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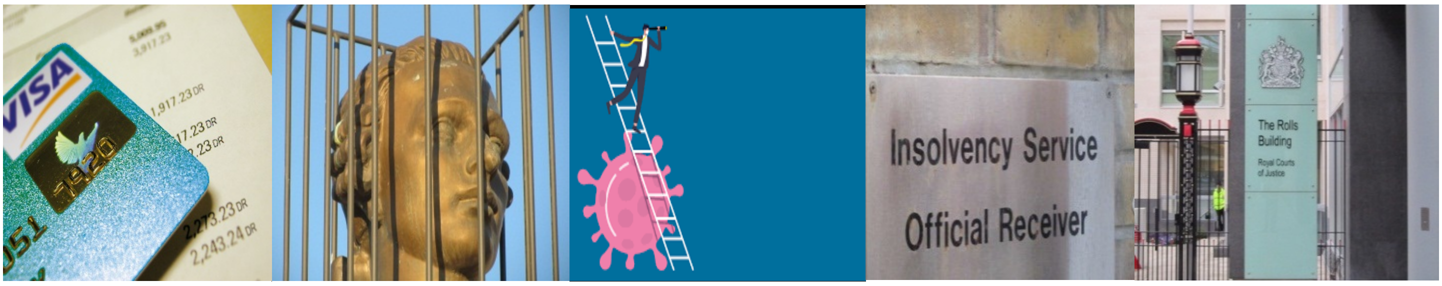

JULIAN DOBSON SOLICITORS

We are solicitors dealing exclusively with insolvency matters. Based in the City of Brighton & Hove, we are close to Brighton County Court, one of the busiest bankruptcy courts in the country. The firm acts mainly for insolvency practitioners throughout England and Wales.

As a firm of solicitors, we have a Licensed Insolvency Practitioner (non-appointment taking). We emphasize a practical approach in our dealings with clients, the courts and others.
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The contents of these notes are a summary of the relevant provisions. Legal advice should be taken in relation to specific enquiries. Any liability is disclaimed.

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INDEX

Administration

Duffy v Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch)

Retrospective extension of administration order

Chronology

17/01/2019	Administrators appointed by QFC
Nov/2020	Court orders extension of administration to 17 January 2022
Jan/2021	Administrators become aware of existence of secured creditors with liens
16/01/2021	Administration purportedly extended to this date by creditors
12/02/2021	Application to court for retrospective administration order
17/01/2022	Date to which administration order extended by order of court

Facts

This was a case where the court had to consider how to deal with a defective extension of an administration order. The administration order was due to expire on the first anniversary being 16 January 2020. The administration order was purportedly extended by creditors for a further twelve-month period which would have meant that the administration would have ended on 16 January 2021.

The company was a special purpose vehicle which had been set up to develop five blocks of student accommodation. It was funded by investors who agreed to purchase long leasehold interests in the property. Some time after November 2020 the administrators accepted an offer to sell the company's land and buildings although they had not yet completed the transaction. It was in January 2021 that the administrators became aware of the existence of a number of secured creditors. These were investors who had paid a deposit for the purchase of the apartments which meant that they had a purchaser's lien over the property. The investors concerned had protected their liens by registering unilateral notices against the property. It was at this stage that the administrators become aware that they were potentially secured creditors and that their consent should have been obtained to the first extension of the administration order.

On realising that the consent of all secured creditors as required by **Para 76 Schedule B1** of the **Insolvency Act 1986 (IA1986)** had not been obtained, the administrators applied for a retrospective administration order. The company's main secured creditor Lendy Limited together with its security trustee Saving Stream Security Holding Limited had made the original appointment of the administrators as qualifying floating charge holders and had consented to the extension of the administration order. **Para 78** requires that "consent" means the consent of each secured creditor and the unsecured creditors of the company. However, where the administrators have made a statement under **Para 52(1)(b)** to the effect that the company will not make a distribution to unsecured creditors, then the need for consent of unsecured creditors is dispensed with. Similarly, the consent of preferential creditors is only required where the administrator considers that a distribution will be made to such creditors which in this case the administrators did not consider any distribution would be made to preferential creditors. This meant that only secured creditors' consent was required. However, this is the consent of all secured creditors and not merely a majority. As the secured/investor creditors' consent had not been obtained, the court had to consider the invalidity of the purported extension of the administration order.

A further question was whether it could make a retrospective administration order to remedy the invalidity of the extension of the administration order. This involved consideration of the decision in **Petit v Bradford Bulls (Northern) Limited [2016] EWHC 3557 (Ch)** where the court held that it did have the power to grant a retrospective administration order pursuant to **Para 79** of **Schedule B1**. The court also referred to the decision in **Gregory v A.R.G. (Mansfield) Limited [2020] EWHC 1133 (Ch)** in which the court identified a number of different approaches that may be taken to dealing with invalid appointments including extension of appointments. However, on this point it was noted that a court cannot extend an administration order with retrospective effect after it has expired, and further that it cannot back-date the making of an administration order for more than 364 days. In applying that to the current situation there would be a short period between January 2020 and February 2020 when the administrators would not have been in office.

In referring to **Gregory v A.R.G. (Mansfield) Limited** it was seen that the ability to grant retrospective appointments has been relied on for many years. However, **Para 77** of **Schedule B1** prevents a retrospective extension of time by court order once the administration has expired. Further, applications for retrospective extensions are made on the application by administrators (**Para 76 (2)(b) Schedule B1 IA1986)**. However, if their term of office has expired the former administrators are no longer administrators with standing to apply. Further the court cannot make a retrospective administration order further back than 364 days. This is because the period of office would have expired by the time of the making of the order and there would be no ability to extend the term of office from its expiry under the (retrospective) court order. As a possible solution it was suggested that the court should make two retrospective administration orders to get round this problem. On this point the court observed that in **Re G-Tech Construction Limited [2007] BPIR 1275** the court, whilst willing to grant a retrospective administration order was not prepared to back-date it by more than one year.

Decision

HH Judge Davis-White QC held as follows:

1. The granting of more than one retrospective order would not be permissible

2. Further, it would not be possible to grant an administration order which took effect any earlier than 364 days before the date of his order.

3. As the company was insolvent throughout and there was a real prospect of achieving a statutory purpose the necessary conditions for making an administration order were present and as such a retrospective administration order would be granted. Further the administrators did have locus to make the application for the administration order in their capacity as creditors of the company in respect of unpaid remuneration carried out during the period of the valid administration.

4. Administration order was made to take effect 364 days earlier. A further order was made extending the administration order.

Comment

- This case highlights the need to identify secured creditors of all types when considering seeking their consent to an administration order.

- Secured creditors come in a number of different guises which means that secured creditors are not restricted to simply those recorded at Companies House.

- This case provides useful clarification on when and on what terms a retrospective administration order will be granted. In this case this left a period when the administration had not been extended validly. Whilst the report doesn't provide details, it is notable that the Judge indicated that he was prepared to make other procedural orders which may have taken into account any steps taken by the administrators during the period of invalidity.

- Following the United Kingdom's departure from the EU the recitals that need to be made in connection with the opening of insolvency proceedings and in relation to orders such as the retrospective administration order made in this case, have been subject to change. This case contains at Para 50 onwards, a detailed and technical explanation of the changes in those Regulations.

Administration

Hyde & Ors (Joint Administrators of BetIndex Limited) [2021] EWHC 1542 (Ch)

Trust Fund distribution and Berkeley Applegate costs order

Facts

BetIndex Limited is a Jersey company carrying on business as a betting operator. Following a request from the Royal Court in Jersey, and order was made in the Business and Property Courts of England and Wales placing the company into administration on 26 March 2021.

The administrators made an application to court for directions pursuant to **Para 63** of **Schedule B1** of the **Insolvency Act 1986** ("IA1986") with regard to the treatment and distribution of a separate client money bank account operated by BetIndex pursuant to the terms of a deed of trust. At the date the administration order was made there was approx. £4.5million held in the client bank account. One of the issues the court had to deal with was the question of when the monies held in the client account subject to the trust should be distributed i.e, when shall they be calculated for the purpose of distribution. Would this be the date of the administration order or alternatively at some later date.

BetIndex operated a platform called Football Index to allow customers known as traders to buy and sell shares in players. Dividends would then be credited to their account depending upon players performances. The shares purchased had a limited life-span of three years. The balance on the client account subject to the trust broadly equated to the amount due to traders at any given time. The accounts being reconciled on a weekly or monthly basis.

Notwithstanding the administration traders continued to be entitled to dividends for the remainder of the three year period of the share in the player in which they had purchased.

At the time of the administration order the client account held approx. £4.5 million and the amount due to traders was about £3.2 million. No further funds had been added to the client account since the platform was suspended however, the ongoing entitlement of traders to dividends meant that by 22 April 2021 the cash balances due to customers exceeded the amount in the client account. Dividends continued to accrue at the rate of approx. £500,000 per month.

The administrators' strategy was to enable the business to continue by agreeing arrangements with the existing creditors via a company voluntary arrangement and to seek new funding for the continuation of the business under a different business model. If successful, unsecured claims would receive approx. 20 pence in the pound compared to eight pence in the pound if the company went into liquidation.

The significance of the timing of the calculation of entitlements in respect of the client fund account meant that if calculated at the date of the administration order, i.e, 26 March 2021 then all of the traders who were owed money at that point would receive the full amount due to them. On the other hand, traders who had purchased shares more recently who would expect to receive winnings over the next three years, would recover much less from the trust assets as they may have had very little in the way of actual entitlement as at 26 March 2021. They would therefore have to claim as unsecured creditors for the balance and would only potentially receive 20 pence in the pound.

It was agued by the administrators that the entitlement should be calculated at the date of the administration order whereas against this it was argued that the entitlement should not be calculated until the three-year period had expired and all dividends/future earnings had been calculated.

The court had to determine the question by reference to the trust deed.

The key issues were summarised as follows:

1. The trust assets be distributed now or only after all rights in relation to existing shares expire i.e, in three years' time?

2. If to be distributed now what is the date of entitlement?

3. Should the calculation of customers' entitlements take into account potential future dividends?

4. If there is a surplus, should it be paid to BetIndex or retained in the trust to meet future obligations to its customers?

The trust deed itself stated as follows:

> *"2.2 Where there is an Insolvency Event:*
>
> *2.2.1 the claims of Customers are to be paid from the Client Bank Account Monies in priority to all other creditors;"*

It was recognised that there could be more than one Insolvency Event and it was submitted that entitlement should be calculated as at the first insolvency event.

Decision

On the question of timing, the interpretation of the trust deed meant that there was a requirement to pay customers who had a crystalised entitlement at the date the Insolvency Event occurs i.e, the date of the administration order. However, that does not mean to say that the distribution had to be made immediately. In this case it meant that the distribution payment should be made as soon as practicably possible.

The terms of the trust deed also required that only the entitlement that had already accrued to the trader customer would their entitlement to payment. It did not include dividends that might arise in the future.

Any surplus should be returned to the company BetIndex.

On the question of costs, it was argued that the administrators' costs should be paid out of the trust assets. In support of that claim, the administrators relied on the decision in **Berkeley Applegate (Investment Consultants) Limited (No 2) [1998] 4 BCC 279** which held that expenses incurred by a liquidator in an administering trust assets were outside the scope of **S115 IA1986** and should be paid out of the trust assets in priority to the assets of the company. It was argued that that principle extended to administrators equally.

In **Re Berkeley Applegate (Investment Consultants) Limited (No 2) [1998] 4 BCC 279** it was stated that:

> *"the authorities establish, in my judgment, a general principle that <u>where a person seeks to enforce a claim to an equitable interest in property</u>, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of it being exercised*

include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in re Marine Mansions Co and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v Nesbitt); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in equity (as in Phipps v. Boardman)."

In the current case it was noted that in relation to the principle in **Berkeley Applegate** that no beneficiaries were seeking to enforce their beneficial interest claims. This element was found not to be an essential requirement for the application in principle in **Berkeley Applegate**. The purpose of the work done by the administrator in relation to the trust was undoubtedly intended to give effect to the equitable interest of the beneficiaries.

It was ordered that the administrators were entitled to be paid their fees and expenses for dealing with the trust assets and administrating the trust.

Comment

- This decision be welcome confirmation for those dealing with financial entities where monies or property are held in client accounts subject to trusts. Office holders will in dealing with such trust assets have a legitimate claim for their fees and expenses to be paid out of the trust assets which they administer. As was noted in this case the inherent jurisdiction of the court to make such an order applies even where those seeking it have acted without obtaining prior authority of the court.

Administration

Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

Notice of intention to appoint an administrator – abuse of process

Chronology

03/11/2020	Purported service of Notice of intention to appoint an administrator ("NOITA")
16/11/2020	Purported service of NOITA
16/11/2020	Default and Demand Letter
27/11/2020	NOITA
07/12/2020	Receivers appointed by STS
10/12/2020	NOITA
21/12/2020	Service accepted and disclosure of 2nd NOITA (10/12/20)
13/01/2021	Receivers application issued

Facts

This was an application by receivers appointed over a property development known as Seabrook Heights. The receivers had been appointed by Security Trustee Services Limited ("STS") in circumstances where it became apparent that Seabrook Road Limited ("Seabrook") had filed Notice of intention to appoint an administrator ("NOITA") on 27 November 2020 and again on 10 December 2020. The joint receivers were concerned that the validity of their appointment may be challenged and as such made the application to court to have their appointment declared valid.

STS had provided finance to Seabrook for which Seabrook had given a charge over the property known as Seabrook Heights by way of legal mortgage and a floating charge. Seabrook had failed to make the monthly payments under the finance agreement and had commenced negotiations with STS concerning re-financing proposals. During the course of those negotiations Seabrook had stated that it wished to avoid administration.

