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Insolvency Legal Update 2023

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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.

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Administration

Re Avanti Communications Ltd (in administration) [2023] EWHC 940 (Ch)

Sale assets - subject to fixed or floating charges?

This was an application by administrators for directions pursuant to **paragraph 63 of schedule B1** of the **Insolvency Act 1986 (“the 1986 Act”)** for a determination of whether certain assets which had been sold by Avanti Communications Limited (in administration) (“the Company”) were secured by fixed or floating charges.

Facts

The joint administrators were appointed administrators of the Company on 13th April 2022 under **paragraph 22 of schedule B1** of the **1986 Act**. The outcome of the application would determine what is payable and what has been paid to creditors. Whilst the administrators took a neutral stance, the secured creditors submitted that the relevant assets were secured by fixed charges at the time of their disposal.

The relevant assets included satellite payloads, network and ground station facilities including spares, electronic equipment, satellite network filings and ground station licences. Between March and April 2022 transactions took place for the sale of the relevant assets in return for intercompany loan instruments. As part of the sales the administrators put in place a secured administration funding agreement which was designed to protect the position of preferential and unsecured creditors in circumstances where some or all of the relevant assets were determined to have been secured by floating charges at the time of the transactions. The transactions having been made on the basis that the relevant assets were subject to fixed charge securities.

At the time of the transactions the Company had borrowings of approximately $825.6 million pursuant to a raft of financing agreements and securities. The key securities that were in question were two debentures dated 3rd October 2013 and 26th January 2017, which were in the same material terms.

Looking at the 2017 debenture it was stated to charge *“assets, both present and future from time to time owned by it or in which it has an interest”*, *“by way of first fixed charge”,* and was wide enough to cover all the relevant assets. The debenture also contained a negative pledge whereby the Company agreed not to create any other security over the charged assets without consent.

The debenture contained provisions for the release of the security in specified circumstances only. It also contained a series of exceptions. Those exceptions were referred to as the Limited Value Exception where the transaction was less than $2 million, the Capacity Exception, the Obsolete Exception, the Usefulness Exception and the Licence Exception.

The Characterisation issue

The determination of whether the assets sold were subject to fixed or floating charges was referred to as the Characterisation issue. As to whether the assets were subject to fixed or floating charges depends on the nature of the security when it was created, unless there has been some change since i.e. by crystallisation or release, which in this case did not apply.

Determination of whether a charge is fixed or floating requires a two-stage enquiry. This was set out by Lord Millett in **Agnew V Commissioners of Inland Revenue [2001] UKPC 28,** in which he stated;

> *"At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. The object at this stage of the process is not to discover whether the parties intended to create a fixed or floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. …….. So here: in construing a debenture to see whether it creates a fixed or floating charge, the only intention which is relevant is the intention that the company should be free to deal with the charged assets and withdraw them from the security without the consent of the holder of the charge; or, to put the question another way, whether the charged assets were intended to be under the control of the company or the charge holder."*

The general approach at the First and Second stage was summarised in **Lightman & Moss the Law of Administrators and Receivers of Companies (sixth edition) at 3-021** where it was stated;

> *"Any unfettered or significant commercial freedom in the chargor to deal with a fluctuating class of assets without the consent of the chargee will be inconsistent with the existence of a fixed charge over those assets. The critical issue is the nature and extent of the chargee's control of the assets in question."*

In considering the authorities and what constitutes a fixed or floating charge it was noted that the nature of the assets in question must also be taken into account. In particular a distinction is often drawn between a chargor's circulating capital and its non-circulating capital. **In Arthur D Little Ltd (in administration) v Ableco Finance LLC [2002] EWHC 701 (Ch)** Roger Kaye QC stated;

> *"It is a striking feature of all the relevant cases to which I was referred that a charge over what was regarded as the company's circulating capital was inconsistent with a fixed charge."*

First Stage

The first question was whether the relevant assets were within the scope of the charging clause in the 2017 debenture, to which the answer was yes. The second question was, what was the nature of the contractual restrictions and permissions on the disposal of the relevant assets under the security documents. The relevant assets were all subject to considerable restrictions upon their disposal subject to certain exceptions. Having considered each of those exceptions it was noted that none of the exceptions applied to the transactions in question.

Second stage

Having established the parties respective rights and obligations under the First stage it is then necessary to consider whether as a matter of law those rights are consistent with fixed or floating charge security.

The critical question in the Second stage is the question of control. Here reference was made to **Goode and Gullifer** on **Legal Problems of Credit and Security (seventh edition)** at **4-23** in which it was stated;

> *"Thus only total prohibition of all dealings and withdrawals without permission is enough to create a fixed charge."*

Commenting on this Mr Justice Edwin Johnson said that the textbooks suggest that the law may have reached the point where a charge can only be characterised as fixed where there is a total restriction on any disposal of the charged assets by the chargor or without the consent of the chargee. If correct, then the 2017 debenture could not have created a fixed charge over the relevant assets because it permitted certain dealings with the relevant assets. Having reviewed the authorities, Mr Justice Edwin Johnson took the view that the case law supported a more nuanced approach which depended on a combination of factors.

Decision

The charge created by the 2017 debenture over relevant assets was not necessarily a floating charge simply because the company had some ability to deal with the relevant assets.

The restrictions did not impose a total restriction on the company dealing with the relevant assets. The ability of the company to deal with the relevant assets was however strictly limited.

There was no opportunity for the company to dispose of the relevant assets or any of them in the ordinary course of its business.

The scheme of restrictions on disposal of the relevant assets gave the chargee very significant control over the relevant assets.

The relevant assets did not constitute anything resembling the circulating capital or fluctuating assets of the company.

The relevant assets could perfectly well have been the subject of a fixed charge.

Both the 2013 and 2017 debentures took effect as fixed charges when created and remained fixed charges at the time of the transactions.

Comment

- This case confirms that in determining whether a charge is fixed or floating it is not a question of looking for a total prohibition. Instead, it should be looked at as a range of possibilities as to total freedom at one end of the spectrum and a total prohibition at the other. A charge can be either fixed or floating and yet not be at either end of the spectrum.

