorn*. *Aaron's* case has also made clear, however, that the implied exception does not encompass every item of evidence upon which the Secretary of State might wish to rely but, rather, only encompasses reports and materials produced under the statutory scheme that developed under the Companies Acts and which now, as the Court of Appeal in *Aaron* recognised, has been “broadened” to encompass provisions of the Financial Services and Markets Act 2000. This having been said, where evidence upon which the Secretary of State wishes to rely merely infringes the rule against hearsay and does not infringe the rule in *Hollington's* case, recourse to the implied exception will be unnecessary as whether or not the evidence was produced under the statutory scheme, such evidence will still be admissible under section 1 of the Civil Evidence Act 1995, provided that it is relevant to an issue in the proceedings

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