On 16 November 2020 a default and demand letter was sent to Seabrook by STS. On 07 December 2020 STS appointed receivers over the property. Later that day an insolvency practitioner contacted both the receivers and STS and informed them that Seabrook had filed an NOITA with the court on 27 November 2020. This was the first that STS knew of any such notice. Whilst the notice made it clear that Seabrook understood that STS was a qualifying floating charge holder no notice was given to STS. Solicitors for STS and the receivers pointed out that the notice was of no effect and that it was an abuse of process. The receivers' solicitors stated that an application would have to be made to court in order to deal with any challenge to their validity. On 21 December 2020 Seabrook's solicitors agreed to accept service and disclosed the existence of a second NOITA dated 10 December 2020. Again, notice was not given to STS.

The receivers' application was issued on 13 January 2021. Following this it became apparent that two further NOITAs had been purportedly served by Seabrook on 03 November 2020 and on 16 November 2020. Again, STS had not been notified of either of these notices.

The relevant provisions are contained in **Schedule B1** of the **Insolvency Act 1986** ("IA1986"). **Para 22** permits a company to appoint an administrator out of court. **Para 26** requires that the company shall give at least five business days' written notice to any person who is or may be entitled to appoint an administrative receiver or administrator of the company i.e, a qualifying floating charge holder. **Para 27** requires a person who gives a notice of intention to appoint under **para 26** to file a copy with the court. **Para 28** prevents an appointment being made under para 22 unless the person who makes the appointment has complied with the requirements of **paras 26** and **27** and the period of notice specified under **para 26** has expired or each person to whom notice has been given under **para 26** has consented.

Para 44 provides for an interim moratorium to arise from the time when the copy of the notice of intention to appoint an administrator is filed with the court under **para 27(1)** until:

(a) the appointment takes effect or

(b) the specified period under **para 28(2)** expires.

Para 43(2) states that:

> "when the moratorium applies, no step may be taken to enforce security over the company's property, except with the permission of the court."

The court considered the earlier decision of **JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2018] 1WLR 24.** In that case the Court of Appeal held that in order to give notice under **para 26** of **Schedule B1** the person had to propose or intend unconditionally to make such an appointment. A conditional proposal or intention to appoint an administrator neither entitled nor obliged a company to give a notice under **para 26**. In that case the Court held that an intention to appoint an administrator which was conditional on a CVA not taking effect was not a valid intention for the purposes of **par 26 Schedule B1**. As such, the NOITA was not validly given nor had a copy of it been validly filed with the court with the result that the interim moratorium had not been invoked. The NOITA would be removed from the court files.

Decision

Notice to the qualifying floating charge holder had not been given in respect of either of the two NOITAs or indeed the earlier ones. This was a serious and inexcusable breach of the rules and the notices were an abuse of process.

Following the Court of Appeal in **JCAM** notice may only be given if the company has a genuine and settled intention to appoint administrators. The company did not have such an intention at the time when any of the notices were served.

The notices were served in an attempt to obtain a moratorium and to arm the company with an argument against the appointment of receivers.

The timing of the notices supports the inference that what was really being done was to give the company leverage in negotiations.

There was never the necessary intention required before a valid notice may be given under **para 26**. The notices were not valid and the interim moratorium did not come into effect.

The NOITAs will be removed from the court file.

Comment

- This case is an extreme example of the abuse of filing and serving of notices of intention to appoint an administrator. The use of such notices as a stalling tactic will invariably be an abuse of process.

- This case once again confirms that a party serving a notice of intention to appoint an administrator must have a genuine and settled intention to appoint an administrator.
- Further that appointment must not be conditional upon other events.

Administration

Wessely v Zoom UK Distribution Ltd (in administration) [2021] EWHC 800 (Ch)

Effect on administration of failure to give notice to qualifying floating charge holder

Facts

It wasn't until three months after the appointment of administrators to Zoom UK Distribution Ltd ("the Company") that it was realised that the directors had failed to give notice to Lloyds in its capacity as a qualifying floating charge holder as required by **Para.26** of **Schedule B1** of the **Insolvency Act 1986** ("**IA1986**"). Following the discovery, the administrators made two applications to court for directions.

The first application was under **Para.63 Schedule B1 IA1986** seeking a declaration that the administrators' appointment was valid despite a defect in procedure relating to their appointment and that any of their acts since that date are valid.

The second application addressed the position where the directions' application is refused. In those circumstances the second application was for a retrospective administration order.

The Company had in March 2009 granted a debenture in favour of Lloyds TSB Bank plc ("Lloyds Debenture") which meant that Lloyds was a qualifying floating charge holder.

In January 2010 the Company granted another debenture in favour of Lloyds TSB Commercial Finance Limited ("TSB Debenture"),

In 2017 the Company re-financed and obtained alternative invoice financing from Aldermore Bank plc secured by the Aldermore Debenture. The intention was that the Aldermore Debenture would replace the TSB Debenture.

At Companies House the TSB Debenture was marked as satisfied however due to an error, the Lloyds Debenture was also marked at Companies House as satisfied.

The administrators eventually became aware that the Lloyds Debenture was still valid and that as such they should have been given at least five business days' written notice by the directors of the intention to appoint administrators. That had not taken place.

A question the court had to consider was what are the consequences of a failure to comply with **Para.26(1)(b)** of **Schedule B1 IA1986** i.e, the failure to give notice to a qualifying floating charge holder of the intention to appoint an administrator? The court considered the numerous authorities concerning the defective appointment of administrators.

Notwithstanding the considerable case law that has developed in this area, it was noted that the only decision which was directly on the point in question in this case, was in **Re Tokenhouse VB Ltd (formerly VAT Bridge 7 Ltd) [2021] BCC 107** ("**Tokenhouse**").

In **Tokenhouse,** ICC Judge Jones identified the underlying problems being:

> "31. … the tension between: (i) the normal meaning of the words used within those provisions strongly suggesting that non-compliance with their out-of-court procedural requirements should prevent an appointment being effective; and (ii) the fact that this may have a disproportionate result when compared with the prejudice caused by breach and, even more importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid."

Judge Jones concluded that the breach of **Para.26(1)(b)** did not mean that the administrators' appointment by the directors was void.

Tokenhouse was followed by a decision of Deputy ICC Judge Frith in **Re NMUL Realisations Limited [2021] EWHC 94 (Ch)** which dealt with the failure of a debenture holder to serve notice of intention to appoint administrators on the holder of a prior security. In that case the defect was held to be an irregularity which could be remedied by an order under **Rule 12.64** of the **Insolvency (England and Wales) Rules 2016** which did not render the administrators' appointment void. When considering **r12.64**, it should be remembered that it applies to "*insolvency proceedings*". However, in this case, it was common ground between the parties that an out of court appointment of administrators pursuant to **Para.22 Schedule B1** does constitute "*insolvency proceedings*" for the purpose of **r12.64**.

Decision

In the current case the court was persuaded to follow the reasoning in **Tokenhouse** and hold that a breach of **Para.26(1)(b) Schedule B1** did not render the administrators' appointment void. Further the court followed the Soneji approach as expounded in the case of **R v Soneji [2005] UKHL 49** in which it was held that the focus is

> "*on the consequence of non-compliance and taking into account those consequences, to consider whether [as a matter of statutory construction] Parliament intended the outcome of non-compliance to be a total invalidity.*"

The court referred to the decision in **Re Skeggs Beef Ltd [2019] EWHC 2607 (Ch)** in which Mr. Justice Marcus Smith identified three categories of case to be applied when deciding the consequences of a breach of the requirements for an out-of-court appointment. Namely, where the breach is (i) fundamental, (ii) not fundamental but have caused no injustice, and (iii) not fundamental but have caused substantial injustice.

The conclusion in the current case being that the breach of **Para.26(1)(b)** fell into the second category of case meaning that the administrators' appointment whilst defined as defective, the defect is curable.

Referring to **Para.104** of **Schedule B1** that provides that the actions of an administrator are valid in spite of a defect in his appointment or qualification. Further, **r12.64** provides that no "*insolvency proceedings*" will be invalidated by any formal defect or irregularity unless the court before which the objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.

Following the above, it was concluded that the breach was not fundamental but has caused no injustice. In consequence the directions application was granted and the acts of the administrators declared valid.

On the question of costs, it was held that the directors were at fault and therefore liable to pay the costs of the application. It was noted that to order the costs to be an expense of the administration as the directors had sought would mean that the return to creditors would be depleted. As such the directors were ordered to pay the costs.

Comment

- This is yet another decision in a long line of cases dealing with the defective appointment of administrators. The case of **Re A.R,G. (Mansfield) Limited [2020] EWHC 113 (Ch)** contains a detailed review of the case authorities. Similarly, in the case of **Tokenhouse** there can be found as an appendix an analysis of all of the authorities on this particular area of law.

- In the current case, the directors sought to argue that they should not be responsible for the costs as in making the appointment, they relied on the advice of others, including the administrators.

Bankruptcy

Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Trustee's attempt to recover payments made to third party under Section 284 of the Insolvency Act 1986

Facts

Chronology

23/03/2013	HMRC present petition
19/07/2013	Cheque from bankrupt to ART
25/07/2013	Bank transfer by ART to De Walden for £30,807
07/08/2013	Cheque from bankrupt to De Walden for £25,199
14/08/2013	Cheque clears to Aurora for £27,972
16/08/2013	Cheque by bankrupt to De Walden for £25,000
18/10/2013	Bankruptcy order
24/12/2013	Trustee appointed

Mr. Wasu, the bankrupt, was a dentist. Shortly before the limitation period expired on 04 October 2019, the trustee issued an application under **s284** of the **Insolvency Act 1986 (IA1986)**. Initially there were ten respondents of which eight settled. There remained two respondents. The first being Aurora Leasing Limited **(Aurora)**, the second being Howard De Walden Estates Limited (**De Walden)**.

Aurora had agreed to acquire dental equipment to a value of £233,100 which it then leased to a partnership created by the bankrupt's parents, although the bankrupt was not a member of the partnership. In arranging the finance and leasing it was explained that the dental practice was to be operated by a company known as Weymouth Medical Limited of which the bankrupt was the director and sole shareholder. The equipment lease was guaranteed by the bankrupt. On 26 July 2013 the bankrupt wrote a cheque for the initial rental of £27,972 in favour of Aurora which was cleared on 14 August 2013. Aurora had no knowledge of the petition at this point and did not become aware of it until 30 May 2014. The partnership defaulted thereafter, the equipment lease was terminated and the equipment recovered.

The equipment that had been leased from Aurora was to be installed at 29 Weymouth Street London W1 which was let by De Walden to Wasu Property Limited **(WPL)** under a lease for a ten year term from 26 October 2012. The first six months were rent free and the first quarterly payment of £50,199 was due on 29 April 2013. The bankrupt was a director of WPL and held 34% of its shares. Eventually the property was repossessed by De Walden with WPL owing arrears of £110,000.

The trustee sought to recover the payments made to De Walden under **s284 IA1986** totalling £81,806. They were 19 July 2013 £30,807 paid from the bankrupt's account to Alexander Reece Thomson **(ART)** as agent for De Walden. 25 July 2013 ART made a bank transfer to De Walden for the same amount. A second payment by cheque dated 07 August 2013 from the bankrupt paid £25,199 to De Walden and thirdly 16 August 2013 cheque from bankrupt to De Walden for £25,000 being the balance of the September quarter's rent.

284 Restrictions on dispositions of property

284(1) [Where a person is made bankrupt] Where a person is made bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court.

284(2) [Application of s284(1) to payment] Subsection (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property and, accordingly, where any payment is void by virtue of that subsection, the person paid shall hold the sum paid for the bankrupt as part of his estate.

284(3) [Relevant period] This section applies to the period beginning with the day of the making of the bankruptcy application or (as the case may be) the presentation of the bankruptcy petition and ending with the vesting, under Chapter IV of this Part, of the bankrupt's estate in a trustee.

284(4) [Limit to effect of s284(1)-(3)] The preceding provisions of this section do not give a remedy against any person—

(a) in respect of any property or payment which he received before the commencement of the bankruptcy in <u>good faith</u>, for <u>value</u> and <u>without notice</u> that the bankruptcy application had been made or (as the case may be) that the bankruptcy petition had been presented, or…….

Most of the facts were agreed before the hearing which left only two matters for the court to determine and they were :

1. Was ART acting as an agent of the bankrupt in its receipt of the cheque for £30,807

   and

2. In relation to sub-section (4) did Aurora and De Walden receive the payments "for value"?

On the first point ICC Judge Prentis held that ART in receiving the payment was acting as agent for the provider of those monies i.e, the bankrupt. The trustee had not sought to make ART liable for its receipt of the payment. Further it was noted that if ART were not agent for the bankrupt but for WPL the payment it received will still be void as the bankrupt was a director of that company.

As to value, it was argued that the trustee in considering value, it should be "whatever value is to be taken into account must be the value that retains a presence in the bankruptcy estate".

In considering this question the court noted that there are substantial differences between **s127** and **s284** and because of this it was best to approach **s284** on its own terms. Looking at the section it was noted that the word "value" is not qualified and further there is no requirement that the value must be received by the estate rather than a third party.