- Despite having detailed legal advice, the administrators took steps to protect the position of creditors in the event that the charges were later found to be floating in nature.

Administration

Re Scentrics Information Security Technologies Ltd (in administration) [2023] EWHC 522 (Ch)

Claim that Administrators' appointment was invalid.

This was an application brought by Mr Chandrasekaran ("the Applicant") claiming that the appointment of administrators to Scentrics Information Security Technologies Limited ("Scentrics") was void and of no effect.

Facts

Scentrics was incorporated on 19 March 2008 and had been founded by the applicant who was a mathematician and computer scientist. Scentrics had been developing a mass security and privacy platform. The majority of the Scentrics's shares were held indirectly by Epona Trustees Ltd ("Epona"). Epona was the trustee of the Applicant's family trust.

On 8 June 2012 Epona entered into a loan agreement with Scentrics for £460,590 secured by debenture which included a fixed and floating charge ("the Debenture").

The Debenture contained a power to appoint an administrator if the Debenture became enforceable. On 20 July 2014 Mr Taylor entered into a loan agreement ("2014 Loan") by which he lent to Epona £1.33 million. On the same day Epona assigned to Mr Taylor the Scentrics loan the Debenture and other securities.

Mr Taylor died on 8 June 2020 and probate was granted to his executors on 15 October 2020. Epona having defaulted in repayment of the sums due under the 2014 Loan, the executors demanded repayment. Payment having not been made a Notice of Appointment of Administrators dated 22 November 2020 detailed "*Mr Ian Taylor acting by his executors*" as the "*appointer*".

The dispute

The Applicant claimed that the appointment of the administrators was invalid on two grounds. The first ground of alleged invalidity relied on the terms of a negative pledge clause which stated that Scentrics:

> "shall not repay or prepay the Scentrics Loan Agreement until Epona Trustees Limited has repaid the loan made to it by Ian Taylor under the [2014 loan]".

The Applicant's position being that Scentrics was prevented from repaying the Scentrics loan and as such the Debenture never became enforceable as the underlying loans secured were not repayable unless and until the 2014 Loan itself had been fully discharged.

The second ground of alleged invalidity related to the Notice of Appointment itself in that the statutory declaration wrongly identified the appointer and holder of the relevant qualifying floating charge as Ian Taylor. Mr Taylor had died by the time of the purported appointment of the administrators.

Ground 1

In considering the security documents it was noted that the Scentrics loan agreement was already in default as the repayment date had passed. Secondly, there was an Event of Default which meant that the Debenture was immediately enforceable, Mr Taylor being entitled to enforce the security if the 2014 Loan had not been paid on its due date which it had not.

As to the negative pledge agreement, it made no sense to place an obstacle in the form of a requirement for written waiver in the way of immediate recourse to the relevant security in the event of default under 2014 Loan. On this ground the Judge was unable to accept the Applicants contention that the Debenture was unenforceable.

Ground 2

The Applicant claimed that the Notice of Appointment was not merely formally irregular but was fundamentally defective and therefore a nullity.

Paragraph 18 of **Schedule B1** provides that:

(1) A person who appoints an administrator of a company under paragraph 15 shall file with the court-

(a) a notice of appointment; and

(b) such other documents as may be prescribed.

(2) The notice of appointment must include a statutory declaration by or behalf of the person who makes the appointment-

(a) that the person is the holder of a qualifying floating charge in respect of the company's property,

(b) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and

(c) that the appointment is in accordance with this Schedule.

Rule 3.171(f) of the **Insolvency Rules 2016** also provides that a notice of appointment under **paragraph 14** of **Schedule B1** must contain:

> "a statement that the appointer is the holder of the qualifying floating charge in question and that it is now enforceable."

The Notice of Appointment defines the appointer as;

> "Mr Taylor, acting by his executors."

Paragraph 3 of the Notice of Appointment says;

> "The appointer is the holder of a qualifying floating charge that is now enforceable. The qualifying floating charge is dated 8 June 2012 and registered on 27 June 2012, and was assigned by Epona Trustees Ltd to the appointer by way of security assignment dated 28 July 2014."

Finally, the statutory declaration is signed by;

> "John Riches an authorised representative and an executor of the estate of Ian Taylor"

And he:

> "solemnly and sincerely declares that the appointer is the holder of a qualifying floating charge in respect of the company's property."

The Applicant claimed that the Notice of Appointment defined the holder of the Debenture as Mr Taylor. Mr Taylor was not however the holder of the qualifying floating charge in respect of Scentrics and nor could he have been the appointer as he had died.

In support of the Applicants claim reference was made to **Re Skegg's Beef Limited [2020] BCC 43** in which it was explained that defective out of court appointments of administrators can be divided into three categories;

(a) cases where the defect is fundamental, with the consequence that the purported administration appointment is a nullity

(b) cases where the defect is not fundamental and causes no substantial injustice, in which case, the administration proceedings will not be invalidated by the defect; and

(c) cases where the defect is not fundamental but substantial injustice is caused, in which case, the court must consider whether the substantial injustice can be remedied by an order of the court and if so, whether it would be appropriate to make a remedial order.

The Applicant complained that the defect in the statutory declaration and the Notice of Appointment was a defect of the first category.

The Applicant further relied on the case of **Secure Mortgage Corporation v Harold [2020] EWHC 1364 (Ch)** in which the statutory declaration was signed by Mr Tierney denoting the appointer and holder of the floating charge as *"the Estate of the late Mr Peter Nolan"* even though the estate was not a person and the executors were not named or identified. In that case the court noted that paragraph 19 provides that no such appointment takes effect until the requirements are satisfied. Where the right of appointment was vested in a person who died it was all the more important in the absence of a Grant of representation, to identify the person or persons who made the appointment. In that case the appointment was held to be a nullity.

Decision

Having already rejected ground 1 of the Applicant's case, the court considered ground 2 and the alleged defects in the Notice of Appointment.

Mr Justice Richard Smith said it was quite clear that the reference in the Notice to Mr Taylor as the appointer of the administrators was erroneous. Mr Taylor could not have been the appointer as he had died. Neither did he hold a qualifying floating charge. The rights to the qualifying floating charge had vested in Mr Taylor's executors upon his death.

