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# Alert | Litigation

December 2023

## Guilty or Not Guilty: UK Supreme Court Decides Fate of Administrator Appointed Under Insolvency Act

**Go-To Guide:**

- Persuaded by the words used in the legislation, UK Supreme Court holds that a company administrator appointed under the Insolvency Act is not an officer of a company under TULCRA.
- Supreme Court's approach in *Palmer* to analysing who is a company officer is instructive in focusing on the substance and not merely the title of a person's role within a company.
- Decision is not a green light to disregard the provisions of TULCRA; failure to observe a company's obligations under the act may expose the company to civil claims.

'Tis the season for giving, and the recent UK Supreme Court decision in *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court and another* [2023] UKSC 38 is a welcome gift to insolvency practitioners. The Supreme Court held that an administrator of a company appointed under the Insolvency Act 1986 is not an officer of a company within the meaning of the phrase "any director, manager, secretary or similar officer of the body corporate" used in section 194(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA). As such the administrator is not criminally liable under section 194 of TULCRA for failing to give notice to the Secretary of State of certain redundancies.

## The Facts (abridged)

On 13 January 2015, Mr Robert Palmer of the Gallagher Partnership was appointed as one of three joint administrators of West Coast Capital (USC) Ltd ("USC"). The next day employees of USC were given a letter signed by Mr Palmer stating that they were at risk of redundancy and giving notice of USC's intention to consult with them at a staff meeting later that day. Shortly afterwards, the employees were handed another letter, also signed by Mr Palmer, dismissing them with effect from that day.

In July 2015, criminal proceedings were brought against Mr Palmer under section 194 of TULCRA. In accordance with TULCRA, employers contemplating mass redundancies are under a duty to consult with representatives of the employees and to notify the Secretary of State of the proposed redundancies. Section 194(3) allows for accessorial liability to officers of a company that has committed an offence.

Mr Palmer entered a plea of not guilty to the offence and raised a preliminary legal argument before the District Judge in the Magistrates' Court that an administrator could not be an officer of a company within the meaning of TULCRA. The District Judge ruled against Mr Palmer, but he was given permission for judicial review of the District Judge's decision. The criminal proceedings were adjourned pending the outcome of Mr Palmer's claim for judicial review.

In November 2021, the Divisional Court upheld the decision of the Magistrates' Court. In particular, the Divisional Court was concerned that, if an administrator was not an officer of a company, there would be nothing to deter non-compliance of the notice requirements and the criminal sanction would be meaningless in the case of a company in administration, i.e., there would be a vacuum in a situation in which collective redundancies were likely to take place.

## A Gift-Wrapped Decision from the Supreme Court

On appeal, the Divisional Court's judgment came before five justices of the Supreme Court, and their decision was unanimous. Mr Palmer's appeal was allowed, and the decision of the District Judge was quashed.

The Supreme Court reasoned that the Insolvency Act did not indicate that administrators should be considered officers of a company. In fact, the Court noted, numerous references within the Insolvency Act make it clear that administrators are to be distinguished from officers of a company.

Having established the general proposition, the Supreme Court turned to section 194(3) of TULCRA to decide whether an extended meaning should be given to the term "other similar officer", used in that sub-section, to include an administrator. According to the Supreme Court the answer is "tolerably clear". It is a constitutional test. Does the person hold office within the constitutional structure of the body corporate, as is the case with directors, managers and secretaries? That is the normal meaning of an officer of a company. In the case of section 194(3) of TULCRA, the normal meaning is emphasised by the prior reference to directors, managers and secretaries, all of whom are officers in the conventional sense. However, the words "other similar officers" are there for good measure.

The Supreme Court gave examples where the words "other similar officers" may apply. For example, statutory companies, bodies incorporated by royal charter, and foreign bodies corporate. The officers of these bodies may include a variety of titles and functions similar to directors, managers and secretaries, making them potentially liable under section 194 of TULCRA.

The Supreme Court's decision should be warmly received by insolvency practitioners. In broad terms it confirms that administrators are not officers of a company and more specifically that they should not be held criminally liable under TULCRA, unless they qualify as certain "other similar officers" as noted above. However, the decision does not mean the provisions of TULCRA can be ignored entirely. TULCRA provides important protections to employees. Administrators are not absolved of all responsibility in this regard, as a company may face civil action where it fails to meet its obligations under TULCRA. Therefore, a careful balancing act is needed to ensure the statutory purpose of administration is achieved. Early legal advice will likely help ensure that administrators navigate the numerous competing obligations and that they don't slip onto the naughty list.

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