Decision

Both Aurora and De Walden provided the value which the bankrupt intended by making each payment. The payment by the bankrupt to Aurora in the sum of £27,972 was to enable the furtherance of his profession as a dentist. In the bankrupt causing the payment to be made to De Walden through ART and to direct payments to De Walden in respect of the lease, those payments meant that the property remained available for use by the bankrupt and WPL. Further, each of the transactions were commercial transactions. It was possible to infer that arrangements had or would have been made with the partnership and WPL which would reflect the value the bankrupt had conferred upon them through the release of their concomitant liabilities by virtue of the payments.

It therefore could be assumed the bankrupt's estate did receive the benefit of the payments which he had made through the conferring or imposition of enforceable rights in the same amounts against the partnership and WPL.

The applications against Aurora and De Walden were dismissed.

Comment

- It is notable that the strategy adopted by the trustee in this particular instance was to pursue a number of respondents at the same time in respect of alleged void dispositions/payments under **Section 284**. Whilst that approach was successful in procuring settlement offers from eight of the ten respondents, it did leave the trustee with the task of pursuing litigation, ultimately unsuccessfully, against the two remaining respondents. The approach adopted in this case has echoes of the liquidator's claims in the case of **Officeserve Technologies Ltd (In Liquidation) Annabels (Berkley Square) Ltd [2018] EWHC 2168 (Ch)** under **Section 127** which was pursued against multiple recipients.

- This case apart from giving useful clarification as to what is meant by 'value' within the section also confirms that the value does not have to be conferred directly on the bankrupt and his estate in order to operate as part of a successful defence under **Section 284(4)** raised by a recipient party.

Bankruptcy

HMRC v Sanders [2021] EWHC 1843 (Ch)

Rejection of proof and the Rule in ex parte James

Facts

This was an application by HMRC appealing a decision by the trustee to reject their proof of debt in the sum of £5,667,888.

Mr. Sanders was appointed on 07 March 2018 as trustee in bankruptcy of the estate of the late Mr. Deville, (who died on 29 April 2016), following the making of an Insolvency Administration Order under the **Administration of Insolvent Estates of Deceased Persons Order 1986**. ("IAO")

The deceased was a solicitor specialising in commercial property. He also had in addition to his business on his own account a separate business run through a corporate structure. Previously, he had submitted a self-assessment tax return for 2010/2011 in which he made a claim for repayment of tax in respect of financial arrangements that arose through his corporate structure. Having submitted the tax return, he received a repayment from HMRC in the sum of £5,042,837 on 26 March 2012.

In 2013 HMRC began investigating the repayment, and as a result, concluded that the tax return that had been submitted was wrong as it relied upon unallowable deductible expenses. On 11 November 2015 HMRC served a Closure Notice on Mr. Deville. _On 16 July 2018 HMRC submitted a proof of debt for a total sum of £5,677,788, the proof reflecting the position asserted by HMRC in the Closure Notice. Following receipt of the proof the trustee took advice from Counsel who produced a written opinion stating that the only sum which HMRC were entitled to prove for was £9,339. Privilege was waived in relation to Counsel's opinion which was sent to HMRC for discussion. The trustee was surprised at the advice received but nevertheless felt compelled to follow it. He therefore formally rejected HMRC's proof of debt on 23 March 2020. Subsequently, HMRC issued the application to challenge the rejection of proof.

Counsel for the trustee relied on a "blunt technical point". This was that the Closure Notice did not "make the amendments of the return required to give effect to his conclusions". This meant that the Closure Notice did not comply with the relevant statutory obligations and that as such the proof should be rejected. For HMRC it was argued that the letter of explanation that accompanied the Closure Notice ran to some 33 pages setting out clearly the basis for the amendments to the assessment. HMRC also said that even if the Closure Notice was defective then they would rely on **Section 114** of the **Taxes Management Act 1970** ("**s114**").

There was no dispute between the parties that the repayment had been made to Mr. Deville was wrong. The challenge against the rejection of the proof was brought under Insolvency **Rule 14.8(1)** of the **Insolvency (England and Wales) Rules 2016** ("IR2016") which provides:

> "(1) If a creditor is dissatisfied with the officeholder's decision under rule 14.7 in relation to the creditor's own proof (including a decision whether the debt is preferential), the creditor may apply to the court for the decision to be reversed or varied."

Under that provision the court is not restricted to the material before the officeholder at the time only. If the court considers the decision to be wrong, it can reverse or vary it. HMRC sought the admission of their proof in full with the costs of the application payable as an expense of the bankruptcy.

The court considered the technical requirements for the Closure Notice and identified that the key issue is whether or not the Closure Notice made the necessary amendments to the return to give effect to the person dealing with the matter at HMRC's conclusions. In essence the problem was that the Closure Notice failed to say that Dr Deville's self-assessment return now showed a liability of £9,339 plus £5,042,000. As to the effect of the Closure Notice it was clear that the personal representatives were aware of it as they had appealed to the First Tier Tribunal.

The court also considered HMRC's alternative argument under **s114 TMA 1970:**

> "(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

Decision

Notwithstanding the technical deficiency argument relied upon in rejecting the proof, Deputy ICC Judge Frith held that the Closure Notice did comply with the relevant statutory provisions and that the trustee's rejection of HMRC's proof should be reversed and the proof allowed in full.

It was observed that the fact that an insolvent estate with a substantial deficiency would become solvent paying all non-fiscal creditors in full and making distributions to the beneficiaries under the will was the natural consequence of the technical point that was advanced on behalf of the Respondent.

In considering the **s114** argument, it was noted that the Closure Notice could have been perfected by the addition of a few words. It was clear that this was a perfect case for the application of **s114**.

As referred to above, the repayment of the tax was clearly wrong and would have had the perverse result detailed above. Further there would be a significant loss to the public purse and a significant windfall to the otherwise insolvent estate which would then become solvent.

Neither of the parties had raised or made any submissions concerning the rule in **Ex parte James (1874) LR9 Ch App 609**. As such they were invited to make submissions on the rule after the hearing which would then be taken into account in the judgment.

The rule in **Ex parte James** means that the court will not permit its officers to act in a way which although lawful and in accordance with enforceable rights, does not accord with the standards which right thinking people think should govern their conduct. Reference was made to the recent decision of the Court of Appeal in **Lehman Brothers Australia Limited (in liquidation) v MacNamara [2020] ERWCA Civ 321**.

The conclusion being that the rule in **Ex parte James** was engaged and in order to do justice between the parties the decision on the proof would be reversed.

Comment

- The trustee in dealing with the Closure Notice and the proof of debt received from HMRC sought advice from leading Counsel on the Closure Notice itself. Unfortunately, the focus on the tax aspects did not extend to the bankruptcy principle in the rule in **Ex Parte James.**

- The rule in **Ex Parte James** is an evolving concept. As highlighted in this case the current approach was set out in **Lehman Brothers Australia Limited (in liquidation) v MacNamara [2020] ERWCA Civ 321**.

Bankruptcy

Jackson v Ayles and Pumphrey [2021] EWHC 995 (Ch)

Trustee challenges secured loan under FSMA

Facts

This was an application by the trustee in bankruptcy of Mr. Ayles in respect of a loan secured over the matrimonial home made by Mr. Pumphrey. Mr. Ayles was a plasterer and general builder who undertook small property developments. In order to fund those developments Mr. Ayles secured finance from Mr. Pumphrey as he was unable to obtain it from mainstream lenders. Mr. Ayles was adjudicated bankrupt with debts in excess of £3.6m. Mr. Ayles property, the matrimonial home, was now vested in the trustee in bankruptcy. The trustee in bankruptcy sought an order for possession and sale of the matrimonial home which was subject to security held by Mr. Pumphrey in resect of a loan previously made. As part of the trustee in bankruptcy's application, she further sought a declaration that the security held by Mr. Pumphrey was unenforceable pursuant to the **Financial Services and Markets Act 2000**. ("**FSMA**")

There was a second charge granted in favour of Mr. and Mrs. Pumphrey between presentation of the bankruptcy petition and the making of the bankruptcy order. Shortly before trial Mr. and Mrs. Pumphrey conceded that the second charge was void.

Mr. Pumphrey was an experienced and wealthy investor in property, who was prepared to make loans to individuals and businesses. Mr. Ayles had borrowed money from Mr. Pumphrey in order to carry out developments. The lending would be subject to monthly compound interest and expressed to be for a short term. One such project was at Canada Road in West Sussex. On completion and sale there was nothing left for Mr. and Mrs. Ayles. Mr. Pumphrey received his capital and interest of £41,273. A subsequent development at Anne Howard Gardens was completed and sold and Mr. and Mrs. Ayles received £7,305. Mr. Pumphrey received his capital plus interest of £105,103.

Later Mr. Ayles sought funding to purchase a home. Mrs. Ayles' mother lent £30,000 and Mr. Pumphrey lent £180,000 in return for a first charge with monthly compound interest. This was known as the Weymouth Loan. Mr. Ayles' difficulties resulting in his bankruptcy arose from a development where a sub-contractor lost his life and the bank withdrew its funding. As a result Mr. Ayles did not have profits to repay Mr. Pumphrey for the lending on the Weymouth property.

The **FSMA** provides that regulated mortgage contracts if carried on by way of business are regulated activities and accordingly cannot be engaged in by unauthorised persons.
S26(1) of the **FSMA** provides:

> "An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party".

S28 FSMA provides that:

> "(1) This section applies to an agreement which is unenforceable because of section 26 . . .
> ….
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –
>
> (a) the agreement to be enforced; or
> (b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced…….

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

It was conceded that Mr. Pumphrey had conducted an "activity of a specified kind" for the purpose of the **FSMA** and that he is an unauthorised person. Mr. Pumphrey contended that because the activity had not been carried on "*by way of business*" it was not regulated and so did not infringe **s19**. The court considered issued guidance by the **FSMA** which stated that the business test could be satisfied by an activity undertaken on an isolated occasion. However, the court found more extensive guidance in the case of **Khodari v Al Tamimi [2009] EWCA Civ 1109** in which Newey J identified the factors for "*carrying on by way of business*" to be as follows:

Helden v Strathmore Ltd [2010] EWHC 2012 provides:

1. A sizeable number of loans;
2. The loans were made over a number of years and with some regularity;
3. Substantial amounts of money were advanced;
4. The loans were made with a view to profit;
5. Any friendship grew out of the financial relationship, and was not otherwise pre-existing;
6. Some informality but solicitors were often instructed;
7. The loans were generally secured;
8. The loans formed part of a chain of not dissimilar transactions; and
9. Strathmore was a limited liability company with commercial objects**.**

Where a person carries on a regulated activity in contravention of the general prohibition it is unenforceable pursuant to **s26 FSMA,** but **s23** provides the court with a discretion to allow the agreement to be enforced if it is just and equitable to do so in all the circumstances. Having regard to "*whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition.*"

The court then posed three questions:

1. Was the Weymouth Loan an activity "*carried on by way of business*"?;
2. If the consequences of **s26 FSMA** apply i.e, it is unenforceable, is it just and equitable to allow the Weymouth Loan to be enforced?; and if so,
3. How should the court exercise its discretion?

Mr. Pumphrey's own Counsel described him as "*commercial to the core*". Mr. Pumphrey expressed triumph in his financial success and was described by Mr. Ayles as a man with whom one could not negotiate. He did not understand why a lender would agree to simple interest when compound interest could be obtained. Further he was unlikely to favour family members with a soft loan. Overall, his desire to enrich himself was his first priority.

Decision

Chief ICC Judge Briggs found as follows.

On the balance of probabilities Mr. Pumphrey's lending was carried on by way of business. It was part of his overall enterprise. Mr. Pumphrey was not an authorised person and was barred from carrying on "regulated activity". He was therefore in breach of the general prohibition and as such the Weymouth Loan was unenforceable pursuant to **s26 FSMA**. In considering whether it would be just and equitable to allow the Loan to be enforced, it was observed that Mr. Pumphrey was sophisticated and experienced whereas Mr. Ayles was not. Mr. Pumphrey had benefited disproportionately in respect of the Canada Road development. He observed it was hard to see how Mr. Ayles was ever likely to make a profit on a building venture funded by Mr. Pumphrey.

If the court permitted enforcement of the Weymouth Loan the entire proceeds of sale would enure for the benefit of Mr. Pumphrey.

In considering **s28 FSMA**, namely was it reasonable to believe that the **FSMA** applied to the Weymouth Loan, it was noted that Mr. Pumphrey had the ability to engage solicitors to advise him but chose not to do so. Mr. Pumphrey could not make good the contention that he reasonably believed that he was not contravening the general prohibition.

Mr. Pumphrey was not an authorised person he was barred from carrying on a regulated activity and therefore the Weymouth Loan is unenforceable. Further it is not just and equitable to allow the Loan to be enforced.

Comment

- The trustee's challenge in this case was successful and the Weymouth Loan granted by Mr. Pumphrey was found to be unenforceable. This meant that other creditors would be able to benefit following the sale of the property.

Bankruptcy

Lyle v Bedborough [2021] BPIR 581

Declaration of Trust – transaction at an undervalue s339

Facts

This was an application made by the joint trustees in bankruptcy of Mr. Bedborough ("H") seeking orders under **s339** and **s423** of the **Insolvency Act 1986** ("**IA1986**") in respect of the matrimonial home. Mr. and Mrs. Bedborough were married in 1990 and in 1994 they purchased the family home ("the Property"). Whilst it was registered in joint names the transfer did not contain an express declaration of trust.

In defence of the proceedings brought by the joint trustees in bankruptcy, H and his wife ("W") claimed that they had had discussions in 2008 which resulted in an oral agreement as to how they held the Property between themselves. ("2008 Agreement"). It was claimed that the oral agreement came about as a result of W giving H an ultimatum to the effect that if he did not agree to her having a greater interest in the Property she would divorce him and make a claim for a property adjustment order under the **Matrimonial Causes Act 1973**. H and W asserted that the oral discussions in 2008 resulted in a common intention constructive trust and that that was outside the five year period for the purpose of **s339** and therefore could not be challenged under that provision.