Nor were the executors acting on Mr Taylor's behalf. There was no agency for Mr Taylor or his estate. The executors acted in their own right in their capacity as executors of Mr Taylor's will from which their authority to appoint administrators arose.

Notwithstanding the errors in the Notice of Appointment, the appointment was nevertheless compliant with **paragraph 18** of **Schedule B1**

The Judge stated that even if he was wrong on this point he would still have found the defects relied upon by the Applicant were in the nature of a procedural irregularity and not so fundamental as to give rise to a nullity. As procedural irregularities they would have been capable of waiver under **rule 12.64** of the **Insolvency Rules 2016** and in such a case he would have waived them.

Comment

- This is yet another case concerning defects and invalidity in the appointment of administrators.

- Where it is proposed to appoint administrators on behalf of a deceased's estate this case follows on from the decision in **Secure Mortgage Corporation Ltd v Harold** and provides more detailed guidance on how the Notice of Appointment should be completed.

- After the decision in this case had been given, there was a discussion concerning whether or not to order the disclosure of the identity of the Applicant's third-party funder. As there was no application for a third party costs order before the court the position was that the Respondents would be left to decide whether or not to seek an order disclosing the identity of the funder.

Bankruptcy

Allen v Derev [2023] EWHC 387 (Ch)

Possession and sale application under foreign bankruptcy order

Following the making of a bankruptcy order against Mr Derev in Russia, the bankruptcy order was recognised in this jurisdiction on 1st December 2020 by an order made pursuant to the **Cross-Border Insolvency Regulations 2006 (CBIR)** and the **UNCITRAL Model Law on Cross-Border Insolvency (Schedule 1 to the CBIR)**.

Mr Allen was recognised as a designated person pursuant to **Article 21(1)(e)** of the **CBIR** by virtue of an appointment order made on 24th February 2021. That order gave Mr Allen all the powers of a trustee in bankruptcy under the laws of England and Wales to realise assets of the bankruptcy estate.

Background

Mr Derev was declared bankrupt in the Russian Federation on 22nd July 2019. Mr Protasov was appointed as Mr Derev's Russian bankruptcy manager.

Mr Derev was the joint legal owner of a property known as Flat 5,14 Montpelier Street, London SW7 1EZ ("the Property") which was registered in the name of Mr Derev and his wife Mrs Dereva. The Property was valued between £11 million and £11.5million.

Mr Allen issued an application for a declaration as to the beneficial interests in relation to the Property and for an order for possession sale.

Prior to issuing the application for an order for possession sale, Mr Derev had accepted that he and his wife were joint beneficial owners. Subsequently in evidence Mr Derev claimed that he had gifted all his property and assets outside of Russia to his wife and children. He explained that his earlier assertion in a previous witness statement that the Property was owned jointly was his understanding "*that the UK law worked that way".*

Mrs Dereva was also made bankrupt in Russia on 28thJune 2021. Her Russian trustee in bankruptcy supported Mr Allen's application for an order for possession and sale. It was said that an application would be made shortly to recognise Mrs Dereva's bankruptcy in England and Wales.

A request for an adjournment of the hearing was refused which meant that neither Mr Derev or Mrs Dereva were present at the hearing. Notwithstanding the fact that neither were available to be cross-examined on their witness statements, their statements were included.

The position of Mr Allen

The order appointing Mr Allen stated that;

> *"Mr Allen shall be entitled to exercise such powers of an insolvency officeholder and/or trustee in bankruptcy under the laws of England and Wales as are reasonably necessary (i) to get in and realise the Debtor's assets located in Great Britain…"*

For Mr Allen it was said that he could rely upon the same rights and legal consequences as would have arisen had the bankruptcy order been made in this jurisdiction. He relied upon the decision in **Re Olusoji Samson Tomoye [2020] EWHC 1965 (Civ).**

In that case a US appointed bankruptcy trustee obtained a recognition order pursuant to CBIR on 16 January 2020. The US bankruptcy had commenced on 20 July 2018. One issue before the Judge was the effect of the recognition order on the bankrupt's legal and beneficial interest in a flat in London. In that case the Judge held that the US trustee could rely in this jurisdiction on the "remedies" under the Insolvency Act 1986 as though the bankruptcy was an English bankruptcy. That included **section 284** of the **Insolvency Act 1986 ("IA86")** and also applied **section 306** of **IA86** so that the estate will vest in the trustee in bankruptcy on the date of the bankruptcy order.

Deputy ICC Judge Agnello KC agreed that Mr Allen could rely on the decision in **Re Tomoye** but questioned whether the Property was actually vested in Mr Allen by the terms of **CBIR** as Mr Allen is not a foreign insolvency officeholder, preferring that any issues concerning **section 306** could be dealt with in the terms of the order.

Beneficial interest

The application was made under **section 14** of the **Trusts of Land and Appointment of Trustees Act 1996**. As one year since the making of the bankruptcy order had already passed **section 335A** of **IA86** applied. In the absence of exceptional circumstances, the interests of creditors will outweigh all other considerations. From the evidence there were no exceptional circumstances.

The formalities for the creation of a trust of land are that it must be evidenced in writing pursuant to **section 53** of the **Law of Property Act 1925**. In the absence of a declaration of trust, there is a presumption that the beneficial ownership follows the legal title. The burden is upon those who seek to displace the presumption to establish why it should be displaced **(Stack v Dowden [2007] AC 776**). In cases such as the present where there is no express declaration of trust, counsel for Mr Allen set out what a person needs to establish in order to displace the presumption as follows;

1) Does the case fall within the domestic consumer context such that the common intention doctrine applies?

2) Is there evidence of an actual common intention, in the form of an agreement arrangement or understanding between the parties that the beneficial ownership should not follow the legal ownership, either at the date when the property was first acquired or at some later date?

3) In the absence of such a common intention, can an agreement, arrangement or understanding to this effect be inferred from the parties' conduct?

4) Has the claimant relied to her detriment on the common intention relied upon?

5) Is there 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?

A common intention constructive trust is defined in **Lewin** at (paragraph 10 – 53) as being where the purchaser of property shares a common intention with the claimant that the claimant is to have a share, or an increased share, in the beneficial interest in the property either at the time of acquisition or at a later date and the claimant acts to her detriment upon the basis of the common intention. Equity will impose a constructive trust so as to give effect to the common intention constructive trust.

The court also considered the Supreme Court case of **Guest v Guest [2022] UKSC 27** which set out the principles relating to proprietary estoppel. In short, a claimant is required to establish a promise which has been relied upon by the claimant to his or her detriment.

Having identified the relevant principles the court then considered the evidence to establish that the Property was a gift to Mrs Dereva such that she had the entire beneficial interest in the Property. There were no contemporaneous documents. Mr Allen did obtain the solicitors file from which he said that his team had found nothing to suggest that the beneficial ownership was other than following the legal title. The Judge noted that no details of the members of the team's experience was given which might enable them to identify the relevant common intention or estoppel.

In earlier proceedings for a freezing order against Mr Derev he had in his witness statement stated that the Property was owned jointly with his wife Mrs Dereva. In correspondence Mr Derev had written to Mr Allen stating on more than one occasion that his wife had a 50% interest. Mr Derev's explanation was that his earlier contradictory statements were his understanding of that's how UK law worked made little sense. Mrs Dereva in her evidence repeated her claims that she thought her husband had given her all his property and assets.

Decision

Deputy ICC Judge Agnello KC held as follows;

The documentation that had been produced by Mr Derev and Mrs Dereva fell very far short of displacing the presumption that the Property was held in joint equal shares by them.

Mr Derev's explanation as to why his witness statement in the freezing injunction proceedings declared the beneficial ownership as 50-50 was simply not believable.

Mrs Dereva had failed to establish that the beneficial interest was anything other than held in equal shares.

A declaration was made that the beneficial interest in the Property is held in equal shares by Mr Derev and Mrs Dereva. There being no exceptional circumstances an order for possession and sale was made.

Comment

- This case demonstrates how a foreign bankruptcy order can be effectively enforced in England and Wales with all the powers of a trustee in bankruptcy as contained in the **Insolvency Act 1986** to enable property to be realised by means of an application for possession and sale.

- The powers of a trustee in bankruptcy were given to Mr Allen as a designated person under CIBR as set out in the order of appointment. Whilst reference was made to the decision in **Re Tomoye** which gave a foreign US trustee in bankruptcy the *"remedies"* under the **Insolvency Act1986** as though the bankruptcy was an English bankruptcy, there remains a doubt as to whether the bankruptcy estate vests pursuant to **section 306** in an English trustee.

Bankruptcy

Brake v The Chedington Court Estate Ltd [2023] UKSC 29

A bankrupt's standing to challenge the acts of the trustee under s303(1) Insolvency Act 1986

This was an appeal concerning the standing of the bankrupts to challenge the acts, omissions or decisions of the trustee of the bankrupts' estate under **section 303(1)** of **Insolvency Act 1986 ("IA 86").** In this case the bankrupts sought to challenge the steps taken by their trustee to facilitate their eviction from the property which was in their possession but not occupied by them.

The legislation

Section 303 (1) IA 86 provides;

> "If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of the trustee of the bankrupt's estate, he may apply to court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee; may give him directions or may make such other order as it thinks fit."

The corresponding provision to challenge a liquidator in a compulsory winding up is contained in **section 168(5)** which states;

> "If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."

The differences in language between sections 168(5) and 303(1) make no difference to the scope of the two provisions. There is no distinction of substance between an "aggrieved" and a "dissatisfied" person. There are limitations on the persons who have standing to apply under these provisions.

The authorities

Neither section is intended to provide a means of redress to a party with no connection to the bankruptcy or liquidation see **Mahomed v Morris [2000] EWCA Civ 46.**

Even if connected with the bankruptcy or liquidation as a bankrupt, creditor or other, limitations apply.
The authorities have established the following principles which serve to confine standing.

First, subject to very limited exceptions, a bankrupt must show that there is or is likely to be a surplus of assets once all liabilities to creditors, and the costs expenses of the bankruptcy have been paid. The same is true of a contributory of a company.

Second, a creditor will not have standing, except as regards a matter which affects the creditor in its capacity as such. This limitation also applies to bankrupts even when they can demonstrate a surplus.

Third, there are other, very limited, circumstances which provide standing to an applicant, whether or not the applicant is the bankrupt, a creditor or a contributory. Those circumstances are confined to cases where the challenge concerns a matter which could only arise in bankruptcy or liquidation and in which the applicant has a direct and legitimate interest.

A bankrupt ceases to have any beneficial interest in his property following a bankruptcy order. The bankrupt only has a contingent statutory right to participate in any eventual surplus after payment in full and with interest of all creditors in the bankruptcy and the payment of the costs and expenses including the trustee's remuneration. Unless there is or is likely to be a surplus the bankrupt has no legitimate interest in the administration of the estate and lacks standing under section 303(1) to challenge the administration by the trustee. Examples given were that the bankrupt cannot require trustee to commence or continue proceedings in respect of any claim that forms part of bankruptcy estate, nor can a bankrupt require the trustee to lend his name to proceedings to be prosecuted by the bankrupt unless there is or is likely to be a surplus in the estate (**see Heath v Tang [1993] 1 WLR 1421**). Similarly, the bankrupt cannot require the trustee to defend claims to property forming part of the bankrupt's estate.

Creditor standing to challenge the trustee or liquidator is limited to matters which affect their interests as creditors under the statutory trust and not in some other capacity. This principle was demonstrated in the following two decisions;

In re Edennote [1996] 2 BCLC 389 creditors applied to set aside the sale of an asset by the liquidator on the ground that it was at an undervalue, claiming that they would have paid a higher price if given the opportunity. The Court of Appeal in considering their challenge under **section 168(5**) held that because the sale was alleged to have been at an undervalue, they had standing as creditors of an insolvent company, but they would have lacked standing as disappointed prospective purchasers.