Subsequently the bankrupt and his wife entered into a written declaration of trust in 2012 ("2012 Declaration") which provided that the bankrupt held a 5% share in the equity in the Property and W the remaining 95%. With regard to the 2012 Declaration, W contended that she had paid £20,000 by way of consideration (£19,000 to HMRC and £1,000 to H), and that as part of the consideration provided she agreed not to seek any recompense in respect of her contribution of £50,000 towards renovations carried out in 2002.

As to the 2012 Declaration, W asserted that since the 2008 Agreement created a common intention constructive trust which altered the beneficial interests at that time the 2012 Declaration was not at a relevant time. W also claimed an 'equitable account' in respect of the £50,000 that she had paid for improvements. However, it was noted that £25,000 of that amount would have benefited her as the joint owner of the Property at that time.

Decision

The conclusion reached by the court on the 2008 Agreement was that whilst discussions had taken place to the effect that H would transfer his interest in the Property to W if she asked him to, both understood the discussions were of no legal or immediate effect.

The 2012 Declaration would be set aside as a transaction at an undervalue under **s339 IA1986**. As to whether or not the Declaration reflected the discussions in 2008 it was noted that in order to establish a common intention constructive trust two points would need to be demonstrated.

Firstly, that H & W had a common intention that the Property was no longer to be held as joint tenants, and secondly W would have needed to have relied on the existence of that common intention to her detriment.

The conclusion was that there was no common intention constructive trust and in any event, W had not acted in detrimental reliance as a result of the 2008 Agreement.

Notwithstanding the fact that the 2008 Agreement was of no effect, had it been so, the Judge concluded that it would not have been set aside under **s423 IA1986** as H's then outstanding financial liabilities were not sufficiently significant for his subjective wish to put assets outside the reach of HMRC to amount to a real and substantial purpose for the 2008 Agreement.

As to the 2012 Declaration the value of consideration received by H was significantly less than the value of the consideration he gave and therefore it constituted a transaction at an undervalue under **s339**.

The most appropriate order would be to set aside the 2012 Declaration which would reverse the transfer of the interest in the Property and reverse the effect of W giving consideration in the sum of £20,000. In the case of the latter that could be achieved by directing that W was to receive a payment of £20,000 (plus interest) from December 2012 to the date of payment out of the proceeds of realisation of the Property after the expenses of the bankruptcy but before distribution to creditors.

The second element of the consideration claimed by W under the 2012 Declaration was the £50,000 she spent on improvements. The concept of an 'equitable account' involves the court determining, after it had determined the respective interests of the parties in a given property, the extent to which those interests imposed on one or both an equitable obligation to account to the other in respect of certain payments made in relation to the property during the ownership period. The question was fact-sensitive and depended on ascertaining the common intention of the parties.

In this case the court was entitled to infer that as the parties lived together there was no common intention that either should have to account to the other for the sums spent on the Property for their joint benefit. The improvements to the Property were for their joint benefit and so no inference was raised. As such W was not entitled to any equitable account in respect of the £50,000.

Finally, the court ordered that there would be an order for possession and sale but that time would be allowed to enable them to find alternative accommodation taking into account W's illness, and the COVID-19 epidemic.

Comment

- In making the order for possession and sale in this case, the court did take into account the effects of the COVID-19 epidemic. However, it was not willing to delay sale until the youngest children reached 18 years of age. Similarly, the court was not prepared to delay the order for possession and sale taking effect by reason of the trustees waiting until the last possible day to make an application for an order for possession and sale as the consequence of that delay had in fact benefited both H and W.

- Where an equitable account is claimed between the parties in respect of payments made by one of the parties towards the repair or improvement of the property, the court will be reluctant to find that an equitable account should be given in circumstances where the parties live together, the property is jointly owned, and the monies spent on the property are for their joint benefit.

Bankruptcy

Murphy and Hyde v Munir & Ors. [2021] BPIR 615

Trustees challenge Trust Deeds as a sham

Chronology

30/11/2006	AS swears affidavit in Pakistan as owner of Stradbroke Drive
31/05/2007	"2007 Deed" Declared by bankrupt ("MM") Station Parade, Walm Lane, Stradbroke Drive, Parkview Beneficiaries: Bankrupt's wife RM & MM's 4 brothers
15/07/2008	"2008 Deed" Stradbroke Drive Beneficial owner Mr Chughtai (nephew)
04/02/2010	"2010 Deed" Thomas Street, Station Parade, Walm Lane, Stradbroke Drive, Parkview Beneficiaries: MM's 4 brothers
21/09/2011	MM proposes individual voluntary arrangement
19/10/2011	MM's IVA approved
05/04/2012	Supervisor presents petition for MM's bankruptcy
29/05/2013	Bankruptcy order against MM
07/08/2013	Trustees appointed

Facts

At the date of Mr Munir's ("MM") bankruptcy he was the registered proprietor of five properties known as Thomas Street, Station Parade, Walm Lane, Stradbroke Drive, and Parkview. Following their appointment as joint trustees in bankruptcy, it was apparent that MM had entered into various deeds of trust. These being referred to as 2007 Deed, 2008 Deed and 2010 Deed. The joint trustees in bankruptcy issued an application seeking a declaration that the various deeds were shams and, in the alternative, they constituted a transaction at an undervalue within the meaning of **s339** of the **Insolvency Act 1986** or alternatively a transaction defrauding creditors for the purposes of **s423** of the **Act**.

MM's nephew Mr. Chughtai and his partner, Ms. Mohammed, issued an application for a declaration that MM held Stradbroke Drive on trust for Mr. Chughtai. The application claimed that Stradbroke Drive was purchased with monies provided by Mr. Chughtai and that the 2008 Deed reflected that arrangement. The application also sought a declaration that a gentleman known as Mr. Saeed ("AS"), who had previously sworn an affidavit in Pakistan on 30 November 2006 stating that he was the owner of Stradbroke Drive had no interest in the property. Subsequently Mr. Saeed denied ever having sworn the affidavit.

Mr. Chughtai and Ms. Mohammed's application sought a declaration that their interest in Stradbroke Drive was free of the charge registered over the property in favour of Business Mortgage Finance 7 PLC ("BMF"). They claimed that as they occupied the property at the time the mortgage was granted their beneficial interest was protected as an overriding interest and that as such the charge held by BMF did not attach to their beneficial interest.

MM's financial position began to deteriorate in May 2007 when Bank of Scotland demanded repayment of £100,000 under a guarantee. By January 2009 MM's solicitors were corresponding with him referring to the threat of a bankruptcy petition from one of his creditors. Later that same year Allied Irish Bank demanded repayment of a personal guarantee of £684,736. In March 2009, a judgment was entered against MM for £109,300 by Bank of Scotland. In September 2011 MM put forward a proposal for an individual voluntary arrangement ("IVA") which was subsequently approved on 19 October 2011. The proposal for the IVA presented a position that was inconsistent with the existence of the declarations of trust. Subsequently, it was claimed that he had informed the nominees staff of the existence of one of the deeds. In this regard it was noted that had the deed been disclosed the proposal would have been significantly different.

Stradbroke Drive

In considering Mr. Chughtai's claim to have provided the money to purchase the property, it was noted that there were no bank statements, texts or emails to confirm the provision of the deposit monies or the alleged loans to support Mr. Chughtai's case. As far as the claimed occupation by Mr. Chughtai and Ms. Mohammed is concerned, it was noted that the only person in occupation at the time of the purchase in 2006/2007 was another family member. Further, Ms. Mohammed did not use the Stradbroke Drive address but continued to use her mother's address. Mr. Chughtai also used an alternative address at 6 Dicey Avenue.

Mr. Chughtai claimed that he had made payments in cash, however when confronted with a payment schedule, which indicated that some payments were made by bank transfer from MM's account, Mr. Chughtai altered his explanation.

It was accepted that Mr Chughtai and Ms. Mohammed were living at the property at the time of MM's bankruptcy but they had not been living at the property since purchase as originally claimed. MM on the purchase of the property had in completing the SDLT form confirmed that he did not hold the land as trustee for another party. This went directly against the claim by Mr. Chughtai that the 2008 Deed was reflection of an existing trust arrangement. As for Ms. Mohammed's position, whilst she had three children with Mr. Chughtai, she had subsequently discovered in 2015 that he was married to another and had a family in Dubai.

Constructive Trusts

Equity follows the law, and the presumption is that the beneficial ownership of a property is the same as the legal ownership. It is for the person claiming that the beneficial ownership is different from the legal ownership to prove it – **Stack v Dowden [2007] UKHL 17** where a constructive trust is claimed the questions that need to be answered are as follows:

1. Is this a case within the domestic consumer context such that the common intention doctrine applies?

2. Is there evidence of an actual common intention i.e, an agreement, arrangement or understanding between the parties either at the date of purchase or at some later date?

3. If there is no common intention, can an agreement, arrangement or understanding be inferred from the parties' conduct?

4. Has the claimant relied to his detriment on the common intention relied upon?

5. If there is an actual common intention, does it extend either expressly or by inference to the shares in which the property is to be beneficially owned?

6. If the common intention does not extend to the shares in which the property is to be beneficially owned, what is a fair share having regard to the whole course of the parties' dealing in relation to the property and to both financial contributions and other factors?

Resulting Trusts

For Resulting Trusts the principles are set out at para 10-02 of Lewin on Trusts (20th edition):

> "When property is purchased and transferred into the name of a person other than the purchaser, a resulting trust arises in favour of the purchaser if there is a presumption of a resulting trust which is not rebutted by evidence that he intended a gift, or if the purchaser establishes that it was his actual intention that the property purchased was not to be owned beneficially by the person in whose name the purchase was made. A presumption of resulting trust arises only when the purchase is made in the name of a person who is in equity a stranger to the real purchaser."

The presumption of a Resulting Trust is addressed at para 10-03-

> "Where there is a gratuitous transfer containing no express or inferred provisions determining beneficial ownership, then the starting point is that there is a rebuttable presumption of resulting trust, in that the transferor did not intend to make a gift."

If Mr. Chughtai provided the purchase monies for Stradbroke Drive, there is a presumption that he did not intend it to be a gift to MM and that he intended to retain the beneficial interest. There is no presumption of advancement between an uncle and nephew.

The Deeds - sham

In relation to the various declarations of trust described as the 2007 Deed, 2008 Deed, and 2010 Deed, the trustees claimed that these were a sham.

A sham is where acts done, or documents executed by parties to the "sham" are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any), which the parties intend to create. To be a sham all parties involved must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

In considering whether the deeds were a sham, the court considered the authorities including **Hitch v Stone [2001] EWCA Civ 63** in which the principles that apply in considering alleged shams were explained.

Decision

It was held that Mr. Chughtai had not made any contribution to the purchase of Stradbroke Drive and that there was no basis for any claim either as a resulting trust or constructive trust prior to the execution of the 2008 Deed.

The 2008 Deed did not reflect an existing trust and had not been mentioned by MM in earlier possession proceedings in respect of Stradbroke Drive. ICC Judge Mullen being satisfied that either the 2008 Deed had not been executed at the time of the possession proceedings or if it had it was understood to be a "*rainy day trust instrument*". In the case of the latter, it was not intended to have effect but to be available to give a false impression of the ownership of Stradbroke Drive if required at the appropriate moment. Mr. Chughtai and Ms. Mohammed having failed to show that they had a beneficial interest in Stradbroke Drive arising out of a resulting or constructive trust, in relation to the 2008 Deed it was held to be a sham.

With regard to the 2007 Deed, that document was incomplete and no one had argued that it was intended to have effect. Replies to an earlier property questionnaire were entirely inconsistent with the existence of the 2007 Deed. There was evidence that MM had created a range of inconsistent documents over the years, none of which had been acted upon. There was also evidence that one or more of the documents were forgeries. In conclusion the Deeds were held to be shams.

However, in the alternative if they were not found to be shams, then the 2010 Deed would have been a transaction at an undervalue for the purpose of **s339** of the **1986 Act**. MM's insolvency at the time of the transaction would have been presumed. There was no attempt to rebut the presumption and it was clear that MM was under financial pressure for some years following the demand under a personal guarantee in 2007. As such the 2010 Deed would have been set aside as a transaction at an undervalue. In the alternative the Deeds would have been set aside as transactions defrauding creditors within the meaning of **s423** of the **1986 Act**.

The claim by Mr. Chughtai and Ms. Mohammed that they had an interest in Stradbroke Drive which was not subject to the charge in favour of BMF relied upon them first of all establishing that they had an interest in the property, and secondly, that they were in actual occupation of the property before the charge was created. Their arguments on both fronts failed, in the case of the latter, it was established that they were not in actual occupation of the property at the time the charge was created and therefore could not claim an overriding interest.

As such the claim of Mr. Chughtai and Ms. Mohammed in respect of Stradbroke Drive failed and the trustees' application in respect of the declarations of trust was upheld in that the declarations of trust were held to be shams.

Comment

- This case is a good example of the considerations that will need to be looked at in determining whether or not a declaration of trust is a sham. The case also sets out a useful reminder as to the requirements for establishing a resulting and/or constructive trust in respect of a beneficial interest in a property.