Re Edengate Homes (Butley Hall) Ltd (in liquidation), Lock v Stanley [2022] EWCA Civ 626 was decided after the Court of Appeal had given judgement in the present case. This was an application under **section 168(5)** by a creditor and former director to set aside the assignment of a claim against him and his family (value £1.2million) by the liquidator to a third party. Without funds the liquidator had assigned the claim on terms which meant the company could receive £800,000 if successful. The application was on the basis that the applicant had not been given the opportunity to buy the claims. The decision to dismiss the application for lack of standing was affirmed. Although the applicant was a creditor of the company, she was not making the application to advance the interests of creditors but to advance her own personal interests as a defendant in the proceedings. The fact that she was a creditor did not therefore give her standing.

Even where there is no surplus nor likelihood of one, there may be circumstances in which a bankrupt will have standing. In **Engel v Perry [2002] EWHC 799 (CH**) the bankrupt applied to annul his bankruptcy under **section 282(1)(b) IA 86** on the basis that the bankrupt considered the trustee's remuneration and legal fees to be excessive and applied under **section 303(1)** for them to be fixed by the court. The trustee objected as there would be no surplus after payment of all the debts expenses. Ferris J rejected the submission that this was a universal requirement, holding that what a bankrupt had to show was "*some substantial interest which has been adversely affected by whatever is complained of".* In that case it was stated that the trustee's remuneration expenses are a matter of considerable significance because this could affect whether a third party will make sufficient funds available to annul the bankruptcy. It was critical that the bankrupt was applying in his capacity as a bankrupt and in respect of an issue – the level of the trustee's costs expenses which was directly relevant to the annulment of his bankruptcy and - arose only by reason of his bankruptcy.

Cases involving persons other than creditors have been shown to be limited to rights of interest arising specifically out of the liquidation or bankruptcy.

In re-Hans Place, Ltd [1992] BCC 737 the liquidator had exercised the power under **section 178 IA 86** to disclaim onerous property. Following disclaimer, the landlord applied under **section 168(5)** in order that the disclaimer be set aside on the grounds it had the effect of terminating as regards future liabilities a company guarantee given by a third party. The application was refused but no objection was taken to the landlord's standing, and the Supreme Court agreed that the landlord did have standing in such an instance.

Facts

The bankruptcies of Mr and Mrs Brake have resulted in an abundance of litigation. This case being concerned with their appeal against the strike out of their application made under **section 303(1)** on the ground that they lacked standing to make it.

The key facts being that Mr and Mrs Brake entered into a partnership with a Mrs Brehme running an accommodation and events business. Following a dispute, the partnership was dissolved. The partnership's property included West Axnoller Farm ("Farm"), West Axnoller House ("the House") and West Axnoller Cottage ("the Cottage"). The Brakes lived in the House and used the Cottage when the House was let to paying guests.

The holders of the first legal charge appointed receivers of the Farm who sold it to Axnoller Events Ltd ("AEL") a nominee for the Brakes. Following the Brakes' bankruptcy, they continued to live in the House and use the Cottage when the house was let. In 2017 AEL was acquired by the applicant Chedington. The Brakes were given notice by Chedington and AEL terminating their employment and requiring them to vacate the House. They refused to vacate the House and possession proceedings were issued against them.

The Cottage was put up for sale by the liquidators of the partnership. They received a bid of £500,000 from Dr Guy and Mr and Mrs Brake offered £476,000. Following the sale there were difficulties with the title to the Cottage and in an effort to obtain a clean title the trustee agreed with Dr Guy to take various steps including making an application to court.

The Brakes responded by making an application under **section 168(5)** seeking to set aside the sale of the Cottage and to have their bid accepted.

Their second application was under **section 303(1)** by the Brakes in their personal capacities and in their capacity as trustees of the Brake trust. They sought orders setting aside the sale agreement and a declaration that the Cottage had revested in Mr and Mrs Brake pursuant to **section 283A IA 86** on the grounds that the Cottage together with the House comprised the Brakes principal residence. Chedington brought the applications to strike out the claims under sections 168(5) and 303(1). The claim under section 283A failed as the Cottage had not been the Brakes sole or principal residence at the date of the bankruptcies.

In the High Court a distinction was made between the position of the Brakes in their capacity as trustees of the Brake Trust and their personal capacities as bankrupts in making their application under section 303(1). As trustees, they were outsiders to the bankruptcy with no interest save as potential bidders for the Cottage. Applying **In re Edennote Ltd** the court struck out the application so far as it was made by the Brakes as trustees. As regards their application in their personal capacities as bankrupts their claims were struck out on the ground that there was no evidence that there was likely to be any surplus in the estates. Separately the liquidation application was struck out for similar reasons.

The Court of Appeal dismissed the Brakes appeal as regards the liquidation application and as regards their application brought by the Brakes as trustees of the Brake Trust, noting that their only interest was as potential bidders.

The only claim remaining to be considered was that of the Brakes in their personal capacities alleging that the trustee interfered with their right to possession of the Cottage by entering into various contractual arrangements with Chedington.

In the Court of Appeal, the test for standing was stated as being far broader than was warranted by any prior authority, it being argued that what needed to be shown was that the bankrupt has a legitimate interest in the relief sought.

In discussion it was suggested that the narrow approach derived from the earlier authorities could result in situations where a bankrupt has no effective recourse against the actions of his trustee. Reference was made to **section 304 IA 86** which provides for misfeasance proceedings against the trustee to be brought for the benefit of the estate by a creditor *"or (whether or not there is, or is likely to be, a surplus for the purposes of section 330(5) (final distribution)) the bankrupt himself"*. The inclusion of the bankrupt as a possible applicant even in the absence of any likely surplus being significant because it extended the class of applicants to a person who had no interest in the bankrupt's estate. However, to ensure that proceedings under **section 304** are brought by bankrupt only in appropriate cases, prior leave of the court is required under **section 304(2**), it being noted that without this filter there is a real risk that insolvency practitioners would be unfairly harassed by litigation.

Decision

The standing of applicants under **sections 303(1)** and **section 168(5)** was summarised as follows;

Creditors have standing where the application concerns their interests as creditors, because the bankrupt's estate or the assets of the company liquidation are administered under the terms of the statutory trust for their benefit as creditors.

Likewise, where there is or there is likely to be a surplus, the bankrupt or contributories are also persons for whose benefit the estate or assets are being administered and they have standing in respect of their interests in the surplus.

Beyond that there is a limited class of cases where creditors, the bankrupt, contributories or others will have standing, but only in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime. **Engel v Perry** and **In re Hans Place Ltd**, provide good examples of cases within this category.

The Brakes do not fall within any of any of these categories and therefore do not have standing to make the application in so far as it deals with the trustee's dealings with the Cottage.

Comment

- When considering the third category capable of giving rise to standing to make an application under sections 303(1) and 168(5) there have been a small number of applications which have arisen directly out of provisions which are peculiar to the insolvency regime**. In re Hans Pl, Ltd** it was the disclaimer of a lease. In **Engel v Perry** it was the trustee's expenses in an annulment. Other possible situations include **section 283A** as argued by the Brakes in this case but could also include a claim by a bankrupt in respect of tools equipment and other property under section 283.

Bankruptcy

Grant v Hussain [2023] EWHC 493 (Ch)

Whether Letter of Severance of a joint tenancy a transaction at an undervalue?

This was an application by the trustees in bankruptcy of Mr A Hussain for an order for possession and sale of the family home based on their claim to a 50% beneficial interest in the property.

Background

On 20th January 2019 a bankruptcy order was made against Mr Akram Hussain following which the joint trustees in bankruptcy were appointed. The trustees in bankruptcy issued an application for an order for possession sale of the family home. The second respondent Mrs Hussain relied upon a Letter of Severance dated 4th October 2017 in which the joint tenancy under which the respondents held the property equally as 50% beneficial owners was severed. Upon severance the parties were stated to hold the property as tenants in common as to 2% of the sale proceeds for the bankrupt and 98% for his wife Mrs Hussain.

The basis of the trustees' application was that the release of the bankrupt's beneficial interest in favour of Mrs Hussain under the Letter of Severance constituted a transaction at undervalue within the provisions of **section 339** of the **Insolvency Act 1986**. It not being specifically stated as to whether they relied upon section **339(3)(a**) and/or section **339(3)(c).**

Section 339(3) provides as follows;

> "(3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if –
>
> a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,
> ………………………….
>
> c) he enters into a transaction with that person 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 the individual."

Mrs Hussain argued that the reason that Mr Hussain released his beneficial interest to her was in return for Mr Hussain using funds from a remortgage, and that that was good consideration. By the time the matter came to trial the trustees accepted that the Letter of Severance was a genuine document but maintained that the release of the bankrupt's beneficial interest constituted a transaction at an undervalue. The evidence referred to the value of the property being £730,000 with an estimated equity of £320,000, which valued the estate interest at £160,000.

At trial Mrs Hussain did not call Mr Hussain to give evidence in support of her claim. She explained that the property was remortgaged, and the sum of £152,055.81p was raised. She claimed that those monies were used exclusively by the bankrupt, and that the remaining equity should belong to her.

The remortgage monies were paid into the couple's joint account. The bank statements showed both the receipt of the remortgage monies and their dispersal.

At trial concern was expressed that Mrs Hussain’s witness statement was unsigned and appeared to have been drafted by a lawyer or someone with legal knowledge. Mrs Hussain replied that the witness statement had been drafted by a friend of her son who was not a lawyer, but she did not know what he did for a living. Subsequently she swore to the contents of her witness statement in the witness box.

Her evidence on the one hand indicated that she was distancing herself from any involvement in the family finances and yet on the other she was prepared to challenge her husband’s wish to remortgage the house and retained solicitors resulting in the Letter of Severance. She also expressly instructed solicitors to register it at H M Land Registry. The Judge declaring that he would treat her evidence with considerable caution.

It was noted that the Letter of Severance did not actually refer to the remortgage and there were questions which may only be answered from an examination of the solicitors file who dealt with the original instructions. Unfortunately, that firm had been intervened and the file was not recovered. It was also unexplained as to why the Letter of Severance was dated 4th October 2017 and yet it was not registered until 23rd October 2018.

Analysis of the bank statements showed payments being made for household expenses, mortgage repayments and cash withdrawals. There were also payments to Mr A Hussain £5000 Mr T Hussain (their son) £20,000 and £4994. There was also a payment to HMCTS of £25,000 and to Mr Mohammed Sain of £20,000 together with a further payment to Mr Sain of £25,000. There were also payments to Ewan ad Co solicitors for £10,000 and Edward Marshall for £16,000. Mrs Hussain could not explain the payments because this was an account controlled by Mr Hussain.

Decision

The decision took into account the following facts and matters:

The £152,000 odd was paid into the joint account because it had to be when it was borrowed from a bank in joint names with joint and several liability.

Mr Hussain was solely responsible for the use of the joint account.

Mr Hussain chose to use the £152,000 to pay for family/household bills as well as liabilities which did not appear to fall into that category. The purpose of the deposit loans and payments to solicitors was not established but there was no evidence of any of them being a liability of Mrs Hussain.

The facts established that the release of the 48% interest did occur in circumstances of the remortgage. In relation to this the payments to HMCTS, Mr Sain, the small loans and the payments to solicitors and Edward Marshall, there was no evidence to conclude that any of them would have been joint and several liabilities and that on the balance of probability it is to be concluded that those payments were the debts of Mr Hussain alone.

This left the payments for household family bills and for mortgage repayments. Since it was noted that Mr Hussain was always the source of those payments it would not affect the consideration because his money would have been used for those payments in any event.

The release created by the Letter of Severance was good consideration and the trustees had not proved on the balance of probability that it was a transaction at undervalue.

Comment

- Notwithstanding concerns over the evidence given by Mrs Hussain, which was treated with considerable caution, it is nevertheless the trustees burden to establish that the release of the beneficial interest under the Letter of Severance was a transaction at an undervalue.

- The lack of availability of the solicitor's file following intervention certainly did not help in establishing what took place, but may not have made any difference to the outcome in any event.