- For a decision concerning a guarantee that was alleged to be a sham see **Go Capital Limited v Phull [2020] EWHC 1235 (Ch)**

Liquidation

Darty Holdings SAS v Carton-Kelly [2021] EWHC 1018 (Ch)

Payments made as part of sale of company challenged as preferences

Facts

This was an appeal against an earlier order made in proceedings in which it was held that the Appellant ('KIL') was a connected person of Comet Group Limited ("the Company") for the purposes of an alleged preference under **s239** of the **Insolvency Act 1986** ("IA1986"). The liquidator claimed that a number of payments totalling £115m constituted preferences.

They were repayments of inter-company debts made as part of an acquisition of the shares in the Company. The Company had gone into administration on 2 November 2012 and then subsequently liquidation on 13 October 2013. The actual claim was for £82m being the difference between the £115m and the amount that KIL would have recovered in an insolvent liquidation. In order to establish the preference, it was necessary to show that KIL was connected with the Company at the time the payments were made.

By **s239** and **s240(1)(a) IA1986** a claim may be made in respect of a preference given to a person who is connected with the company where the preference occurred within two years of the onset of insolvency. Where the person is not connected with the company the time period is reduced to six months.

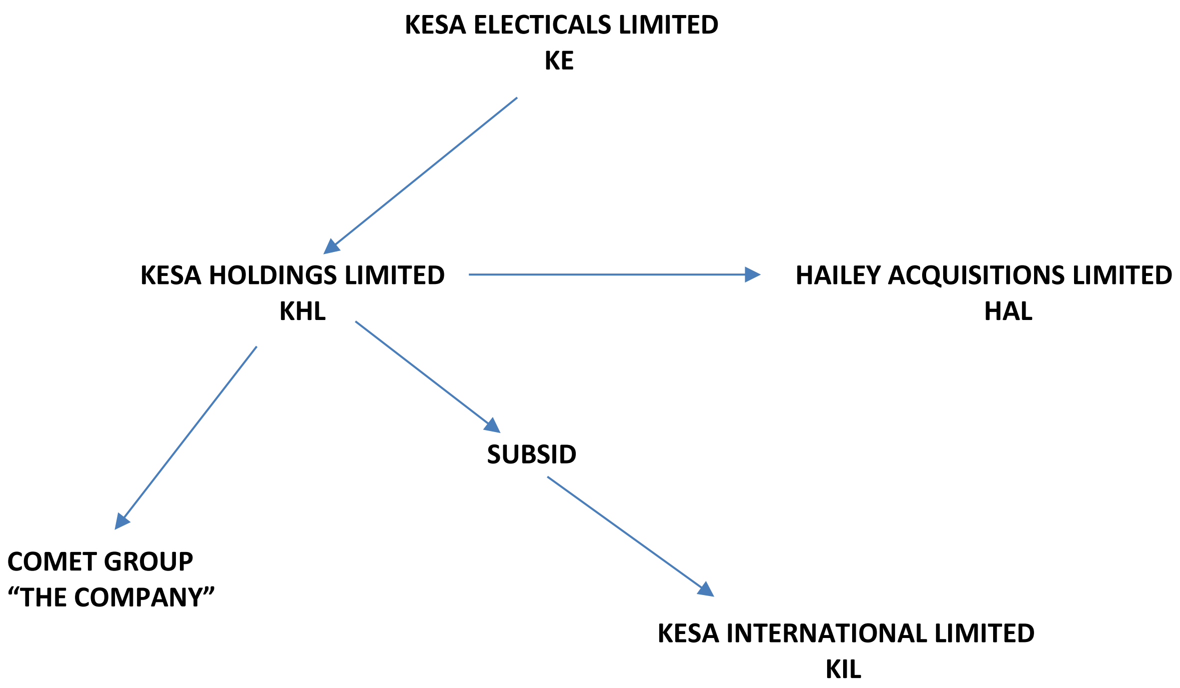
In the current case, the preference was alleged to have taken place just outside the six month period but less than two years. Where parties are connected then the requirement to establish that the company in giving the preference was influenced in deciding to give it by desire to put the person into a position which in the event of the company going into insolvent liquidation would be better than the position they would have been if the thing had not been done is taken to be presumed under **s239(6) IA1986**.

At the hearing from which this appeal arose the Judge held that KIL was connected with the Company at the time of the alleged preference. The Appellant sought to challenge that on the basis that the payments were not made before the transfer of the shares of the Company to the purchaser was effected. The second challenge was that the transaction should be looked at overall as a whole and that the effect of the sequence of transactional steps meant that the Company was no longer connected.

The Company was a well-known high street electrical retailer. Before the sale transaction of which the intercompany payments were part it was owned by the Kesa group of which Kesa Electricals plc ("KE") was the parent. KE owned Kesa Holdings Limited ("KHL") which in turn owned the Company. KIL (the party alleged to have received the preference) was also a member of the Kesa group. It sat below KHL (via two wholly owned subsidiaries). So KIL and the Company were under the common control of KHL.

It was decided to sell the Company together with another company called Triptych Insurance NV ("Triptych"). KIL and KHL agreed terms to sell the shares in the Company on a "cash and debt free" basis to Hailey Acquisitions Limited ("HAL"). Initially there was a sale and purchase agreement entered into ("the SPA") although the Company was not a party to that agreement. On 3 February 2012 the various parties entered into a Completion Agreement ("CA") to which the Company was a party. The CA set out how the various payments were to be made in relation to the completion of the SPA. There were various inter-company balances owed to and by KIL. The Company was indebted to KIL under a revolving credit facility. KIL owed substantial sums to Triptych. The shares in the two companies that were to be sold by KHL. There was then a series of transactions under which the inter-company balances to and from KIL would be paid off at completion.

Completion took place on 3 February 2012, at 2.59pm. The minutes of the board meeting of the directors of the Company held at 2.30pm that day recorded various steps including the registration of the transfer of the entire issued shares of the Company from KHL to HAL. The minutes showed that certain steps were to take place only at completion (including registering the transfer of the shares in the Company from KHL to HAL. The CA detailed the various payments that were to be made.



Statutory Test of connection for preference claim

The relevant provision to determine whether a party is connected for the purposes of preference is contained in **s249 IA1986.** It also provides that a person is connected with a company if he is an associate with it and associate has the meaning set out in **s435 IA1986**.

Para 435(6) provides that a company is an associate of another company if the same person has control of both.

S435(10) provides:

> "For the purpose of this section a person is taken as having control of the company if-
>
> (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
>
> (b) he is entitled to exercise, or control the exercise of, one third more of the voting power at any general meeting of the company or of another company which has control of it …"

The court noted that the Court of Appeal had previously considered **s435** in **Granada UK Rental and Retail Ltd v The Pensions Regulator and anor. [2019] EWCA Civ 1032** in which the Court at Para 126 said this:

> *"Section 435 IA 1986, by contrast, is an elaborate provision under which a multitude of individuals and companies can potentially be considered to be "associates" simultaneously. Whereas, moreover, a "controlling interest" presumably had to be one commanding a majority of the votes attaching to a company's shares, someone can be "taken as having control" under s.435 with no more than a third of the voting power (see s.435(10)(b)). In fact, it would seem that a person could be deemed to have control in the context of IA 1986 if, say, he held just 35% of the shares in a company which in turn held 35% in a company holding 35% in another company with a 35% holding in a yet further company. Plainly, Parliament did not wish s.435(10) (and thus s.435(7)) to bite only on people or entities who control a company in practical terms. It was evidently Parliament's intention that s.435(7), and the term "associate" more generally, should have a wide meaning for the purposes of, for example, the preference and transaction at an undervalue provisions (see, e.g. ss.239(6), 240(1)(a) and 249(b) IA 1986)."*

The timing point

The question was did the impugned payments take place before the registration of the transfer of the shares in the company? The liquidator had not argued that the parties would have been connected under **s249** if the payments occurred at the same moment as registration of the share transfer. On the contrary the liquidators' position was that the Judge was right to hold that the payment had happened before the registration of the share transfer and as such the liquidator relied on that position.

On the question of timing generally, the court considered the decision in **Unidare plc v Cohen [2005] EWHC 1410 (Ch)**, in which the principle was recited that where parties to a transaction which involves executing multiple documents intend them to be executed in a particular order which is necessary to give effect to the intended transaction, the court should be ready to presume that they were executed in the correct order to give effect to the transaction. At the earlier hearing, the court had determined that the CA superseded the SPA and that the CA contained the precise sequence of payments and other steps to be covered. The liquidator contended that the payments were made pre-completion and that the transfer of the shares occurred no earlier than completion itself. On this basis the court concluded that the steps detailed in the CA with regard to the making of payments were made before completion.

The "severance of the connection" point

The Appellant's second argument was that the preference provisions had to be construed against the background of an overall sale transaction and that the purpose of that broader transaction was to sever the connection between the parties. As such the court should conclude that there was no connection between the parties for the purposes of a preference in relation to a specific step. On this point, the court held that there was no basis for construing the statutory provisions in such a restrictive way.

Decision

At the time when the payments were made by the Company to KIL the parties remained associated within the meaning of **s435** and were therefore connected within the meaning of

s249 the severance of the connection by the transfer of the shares that occurred just afterwards was held to be irrelevant to that conclusion.

As such the parties were connected for the purpose of determining the preference in relation to the payments made by the Company to KIL. The appeal was therefore dismissed.

Comment

- This case provides detailed analysis of when parties will be connected and/or associates for the purposes of identifying preferences and/or transactions at an undervalue.

- It also demonstrates that seemingly arm's length corporate transactions can be caught by preference provisions relating to payments made under corporate transactions particularly where the timing of those payments is before formal completion and the transfer of share ownership has been completed. It is however worth noting that the Judge in this particular case was not required to and did not consider in detail what the position would be where such events are simultaneous.

Liquidation

Manolete Partners Plc v Hayward and Barrett Holdings Limited [2021] EWHC 1481 (Ch)

Insolvency litigation – commencement of claims

Facts

This was a case involving three applications.

(a) An application to extend time to admit a witness statement

(b) An application by the fourth Respondent to strike out the claim that he acted as a *de facto* director of Blackwater Plant Limited and,

(c) An application for an unless order requiring the Applicant to pay the issue fee in respect of a Part 7 claim.

Blackwater Plant Limited ("Blackwater"), went into creditors voluntary liquidation on 17 August 2018. A connected company known as Hayward & Barrett Ltd ("H&B") went into creditors voluntary liquidation on the same day. The third and fourth Respondents were *de jure* directors of H&B and it was also claimed that they were directors of Blackwater.

The liquidators identified various transactions in respect of which there were potential claims against the Respondents. In considering the claims the first identified were those arising under specific provisions in the **Insolvency Act 1986** as follows:

Section 213 (fraudulent trading);

Section 214 (wrongful trading);

Section 238 (transactions at an undervalue);

Section 239 (preferences); and

Section 244 (extortionate credit transactions).

These were referred to as "transactional avoidance" provisions. The court also identified other provisions which may be utilised to recover assets for the benefit of the insolvent estate. These included **s.423 IA1986** and **s212**.

S.423 provides:

"This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;…………

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself."

S.212 provides a remedy to bring claims vested in a company in liquidation for the purpose of restoring assets.

By an Agreement dated 03 September 2019 the joint liquidators assigned the transaction avoidance causes of action. In the same Agreement, they also assigned:

> "*all and any claims that [Blackwater] may have….. such claims to include…. breach of duty at common law, breach of fiduciary duty or statutory duty or other legal or equitable duty, any claim in fraud, whether common law or equitable fraud, conspiracy by unlawful means and/or any claim under the …Companies Act 2006*."

These were referred to as the "Blackwater Claims".

The assignee of the Blackwater Claims and the transaction avoidance provisions issued an insolvency application using Form 1AA. There was no issue concerning the claims made in the insolvency application that related to the transaction avoidance provisions. However, in relation to the Blackwater Claims it was argued for the Respondents that the Blackwater Claims should have been issued under **Part 7** of the **CPR** which would have meant payment of a £10,000 issue fee.

It was noted that the claim under **s423** of the **Act** is not an insolvency proceeding as it is found in **Part XVI**.

Decision

1. An assignee of the transaction avoidance claims can bring proceedings against the third and fourth Respondent by way of an insolvency application

2. Whilst the liquidators may commence a claim under **s212** using the insolvency application procedure, an assignee may not. This is because the assignee applicant in those circumstances is not a liquidator, Official Receiver, contributory or creditor.

3. The Blackwater Claims should have been commenced by way of **Part 7**. A claim under **s423** made by a liquidator or assignee is not an insolvency proceeding and therefore a **Part 7** Claim Form is required.

4. Unless the court orders otherwise a claim made by way of an insolvency application that should have been made under **Part 7 CPR** does not invalidate the proceedings. The court may make such order as it thinks fit when exercising its discretion under the procedural rules.

In the current case in respect of the Blackwater Claims, the Applicant was ordered to pay the issue fee.

It was recognised that potentially claims may have to be pursued by way of two separate applications which would have implications for both time, cost, and court resource.

Comment

- Where an applicant is forced to issue claims based on the same facts by way of an insolvency application and by way of a separate Part 7 claim, it remains to be seen as to what guidance will be given by the court to ensure that such claims are dealt with together as expeditiously as possible.

Liquidation

Microcredit Ltd v Rosler [2021] EWHC 1627 (Ch)

Application to remove liquidator

Facts

Microcredit Ltd ("the Company") was a payday lender. The applicant in this case had the same name but was a company incorporated in Malta and was referred to in this case as "Malta". The Company's sole shareholder was a Mr. Kristjan Valdmann. His brother Andres Valdmann was also a director. K Valdmann sold his shares in the Company to Mr. Maximov in October 2014. The Company relied on two Estonian companies to provide its back-office functions. They were Figone OÜ and MC Office OÜ. Both companies were controlled by A. Valdmann. Following an FCA investigation, the Company applied to have its licence withdrawn. As the withdrawal of the licence would render many of the loans irrecoverable, it entered into an agreement with Kapama Limited whereby the loans were assigned to it. The Company then assigned its rights under that agreement with Kapama to Malta.

Previously In October 2012 the Company had appointed iTax UK Business Solutions Ltd ("iTax") in connection with a claim for terminal loss relief ("TLR"). Notwithstanding the TLR claim HMRC presented a petition to wind up the Company and a winding up order was made on 15 June 2015. The respondent liquidator was appointed by the Secretary of State on 20 April 2016. The liquidator instructed iTax to pursue the TLR claim which resulted in HMRC withdrawing their claim and making a payment to the Company of £110,000.

Following the liquidation, whilst Mr. Valdmann completed the Official Receiver's questionnaire, this was done with a minimalist approach. As to the provision of books and records, Mr. Valdmann claimed that they were handed over to Mr. Maximov in Moscow at a meeting which took place in a hotel near Red Square the name of which he could not recall. The liquidator continued to pursue Mr. Valdmann in respect of the books records and information.

Subsequently, there was a challenge to the liquidator's remuneration which was approved by iTax as a creditor for £1,980. It was claimed that iTax were not a creditor and that the claim had been encouraged by the liquidator.

The liquidator issued an application against Malta challenging the transactions which included the Company transferring its rights to receive income from the loan book to Kapama and ultimately to Malta for £50,000. Other claims included an overdrawn loan account.

The application by Malta in this case was for an order directing that the liquidator initiated a decision making procedure for the purpose of considering removing him as liquidator, or alternatively, an order removing him as liquidator. The suggestion that such an application was an attempt to stymie the liquidator's claims against Malta was rejected by the applicant.

The applicant claimed to be the holder whether by assignment or otherwise of substantially all of the creditors' claims. However, the liquidator had rejected the vast majority of the applicant's claims and the liquidator considered himself bound by a claim submitted by HMRC in the sum of £2,595,337.

The key issue was whether or not the liquidator should appeal the assessments raised by HMRC in support of their claim. Malta took the view that he should whereas the liquidator took the view that he should not. If the appeal was successful and HMRC's claim disappears then Malta would be the only significant remaining creditor and there would be little point in the liquidator pursuing Malta when Malta could simply pay off the few remaining creditors and discharge the costs and expenses of the liquidation. As to the appeal against the assessments, this was already out of time, however it was pointed out that the time may be extended. It was recognised that the existing liquidator having accepted the TLR payment would be in a difficult position now challenging the HMRC assessments. On the other hand Malta in support of their assertion that the appeal should be made offered that Mr. Valdmann would meet the costs of any appeal and that the remaining funds in the liquidation would not be at risk. At a somewhat late stage in the proceedings, the liquidator had obtained Counsel's opinion which advised against the making of the appeal. It was noted that only a newly appointed liquidator would be able to demonstrate a good reason for the lateness of the appeal.

The liquidator's approach to creditors' claims

A complaint was made as to the way in which the liquidator had dealt with claims from creditors. It was alleged that he had stirred up iTax and HMRC encouraging them to prove whilst taking a sceptical and inconsistent approach to the claims of Figone and MC Office. This it was claimed could amount to an appearance of bias that would make it undesirable for the liquidator to remain in office. On the iTax claim, there was an impression that the liquidator encouraged a claim to be made by iTax for his own purpose; to obtain a fees resolution that would otherwise not have been passed. In relation to the HMRC claim, it was claimed that they changed their position as a result of the liquidator inviting them to reconsider it. Deputy ICC Judge Baister commenting:

> "*The liquidator's approach to their claims does trouble me.*"

Legal position

Section 172(2) Insolvency Act 1986 gives the court the power to remove a liquidator in a compulsory winding up. A similar power exists under **Section 108(2)** of the Act although that applies to both compulsory and voluntary liquidation. As to the scope of **s108(2)** reference was made to Millet J in **Re Keypak Homecare Ltd (1987) 3BCC** in which he stated:

> "[T]he words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation."

There is no need to show personal misconduct or unfitness, what needs to be shown is that it is, on the whole, desirable that the liquidator should be removed.

Grounds for removal include the following:

(a) The creditors no longer have confidence in the liquidator's ability to realise assets of the company to their best advantage;

(b) An office holder getting too closely involved in matters which he must investigate.

In summary the test is:

> "*measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed*."

The interests of creditors are, however, the most important factor.

Decision

There would be no order directing a decision making process to be instigated in view of the outstanding dispute concerning the claims of creditors.

Whilst the liquidator appears to have encouraged claims from both iTax and HMRC they are not sufficiently strong to warrant his removal.

The appearance of bias in the circumstances outlined is not sufficient to justify a removal of the liquidator.

If the liquidator was removed a new liquidator would have to duplicate a lot of the work carried out by the current liquidator in pursuing the Malta claim. It was however recognised that the current situation required someone other than the present liquidator to form a dispassionate but definitive view on the prospects of a late appeal against HMRC assessments. This cannot be carried out by the present liquidator.

Whilst the current liquidator would not be removed, there would be an appointment of a "conflict liquidator" for the limited purposes of determining whether or not to make the appeal against the HMRC assessments. The assets in the liquidation would not be eaten up as Mr. Valdmann had already indicated that he would meet those costs (which should include providing an indemnity against any adverse costs if an appeal proceeds). An additional liquidator would be appointed for the limited purpose of dealing with the HMRC appeal.

Comment

- This case considers some of the issues that can arise out of circumstances where the liquidator and his staff contact creditors inviting them to submit a proof of debt. As in this case, emails passing between the liquidator and his staff and the creditor in question will be considered in detail in circumstances where there is a subsequent challenge is made to the creditor's claim.

- It is not an infrequent occurrence for office holders to seek the fixing of their remuneration by a decision procedure and to encounter a total lack of response from creditors. In small cases this can then place a disproportionate burden and cost on the estate where the office holder then has to apply to court to have the basis of his remuneration fixed.

- In the case of small insolvent estates in particular, it may be time for a legislative change. A possible suggestion is that where creditors are requested to consider a resolution in respect of the basis of an office holder's remuneration and have been invited by a decision procedure on two occasions and no creditor has voted either in favour or against the resolution, then in those circumstances the resolution could be deemed to be passed.

Liquidation

PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

"Relevant Debts" – Sections 216 and 217 of the Insolvency Act 1986

Facts

Mr. France ran a company called Elusive Yachting Limited. In October 2015 they agreed to purchase a yacht known as Elusive from Discovery Yachts Group Limited (DYGL). Following the delivery of the yacht it became apparent that there were significant defects and further repairs required. Subsequently Mr. France and Elusive Yachting Limited issued proceedings in the Commercial Court against DYGL and its associated company Discovery Yacht Sales Limited (DYSL).

Mr. Langdon was a director of DYGL. Previously the company has been known as Trade Winds Marine Limited prior to the change of name on 21 April 2017. Another company, Discovery Yacht Limited (DYL), of which Mr. Langdon was a director up until 18 April 2017, was on 12 October 2017 placed into insolvent liquidation at which point Mr. Langdon was then in breach of **s216** of the **Insolvency Act 1986** (**IA1986**) and became personally responsible for the debts and liabilities of the Discovery Yacht Group companies.

The claim brought by Mr. France was due to be heard on 11 December 2019. On 5 December 2019 DYGL commenced administration proceedings and an administrator was appointed on 19 December 2019. At the trial the stay of claim imposed by the statutory moratorium was lifted and whilst proceedings were not defended, the Judge considered the relevant documentary evidence and gave judgment against DYGL in the sum of £262,957 plus interest of £22,867.67 plus costs of £283,000. Subsequently Mr. France and Elusive Yachting Limited assigned the claim to PSV. PSV's claim ultimately was for the amount awarded plus further repairs of £240,000 and costs of £600,000. The claim totalling £1,125,824. PSV then issued the claim against Mr. Langdon on the basis that pursuant to **s216** and **s217 IA1986** he was personally responsible for the debts and liabilities of DYGL and therefore claimed the total sum of £1,125,824 from him.

One of the preliminary issues was the question of whether the judgment in the Commercial Court against DYGL was sufficient to establish liability against Mr. Langdon personally for the purposes of **s217**. The point being that Mr. Langdon was not a party to the proceedings in which the judgment was obtained against the company and therefore had no opportunity to defend the claim.

A further issued concerned the timing of the entering into of the contract for the purchase of the boat (September 2017), the breach of that contract (January 2018), and the point at which Mr. Langdon became liable by reason of the insolvent liquidation of DYL (October 2017).

S216 applies to a person who has been a director of a company at any time in the 12 months prior to the company going into insolvent liquidation. Such a person is prohibited for five years from being a director of, or involved in the management of, a company with the same or a similar name. Breach of this prohibition is a criminal offence.

The prohibition does not apply if the Court gives permission, if the new company acquires the business of the insolvent company from a liquidator/administrator and notice is given to all the creditors of the insolvent company or if the new company has been actively carrying on business for 12 months before the insolvency of the old company (see **s216(3) Insolvency Act 1986** and **Rule 22** of the **Insolvency (England and Wales) Rules 2016**).

Mr. Langdon accepted that he was in breach of **s216** with effect from 12 October 2017 because:

1. He was a director of DYL until 18 April 2017.
2. DYL entered into insolvent liquidation on 12 October 2017.
3. At that time, he was a director of DYGL.
4. "Discovery Yachts" was a prohibited name within the meaning of **Section 216(2) Insolvency Act 1986.**
5. He did not obtain permission from the Court to act as a director of DYGL following the entry into liquidation of DYL and none of the exceptions in **Rule 22** of the **Insolvency (England and Wales) Rules 2016** apply.

S217 renders a person in breach of **s216** personally responsible for "all the relevant debts of a company"

"**217 Personal liability for debts, following contravention of s216.**

(1) A person is personally responsible for all the relevant debts of a company if at any time—

(a) in contravention of section 216, he is involved in the management of the company, or

(b)...

(2) Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.

(3) For the purposes of this section the relevant debts of a company are—

(a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are <u>incurred at a time when that person was involved in the management of the company</u>,…"

Decision

Once liability is established in proceedings against the company the defaulting director automatically becomes responsible for that liability. It is not necessary for the liability to be established in separate proceedings against the director.

On the question of possible injustice, it was noted that the defaulting director will by definition have had a close connection with the company and therefore is likely to be aware of any proceedings against the company. In those circumstances if sufficiently minded they could apply to be joined to those proceedings at that time. There is no need for the creditor having obtained a judgment against the company to have to litigate further to establish the same liability against the director where they are in default of **s.216 IA1986**.

On the question of when the liability was incurred, it was held that the cause of action only arose as a result of the breach of the contract in January 2018 and therefore this was the point at which the liability was incurred and are therefore within the scope of **s217 IA1986.** The liabilities were not incurred when the agreement was entered into with DYGL in September 2017.

Comment

- This case establishes that a party having obtained a judgment against a company in respect of what ultimately becomes a relevant debt does not have to re-establish a liability against the individual director for the purposes of **s217**.

- It does not follow that the reference in **s217** to the debts of the company should be limited to those debts which have been established in proceedings against the company.

- Finally, part of the application also included the argument that the liabilities may be established by reference to a Statement of Affairs signed by Mr. Langdon as a director of DYGL when the company was placed into administration. On this point the Court found that the fact that Mr. Langdon had signed a Statement of Affairs did not establish the liabilities for the purpose of **s217 IA1986**.

Liquidation

Standard Chartered Bank v Registrar of Companies [2021] EWHC 1566 (Ch)

Creditor's application to restore dissolved companies

Facts

The creditor in this case, Standard Chartered Bank issued four applications to restore three limited companies and one LLP all of which had entered into members' voluntary liquidation and had subsequently been dissolved. All four restoration entities had been under common control/ownership. The last recorded sole shareholder being a Cypriot company called Hansa Mercator Limited. ("Hansa Mercator"). Hansa Mercator was part of a business known as Amicorp. It was claimed that the directors of the restoration entities were also employees or otherwise linked to Hansa Mercator and or Amicorp.

The applicant claimed that the restoration entities had been used to launder the proceeds of a substantial fraud before being placed into members voluntary liquidation and dissolved. Standard Chartered Bank had, with others, issued letters of credit to secure repayment obligations of an Indian gold bullion trader and jewellery manufacturer known as Winsome. Winsome failed to comply with the repayment obligations and defaulted on US $774 million. This led to a call on the various standby letters of credit.

Steps taken to recover from Winsome identified few assets and left Standard Chartered Bank with a loss of in excess of US $70 million. It was claimed that the ultimate perpetrator and beneficiary of the fraud was a Mr. Mehta who was Winsome's first managing director and that subsequently Mr. Mehta and his associates had directed the laundering of its proceeds from Winsome through up to thirteen companies in the UAE.

The applicants had to satisfy the court that they were creditors pursuant to **s1029 (2)(f)** of the **Companies Act 2006**. In those circumstances the court only has to be satisfied that the applicants have a credible potential legal claim against each of the restoration entities. There is no need to test the claims as if at trial. For the applicant they merely have to show that the claim is not "merely shadowy".

The applicants relied on **s109(2)(i)** of the **Companies Act 2006** in that they are creditors of each of the restoration entities and also upon the general jurisdictional threshold that they are persons who appear to the court to have an interest in the matter. The test is that to satisfy the jurisdictional threshold the court must be satisfied that the applicants' claims are more than merely shadowy and instead have a real prospect of success. The applicants relied further on the terms of **s1031(1)** of the **Companies Act 2006** the courts power to order restoration of each entity on the ground that it is just to do so.