Bankruptcy

Horton v Eurobeam Services Ltd [2023] EWHC 178 (Ch)

Private examination- "Success" and the Trustee's costs

This case is about who pays the costs of the trustee in bankruptcy in relation to an application made for a private examination under **section 366** of **the Insolvency Act 1986 ("IA86")**

Chronology

31st May 2012 Loan agreement ("the Roth Loan")

30th April 2015 Eurobeam loan

21st July 2015 Eurobeam charge over matrimonial home of Moses Krause ("the Debtor")

14th September 2015 Bankruptcy petition presented against Debtor

12th January 2016 Bankruptcy order against Debtor

23rd March 2016 Trustee appointed

16th December 2016 Trustees application under s366 Insolvency Act 1986

23rd January 2017 First hearing of s366 Application

2nd August 2018 Joinder application - Mr Roth

Facts

As a result of investigations into the Debtor's affairs the Official Receiver and the Trustee became aware of an alleged loan of £300,000 to the Debtor from the First respondent Eurobeam Services Ltd ("Eurobeam"). This was purportedly secured over the Debtor's matrimonial home by way of a second charge. The Debtor's bank accounts did not show any receipt for the Eurobeam loan.

At the relevant time, a very old friend of the Debtor, Mr Roth, was the sole director of Eurobeam. The Second respondent was Bude Nathan Iwanier ("BNI") a firm of solicitors who acted for Eurobeam in connection with the Eurobeam loan.

There began a long line of enquiries concerning the Eurobeam loan and the charge, the results of which were unsatisfactory. Explanations given as to the purpose of the loan included building an extension to the Debtor's wife's property, funding the defence of litigation and the repayment of creditors proportionately.

Following a meeting with the Trustee information was requested detailing dates on which monies were transferred to the Debtor by Eurobeam, details of bank accounts, method of payment and how the funds were used. The Debtor's response was that his children had managed the transaction, none of the money was paid into his account and that his solicitor at BNI would know how the money was paid.

The Trustee requested details of the names and addresses of the children and the names and addresses of creditors paid with the loan funds. The Debtor replied with partial addresses only and no details of creditors who had been paid. The Trustee sent further correspondence requesting details of the date of the advance made, the amount advanced and the recipient of the funds. Despite a response, the Trustee was forced to write again noting the disparity between the Debtor's account of events and that of BNI.

Enquiries of Eurobeam resulted in correspondence from Mr Roth. Despite further correspondence with Mr Roth the trustee noted that he had still failed to deal with the queries that had been raised.

After lengthy exchanges of correspondence and having warned of the Trustee's power to apply to the court under **section 366**, an application was eventually issued against both Eurobeam and BNI.

In the interim, the trustee successfully obtained an order suspending the discharge of the Debtor's bankruptcy due to various failures of the Debtor to comply with his obligations to provide information concerning his affairs.

Following the section 366 Application having been issued BNI filed witness statements made by Mr Kandler and Mr Roth. These provided information in which it was indicated that £122,000 (£80,000 plus interest) of the £300,000 loan was said to have been advanced informally by Mr Roth personally to the Debtor (the Roth Loan) The Roth Loan was said to have been rolled up into the Eurobeam Loan. Further, BNI already held the sum of £154,000 on Mr Roth's account and that this is the reason why Eurobeam could not provide any documentary evidence as to how it advanced the sum of £300,000.

Mr Roth's witness statement exhibited a loan agreement dated 31 May 2012 and a Heter Iska in Hebrew without a translation. It also exhibited an email from Mr Roth's assistant to BNI confirming that £16,315 was transferred to BNI's account and instructing BNI to transfer £122,320 to Caruso AG, to transfer £47,994 to Salomon Krausz and to secure the charge "asap".

At the hearing on 23rd January 2017 an order was made directing the Trustee to write to each of the respondents requested the further information and/or documentation required. Following the hearing the Trustee's solicitors corresponded with both Eurobeam and BNI seeking outstanding information including a translation of the 2012 loan documents and the Heter Iska.

There followed further lengthy exchanges of correspondence seeking information during which time it became apparent that Mr Roth should be joined as a respondent to the 366 application. Eventually a Joinder application was issued which was hotly contested by counsel on behalf of Eurobeam and Mr Roth. The outcome was that Mr Roth was joined as the third respondent to the 366 application.

Further evidence was filed in which the responses included a summary of the sums comprised within the Roth Loan which were said to add up to £80,000 but only totalled £44,000. There was also a further sum of £36,000 that Mr Roth claimed the Debtor was indebted to him for. Details of that payment were requested.

Mr Roth's evidence was that the replies in his solicitor's letter were true and accurate, and he stated that he had provided details of the £36,000 loan. The Trustee was not entirely satisfied with the explanations given regarding the pre-July 2011 loan of £36,000 but at this stage took a commercial view and elected not to proceed with the section 366 application further. This then left the question of costs.

Section 366(1) IA86 provides that the court may, at any time after a bankruptcy order has been made, on the application of the trustee in bankruptcy, summon to appear before it any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property. The court may require such person to submit to the court a witness statement verified by a statement of truth containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property.

Rule 12.22 (1) of the **Insolvency (England and Wales) Rules 2016 ("IR 2016")** provides that where the court has ordered an examination of a person under section 366 and it appears to it that the examination was made necessary because information had been unjustifiably refused by the respondent, it may order that the respondent pays the costs of the examination. It was common ground that this rule did not apply to the present case as no examination had been ordered.

Subject to **Rule 12.22 (1)** and **(2**) the Trustee's costs must, unless the court orders otherwise, be paid out of the bankrupt's estate: **Rule 12.22(3)**

Rule 12.1 IR 2016 provides that the provisions of the **CPR** apply for the purposes of proceedings under Parts 1 to 11 of IA86 with any necessary modifications, except so far as disapplied by or inconsistent with IR 2016. Section 366 falls within part 9 of IA86.

Under **CPR 44.2** the court has a discretion as to whether costs are payable by one party to another. **CPR 44.2 (2)** provides that if the court decides to make an order on costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.

In deciding what order to make about costs the court will have regard to all the circumstances including the conduct of the parties and whether a party has succeeded on part of its case.

Whilst the Trustee sought an order that Eurobeam and Mr Roth pay the Trustee's costs, Eurobeam and Mr Roth sought an order that the Trustee pay their costs.