The court referred to the decision in **Re Infund LLP [2018] EWHC 1306 (Ch)** which set out the principles governing the exercise of the court's discretion to restore a dissolved entity to the Register. The principles being as follows:

> (1) If one or more of the gateways for restoration are satisfied, absent special circumstances restoration should follow. Exercising the discretion against restoration should be the exception, and not the rule.
>
> (2) The court must consider the interests of third parties who may be affected by the restoration but it should only take into account prejudice that is directly attributable to the restoration, rather than to any other circumstances.

(3) In deciding whether it is just to restore a dissolved entity to the Register, the court must have regard to all the circumstances of the case, and it is not limited to considering the position at a particular date. Relevant circumstances can include the basis for the removal of the entity from the Register, the reasons for restoration and all other intervening events. The weight to be given to any fact or matter is for the judge to decide.

The court further noted that the applications had been made within the six year period from date of dissolution. That time limit being in **s1030(4)** of the **Companies Act 2006**. If the court ordered the restoration of the companies and the liquidators accepted the claims of the applicant then the companies would move into creditors' voluntary liquidation. In those circumstances new liquidators had been identified to be appointed. Those new liquidators would then using their statutory information gathering powers trace the proceeds into companies further up the line.

The court considered Winsome's explanation for default which it was said was based on the default of the UAE distributor companies. The UAE distributor companies in turn claimed that they had defaulted on their obligations because of foreign exchange and commodity losses. The applicants claimed that there was no commercial rationale for the transactions between the UAE distributor companies and the four restoration entities because derivatives trading was wholly outside the normal course of business and payment flows went in one direction only. The restoration entities had passed on all funds to unknown entities leaving no visible trace. The applicants outlined their proposed causes of action against the four restoration entities these being said to be:

(a) breaches of constructive trust

(b) knowing receipt

(c) dishonest assistance

(d) unlawful means conspiracy

It was further argued for the applicant that the state of affairs gave rise to a constructive trust of monies advanced pursuant to the facility. Referring to the decision in **Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 (HL) at 716 C-D** that:

"*... when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity*."

The court were also referred to the case of **CMOC Sales & Marketing Limited v Persons Unknown [2018] EWHC 2230 (Comm)** which set out the law in relation to claims of breach of constructive trust, knowing receipt, dishonest assistance and unlawful means conspiracy, all in the context of a money laundering operation.

Decision

His Honour Judge Hodge QC held as follows:

The requirement that the claims have a real prospect of success is satisfied because the restoration entities cannot have received the monies in good conscience, given the nature of the restoration entities their business, and the circumstances in which the monies were received and then applied.

It would be just to restore each of the four entities to the Registrar of Companies and as such the orders would be made as requested.

Comment

- The procedural requirements in relation to the restoration of companies had been complied with and in particular the necessary consents from the Treasury Solicitor and from the Registrar of Companies had been obtained.

- The court noted that there is no formal requirement to notify the shareholders of a company in voluntary liquidation of the application. However, the recent case of **Fakhry v Pagden [2020] EWCA Civ 1207, [2021] BCC 46, at [80]** which involved significantly different circumstances, i.e, it was not an application brought by a creditor but involved the interests of members, the court said that on an application to restore to the Register a company and continue the members' voluntary liquidation

  > "*…..it was essential for the court to have considered whether and, if so, how the members should be consulted.*"

- In the current case the court did not consider it necessary for the views of members or members of the restoration entities to be consulted.

Voluntary Arrangement

Lazari Properties 2 Limited v New Look Retailers Limited [2021] EWHC 1209 (Ch)

Landlords challenge to New Look retail CVA

Facts

New Look Retailers Limited ("New Look") operate a retail clothing, footwear and accessories business with over 400 stores. New Look had suffered as a result of the COVID-19 pandemic. At the start of the pandemic, it ceased paying rent and service charge on many of its stores. By August 2020 it became clear that it could not continue to trade without a major restructuring of its liabilities. New Look therefore proposed as part of an overall restructuring a CVA with its creditors. A meeting of creditors took place on 15 September 2020 at which the CVA was approved by a majority of 81.6% by value of those attending and voting.

The terms of the CVA

The Proposal divided creditors into various categories which included separate categories for different landlords.

Category A comprised landlords of distribution centres which were deemed critical to the Company's operations. Category A landlords' rights remained unimpaired by the CVA save for a change in terms of timing of payment of rent from quarterly to monthly.

Category B landlords were properties where the costs were above market rent and the Company proposed to continue trading from those properties. The terms for Category B landlords were that rent arrears would be released in full, they would participate in a dilapidations allowance, and rent would now be a turnover rent payable in arrears. The landlords did however have an opportunity to terminate the lease.

The remaining categories of landlords were to be subject to varying terms providing for the release of arrears and varied rental terms. In all remaining categories the landlord was given the right to terminate the lease.

The Proposal provided that one key category of creditor the senior secured notes ("SSN") would be able to vote for the unsecured element of their claims which amounted to £273.4 million. The SSN creditors were also subject to provisions contained in the overall restructuring, which it was subsequently argued incentivised the SSN holders to vote in favour of the proposal.

Future Rent and Voluntary Arrangements

The landlords are creditors for the purpose of the voluntary arrangement in respect of the tenant's liability for rent falling due in the future. Such rents would not be provable in the liquidation; a landlord would be restricted to proving for instalments of rent as they fell due after the commencement of the liquidation. Notwithstanding this it is a pecuniary liability to which the Company may become subject by reason of the covenant to pay the rent in the existing lease. The question of future rent was considered in detail by Norris J in Debenhams (**Discovery (Northampton Limited) v Debenhams Retail Limited [2019] EWHC 2441 (Ch)** ("Debenhams")).

A landlord's claim for future rent is treated for voting purposes as unliquidated and unascertained. This means that pursuant to **Rule 15.31(3)** of the **IR 2016** the chairman will value the claim at £1 unless he decides to put a higher value on it. A CVA may compromise the claim of a landlord in respect of its right to future rent as was held in **Doorbar v Alltime Securities Ltd (No.2) [1995] BCC 728, at 738; Re Newlands (Seaford) Education Trust [2006] EWHC 1511 (Ch)**.

As to whether a CVA can compromise a claim for future rent whilst the Company continues in possession was considered in Debenhams in which it was held that it could.

On this last point the applicants in this case sought to argue against the decision in Debenhams.

The applicants' challenge to the CVA fell under three headings:

1. The Jurisdiction Challenge

a. It was not a composition in satisfaction of the Company's debts as on a true analysis it involved separate arrangements with different groups of creditors.

b. There was insufficient give and take between the Company and the differing creditor groups.

c. The new termination rights sought to improperly interfere with the property rights of the landlords.

2. The Material Irregularity Challenge

a. The way in which landlords' claims were calculated for voting purposes

b. Omissions or inaccuracies in the proposal

3. The Unfair Prejudice Challenge

a. The requisite majority of votes at the creditors meeting was secured with the votes of creditors who were unimpaired by the CVA.

b. Creditors whose claims were compromised were treated differently from others.

c. Modifications to the terms of the leases were unfair.

Decision

Mr. Justice Zacaroli held as follows:

1. Jurisdiction Challenge

On this it was held that a CVA may legitimately provide for payment of some creditors in full where that is commercially justified on business continuity grounds. This means that this cannot cause a CVA to fail the requirement for sufficient give and take. A CVA that provides for different treatment of different subgroups of creditors is not for that reason outside the jurisdictional scope of **s1(1)** or necessarily unfairly prejudicial.

2. Material irregularity Challenge

As to Material Irregularity, the court considered the question of the 25% discount applied to the claim of landlords for voting purposes. The starting point is **Rule 15.31(3)** which provides that an unliquidated or unascertained amount is to be valued at £1 unless the chair decides to put an estimated minimum value on it. The proposal contained a schedule detailing the formulae for calculating the claims of landlords for voting purposes. It was noted that no landlords had made any representations as to alternative methods of calculation. Therefore the 25% discount was found not to constitute a Material Irregularity.

3. The Unfair Prejudice Challenge

Is the arrangement unfairly prejudicial?

In considering this question the courts have developed two tests known as the vertical and horizontal comparators. A vertical comparator looks at the minimum return below which a CVA cannot go. That is a comparison with what a creditor's position would have been in the event that the CVA was not approved and typically would be that their position in a winding up. The horizontal comparator is a consideration of the position between creditors.

The mere fact that there is differential treatment between creditors does not however establish unfair prejudice.

The proposal is not necessarily unfairly unprejudicial by reason of the fact that the majority of the creditors voting in favour of the proposal was achieved by votes of unimpaired creditors or those who received substantially different treatment.

The applicants' objected to the reduction in rent and modifications to the leases including payment of rent in arrears and the release of keep open covenants. In particular the reduction of rent where there was no option to terminate could potentially be inherently unfairly prejudicial. The New Look proposal however provided that landlords had the ability to terminate in the event that they were not willing to accept the long-term reduction in rent.

Looking at the vertical comparator which is a liquidation, in those circumstances the leases would be disclaimed and a landlord would only receive a very small return. It will be difficult to find unfair prejudice in a CVA against that background where it compromised claims of landlords to future rent for a percentage return which although small was a better return than in liquidation.

The loss of future rent is not forced upon the landlords by the CVA, but is the consequence of the Company's insolvency.

On the differential treatment of the SSN Holders the applicants argued that they were wholly unimpaired by the CVA and therefore it was unfair as their votes had been used to obtain the approval of the proposal. It was found that whilst the SSN Holders were undoubtedly incentivised to vote in favour of the CVA the differences were not sufficient to find that the compromised landlords were unfairly prejudiced by reason of the SSN Holders votes securing the statutory majority at the meeting.

In conclusion the Jurisdictional Challenge, the Material Irregularity Challenge and the Unfair Prejudice Challenge were all rejected.

Comment

- This case, albeit involving different facts, follows the decision in **Debenhams**.

- It contains a useful and detailed analysis of the considerations that should be taken into account when formulating a proposal involving landlords.

- See decision in **Re Regis UK Limited [2021] EWHC 1294 (Ch)** which was heard by Mr. Justice Zacaroli. In that case the landlords brough similar challenges in respect of a

CVA which had long terminated. The challenges included claims of unfair prejudice and material irregularity. All of the landlords claims were rejected save in one instance involving the treatment of a particular creditor. Following that the Judge revoked the CVA but refused any relief against the nominee/supervisors.

Duffy v Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch)

Chronology

17/01/2019	Administrators appointed by QFC
Nov/2020	Court orders extension of administration to 17 January 2022
Jan/2021	Administrators aware of existence of secured creditors with liens
16/01/2021	Administration extended to this date by creditors
12/02/2021	Application for retrospective administration order
17/01/2022	Administration order extended to this date by order of court

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Duffy v Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch)

- Administration purportedly extended by creditors
- Discovery of secured creditors with liens
- Consent of all secured creditors required by Para 76 Sch. B1
- Failure to obtain consent of all secured creditors – effect on administration order
- Application for retrospective administration order

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Duffy v Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch)

Decision

- Only one retrospective order would be permitted
- Retrospective administration order can only take effect up to 364 days earlier
- Administrators' locus to apply for retrospective administration order as creditors
- Retrospective administration order granted to take effect 364 days earlier

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Hyde & Ors (Joint Administrators of BetIndex Limited) [2021] EWHC 1542 (Ch)

- Administrators sought directions as to distribution of client monies of £4.5m
- At what date should the distribution be calculated, the administration order or the expiry of three year period for shares?
- The terms of the Trust Deed

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Hyde & Ors (Joint Administrators of BetIndex Limited) [2021] EWHC 1542 (Ch)

Decision

- Customers to be paid where there is an "Insolvency Event"
- Customers should be paid their entitlement as at the date of the administration order
- Payment to be made as soon as practicably possible
- Any surplus in the client account would be returned to the company

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Hyde & Ors (Joint Administrators of BetIndex Limited) [2021] EWHC 1542 (Ch)

Decision

- Administrators' claim for costs to be paid pursuant to Berkeley Applegate
- Administrators claim for payment under Berkeley Applegate principle similar to liquidators
- Adminstrators would be entitled to their costs being paid out of the trust assets pursuant to Berkeley Applegate

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Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

Chronology

03/11/2020	Purported Notice of NOITA
16/11/2020	Purported service of NOITA
16/11/2020	Default and Demand Letter
27/11/2020	NOITA
07/12/2020	Receivers appointed by STS
10/12/2020	NOITA
21/12/2020	Service accepted and disclosure of 2nd NOITA (10/12/20)
13/01/2021	Receivers application issued

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Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

- Receivers application to declare appointment valid
- Requirements of Para 26 Sch.B1 IA1986
- NOITA's not served on QFC

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Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

- Para 44 Sch.B1 interim moratorium
- JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2018] 1WLR 24
- Intention to appoint administrator conditional on a CVA not valid

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Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

Decision

- Failure to give notice to QFC of NOITA's an abuse of process
- Company giving notice must have settled intention to appoint administrators – no such intention

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Security Trustee Services Limited v Seabrook Road Limited [2021] EWHC 436 (Ch)

Decision

- Lack of necessary intention meant no valid notice had been given under Para 26
- No interim moratorium came into effect
- Appointment of receivers valid

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Wessely v Zoom UK Distribution Ltd (in administration) [2021] EWHC 800 (Ch)

- Court appointment of administrators by directors
- Failure to give notice to QFC – as Para 26 Sch.B1

Administrators' Applications

1. Declaration that appointment valid
2. Application for Retrospective Administration Order

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Wessely v Zoom UK Distribution Ltd (in administration) [2021] EWHC 800 (Ch)

Question

- What were the consequences of failure to comply with Para 26(1)(b) Schedule B1 IA1986?
- Re Tokenhouse VB Ltd (formerly VAT Bridge 7 Ltd) [2021] BCC 107

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Wessely v Zoom UK Distribution Ltd (in administration) [2021] EWHC 800 (Ch)

Decision

- Following Tokenhouse breach of Para 26 did not render appointment void – breach of Para 26 (1)(b) not fundamental and caused no injustice
- Para 104 Sch. B1

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Wessely v Zoom UK Distribution Ltd (in administration) [2021] EWHC 800 (Ch)

Decision

- Rule 12.64
- Breach not fundamental actions of administrators declared valid
- Directors ordered to bear costs

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Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Chronology

23/03/2013	HMRC present petition
19/07/2013	Cheque from bankrupt to ART
25/07/2013	Bank transfer by ART to De Walden for £30,807
07/08/2013	Cheque from bankrupt to De Walden for £25,199
14/08/2013	Cheque clears to Aurora for £27,972
16/08/2013	Cheque by bankrupt to De Walden for £25,000
18/10/2013	Bankruptcy order
24/12/2013	Trustee appointed

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Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Trustees application under S284 against Aurora and De Walden

S284(4) IA1986

"The preceding provisions of this section do not give a remedy against any person-

(a) In respect of any property or payment which he received before the commencement of the bankruptcy in good faith, <u>for value</u> and without notice that the bankruptcy application had been made or (as the case may be) that the bankruptcy petition had been presented.........."

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Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Issues:

1. Was ART acting as agent of the bankrupt in receiving cheque for £30,807?

2. Did Aurora and De Walden receive the payment "for value"?

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Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Decision

- ART in receiving the payment was acting as agent for the bankrupt
- Value = the value that retains a presence in the bankruptcy estate

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Edwards v Aurora Leasing Limited [2021] EWHC 96 (Ch)

Decision

- No requirement that value must be received by the estate rather than a third party
- It could be assumed that the bankrupt's estate did receive the benefit of the payments
- The trustee's claims against Aurora and De Walden under s284 were dismissed

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HMRC v Sanders [2021] EWHC 1843 (Ch)

- Appeal by HMRC against rejection of proof by trustee in the sum of £5,667,888
- Debtor received tax repayment of £5,042,837
- HMRC investigation concluded repayment was wrong

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HMRC v Sanders [2021] EWHC 1843 (Ch)

- Debtor dies and trustee appointed following Order under the Administration of Insolvent Estates of Deceased Persons Order 1986
- HMRC submit proof of debt £5,677.788
- Trustee rejects proof of debt

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HMRC v Sanders [2021] EWHC 1843 (Ch)

- HMRC appeal under Rule 14.8(1) Insolvency (England and Wales) Rules 2016
- Rejection of proof based on technical point and leading Counsel's advice
- HMRC also relied on s114 Taxes Management Act 1970

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HMRC v Sanders [2021] EWHC 1843 (Ch)

Decision

- Closure Notice did comply with statutory provisions proof allowed in full
- Possible windfall to beneficiaries
- S114 TMA 1970 applied if rejection upheld
- Rule in Ex Parte James applied

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Jackson v Ayles and Pumphrey [2021] EWHC 995 (Ch)

- Trustee's application for an order for possession and sale of matrimonial home subject to charge in favour of Mr. Pumphrey
- Trustee's challenge to loan under Financial Services and Markets Act 2000

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Jackson v Ayles and Pumphrey [2021] EWHC 995 (Ch)

- S26(1) FSMA- activity carrying on regulated activity in contravention is unenforceable against other party
- S28 FSMA in considering whether just and equitable to allow enforcement did person carrying on regulated activity reasonably believe they were not contravening the general prohibition?

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Jackson v Ayles and Pumphrey [2021] EWHC 995 (Ch)

- Mr. Pumphrey contended that the lending was not carried on "by way of a business" and therefore not regulated
- Factors indicating carrying on "by way of business"

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Jackson v Ayles and Pumphrey [2021] EWHC 995 (Ch)

Decision

- Mr. Pumphrey "commercial to the core"
- His lending activity was carried on "by way of business"
- The loan was unenforceable under s26 FSMA
- Charge was set aside

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Lyle v Bedborough [2021] BPIR 581

- Trustees' claims under s339 and s423 IA1986
- Matrimonial home registered in joint names – no Declaration of Trust
- 2008 Agreement – oral agreement
- 2012 Declaration – written Declaration of Trust
- Equitable account

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Lyle v Bedborough [2021] BPIR 581

Decision

- 2008 Agreement oral discussions of no legal effect
- 2012 Declaration – set aside as a transaction at an undervalue under s339
- Order to provide for repayment of £20,000 to W
- Claim for equitable account rejected

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31

Murphy and Hyde v Munir & Ors. [2021] BPIR 615

Declarations of Trust

- 2007 Deed
- 2008 Deed
- 2010 Deed
- Trustees in bankruptcy issue application claiming declarations of trust were a sham and/or transactions at an undervalue under s339 and s423 IA1986

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32

Murphy and Hyde v Munir & Ors. [2021] BPIR 615

- Mr. Chughtai and partners application - Stradbroke Drive
- Chughtai and partner claimed occupation
- Chughtai's alleged contributions in cash

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Murphy and Hyde v Munir & Ors. [2021] BPIR 615

- Constructive Trust
- Resulting Trust
- The Deeds - sham

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Murphy and Hyde v Munir & Ors. [2021] BPIR 615

Decision

- Mr. Chughtai was not found to have made any contribution to the purchase of Stradbroke Drive
- The 2008 Deed did not reflect existing trust – "a rainy day trust instrument"
- 2007 and 2008 Deeds held to be a sham

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Murphy and Hyde v Munir & Ors. [2021] BPIR 615

Decision

- 2010 Deed held to be a sham but would have been a transaction at an undervalue under s339 and s423
- Mr. Chughtai claim to be in occupation was not upheld and therefore no overriding interest re charge

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36

Darty Holdings SAS v Carton-Kelly [2021] EWHC 1018 (Ch)

- Sale of shares in the company
- Sale and Purchase Agreement (SPA)
- Completion Agreement (CA)

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37

Darty Holdings SAS v Carton-Kelly [2021] EWHC 1018 (Ch)

- Liquidated payments made by company of £115m
- Payments made between six months and two years
- Repayment of intercompany debts

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38

Darty Holdings SAS v Carton-Kelly [2021] EWHC 1018 (Ch)

Question:

- Was the recipient connected for the purposes of s240(1)(a) IA1986?
- S249 & s435 IA1986
- Completion and timing of payments

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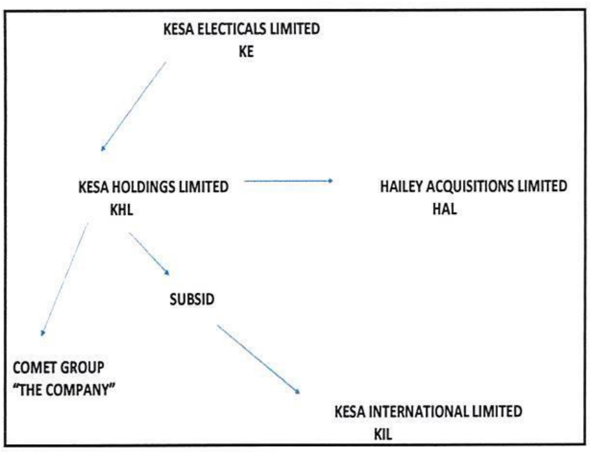

40

Darty Holdings SAS v Carton-Kelly [2021] EWHC 1018 (Ch)

Decision

- The payments were made before the transfer of shares was completed
- Parties were therefore connected for the purposes of s240(1)(a) IA1986
- The payments were preferential
- Appeal dismissed

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Manolete Partners Plc v Hayward and Barrett Holdings Limited [2021] EWHC 1481 (Ch)

- Liquidator assigns various claims to Manolete
- Transactional avoidance claims

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Manolete Partners Plc v Hayward and Barrett Holdings Limited [2021] EWHC 1481 (Ch)

- Blackwater claims
- Claims issued using Insolvency Application Notice Form 1AA
- Respondents argue Blackwater claims require Part 7 CPR

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43

Manolete Partners Plc v Hayward and Barrett Holdings Limited [2021] EWHC 1481 (Ch)

Decision

- Transaction avoidance claims can be pursued by assignee using insolvency application
- Assignee of claims cannot use insolvency application notice for s.212
- Blackwater claims must be commenced under Part 7

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44

Manolete Partners Plc v Hayward and Barrett Holdings Limited [2021] EWHC 1481 (Ch)

Decision

- Claims under s.423 also require Part 7 claim form
- Failure to use Part 7 did not invalidate proceedings
- Applicant ordered to pay Part 7 issue fee

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Microcredit Ltd v Rosler [2021] EWHC 1627 (Ch)

- Liquidator issues terminal loss relief claim resulting in payment of £110,000 to the company
- Following loss of FCA licence company transferred its loan book
- Liquidation investigating claims in respect of loan book and other matters

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46

Microcredit Ltd v Rosler [2021] EWHC 1627 (Ch)

- Liquidator's application against related company concerning the loan book and other matters
- The Applicant applied for an order to invoke decision procedure to consider removal of the liquidator
- The Applicant claimed to be the holder of su8bstantially all of the creditors' claims
- HMRC submitted a claim for £2,595,337

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Microcredit Ltd v Rosler [2021] EWHC 1627 (Ch)

- Liquidator invited to appeal assessments but received Counsel's advice against
- Alleged liquidator stirred up claims to obtain approval of his remuneration
- S172(2) & S108(2) IA1986 power to remove liquidator
- Grounds for removal of liquidator

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48

Microcredit Ltd v Rosler [2021] EWHC 1627 (Ch)

Decision

- No order directing a decision making process for liquidator's removal
- Encouragement of creditors to claim and appearance of bias not sufficient to justify removal of liquidator
- Conflict liquidator would be appointed for the purpose of determining whether or not to appeal HMRC assessment

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PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

- Discovery Yachts Group Limited (DYGL)

  L director from September 2017 onwards
- Discovery Yachts Sales Limited (DYSL)
- Discovery Yachts Limited (DYL)

  L director up to 18 April 2017

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PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

- 12 October 2017 DYL insolvent liquidation
- 11 December 2019 DYGL administration (subsequently in liquidation)
- Creditor obtains judgment against DYGL

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PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

- L in breach of s216 because
  - L director of DYL until 18 April 2017
  - DYL insolvent liquidation 12 October 2017
  - At time L director of DYGL
  - "Discovery Yachts" = prohibited name
  - No permission obtained by L to act as director of DYGL

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PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

S217 IA1986

- **Personal liability for "relevant debts of a company"**
- **Liability if contravene s216 and involved in management of the company**

Relevant Debts

- **Debts and liabilities of the company as are incurred at a time when person involved in management of company**

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PSV 1982 Limited v Langdon [2021] EWHC 2475 (Ch)

Decision

- **Once judgment obtained against the company – no need to establish liability of director separately**
- **Liability incurred at date of breach of contract i.e, January 2018**
- **The mere signing of a Statement of Affairs by the director did not establish liability for the purpose of s217**

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Standard Chartered Bank v Registrar of Companies [2021] EWHC 1566 (Ch)

- **Standard Chartered Bank as a creditor applied to restore companies**
- **Standard Chartered Bank's loss in excess of US $70m from alleged fraud**
- **Have to satisfy s1029(2)(f) Companies Act 2006 of potential legal claim**

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Standard Chartered Bank v Registrar of Companies [2021] EWHC 1566 (Ch)

- Applicant must show claim is not "merely shadowy"
- Applicant also to satisfy general jurisdictional threshold
- Claims have a real prospect of success

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Standard Chartered Bank v Registrar of Companies [2021] EWHC 1566 (Ch)

The Claims

(a) breaches of constructive trust

(b) knowing receipt

(c) dishonest assistance

(d) unlawful means conspiracy

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Standard Chartered Bank v Registrar of Companies [2021] EWHC 1566 (Ch)

Decision

- Claims have a real prospect of success
- The four restoration entities would be restored
- In current case Court did not consider it necessary for the views of members to be canvassed
- However see Fakhry v Pagden [2020] EWCA Civ 1207

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Lazari Properties 2 Limited v New Look Retailers Limited [2021] EWHC 1209 (Ch)

CVA features

- Different categories of landlords
- Categories of landlords treated differently
- Release of rent arrears
- Participation in dilapidations allowed
- Turnover rents
- All landlords had right to terminate lease
- Future rents compromised

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Lazari Properties 2 Limited v New Look Retailers Limited [2021] EWHC 1209 (Ch)

Landlords' Challenges

- Jurisdiction Challenge
- Material Irregularity Challenge
- Unfair Prejudice Challenge

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60

Lazari Properties 2 Limited v New Look Retailers Limited [2021] EWHC 1209 (Ch)

Decision

Jurisdiction Challenge

➤ Different treatment of creditors did not take CVA out of s.1(1)

Material Irregularity Challenge

➤ The discounts applied and calculation of landlords claims for voting upheld and did not constitute material irregularity

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61

Lazari Properties 2 Limited v New Look Retailers Limited [2021] EWHC 1209 (Ch)

Decision

Unfair Prejudice Challenge

- The approval using votes of unimpaired creditors was not unfairly prejudicial
- Modifications to terms of leases were not unfairly prejudicial
- Landlords claims rejected

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