Counsel for the Trustee referred to the decision in **Miller v Bain and Ors [2013] BPIR 959** (a case in which an examination was ordered) where it was stated that the correct test regarding liability for the officeholders costs is whether the officeholder was reasonably entitled to conclude that there was a serious risk that the debtor would not cooperate with him and attend the interview other than under the compulsion of a court order.

In considering the general rule on costs as laid down by the CPR 44.2(2) ICC Judge Barber observed;

> *"In this regard, when considering the success or otherwise of a s366 application, the court must take into account that in many cases a s366 application is an iterative process, in which the respondent will proffer, by way of a series of witness statements purportedly "in answer" to the application, some or all of the outstanding information and documentation which prompted the s366 application in the first place, in an effort to avoid "substantive relief" being granted on the application. Boundaries can become extremely blurred. Viewed in this context, determining "success" involves far more than considering whether or not an order for private examination was ultimately granted. The court must consider the realities."*

Decision

It was entirely unrealistic to suggest that the Trustee had no success on his application simply because the evidence disclosed "in answer" to the application obviated the need for an order for private examination.

On any footing, the Trustee could not be treated as the unsuccessful party when considering costs.

The Trustee was plainly justified in issuing the Application and the Trustee's enquiries would not have been adequately addressed by Eurobeam or Mr Roth without the discipline imposed by court proceedings.

The Trustee cannot on any footing be described as the unsuccessful party. Eurobeam and Mr Roth were under a public duty to assist the Trustee. Their lack of constructive engagement was unreasonable.

Eurobeam was ordered to pay the Trustees costs of the s366 Application and the Joinder Application.

Mr Roth was ordered to pay the Trustees costs of the Joinder application and the section 366 Application. Eurobeam and Mr Roth would also be ordered to pay the Trustees costs of the further hearing to determine the issue of costs.

Comment

- The Trustee's approach was one of measured patience whilst engaged in protracted exchanges of correspondence designed to procure the information requested.
- In corresponding with third parties the Trustee was able to produce an authority from the Debtor to make enquiries concerning his affairs.
- Whilst attempts were made to deflect the Trustee's enquiries by referring to them as a fishing expedition, the Trustee was careful to restrict the ambit of his enquiries and to retain focus on the alleged loan to the Debtor.

Bankruptcy

Mehers v Khilji [2023] EWHC 298 (Ch)

"Use it or lose it" Informing the trustee of an interest under s283A Insolvency Act 1986

Chronology

23rd August 2014 Ms Khilji's husband died intestate

3rd April 2017 Grant of letters of administration to Personal Representative

2nd July 2018 Bankruptcy order against Ms Khilji

7th August 2018 Trustee in bankruptcy appointed

17th September 2018 Letter to Trustee from Administrators solicitors

27th September 2018 Letter to Trustee from Administrators solicitors

28th September 2018 Ms Khilji interviewed by OR gives statement

13th January 2019 Ms Khilji returns Questionnaire and PIQB to OR

12th April 2019 Administrator issues possession proceedings

6th September 2019 Ms Khilji claims interest in Defence and Counterclaim

11th January 2022 Trustee issues application re property

This was a case about the revesting provisions in **section 283** of the **Insolvency Act 1986 ("IA86"),** often referred to as the *"use it or lose it"* provision. A trustee in bankruptcy has three years to decide what to do about an interest in a property which is the home of the bankrupt, the bankrupt's spouse or civil partner, or former spouse or civil partner of the bankrupt. If the trustee does not take certain specified action within the three-year period then the bankrupt's former interest ceases to be part of the bankrupt's estate and re-vests in the bankrupt. In this case the court had to consider what is meant or what it means for a bankrupt to *"inform"* their trustee in bankruptcy of such an interest or for that trustee to otherwise *"become... aware"* of one.

Facts

The Applicant is the trustee in bankruptcy ("the Trustee") of Scherzade Khilji ("Ms Khilji") who is the first respondent to the Trustee's application. The second respondent is the personal representative of the estate of Ms Khilji's late husband ("the Administrator"). The Trustee seeks an order for possession and sale in relation to the property at 49 Slough Ln, London NW9 8YB ("the Property") and further seeks a declaration that the Property has not revested in Ms Khilji under **section 283A(2) IA 86**.

Ms Khilji's husband) died intestate on 23 August 2014. The Property being registered in his sole name. The Administrator was appointed following the grant of letters of administration to him. In the case of intestacy, the estate is held on the statutory trusts which provide for a statutory legacy to Ms Khilji of £250,000; a one-half interest in the remainder of the balance of the net estate to Ms Khilji and the other one-half interest upon trust for the Deceased's children in equal shares.

A bankruptcy order was made against Ms Khilji on 2 July 2018 and the Trustee appointed on 7 August 2018. It was common ground that the bankruptcy estate included Ms Khilji's rights under the un-administered estate of the Deceased. On 17th and 27th of September the Administrators solicitors sent letters to the Trustee's solicitors which contained various statements.

28 September 2018 Ms Khilji was interviewed by the Official Receiver and gave a statement. Subsequently she completed the bankruptcy questionnaire and Preliminary information questionnaire.

12 April 2019 the Administrator commenced proceedings for possession of the Property against Ms Khilji and the Trustee. The Trustee supported the possession claim.

Ms Khilji filed a defence and counterclaim in which she claimed a one third beneficial interest the Property arising under a common intention constructive trust. She later amended her defence and counterclaim pleading that three years from the date a bankruptcy order had expired and her beneficial interest the Property had revested in her by operation of **section 283A(2) IA86**. Later a possession order was granted but stayed pending determination of Ms Khilji's claim that her interest had revested in her under section 283A(2).

Shortly before the hearing the Trustee and the Administrator agreed that Ms Khilji's beneficial interest in the Property at the date the bankruptcy order was 5% and as such that interest vested in the Trustee on appointment. This then simply left the revesting argument to be determined and in the event that Miss Khilji was successful on that point then the extent of her interest would have to be determined later.

Relevant statutory provisions

The definition of a bankrupt's estate is in **section 283** and must be read together with the definition of *"property"* in **section 436** of the **IA86**. The beneficial interest arising under a common intention constructive trust held by a person made bankrupt will vest in their bankruptcy estate.

Section 283A(5)

> "(5) If the bankrupt does not <u>inform</u> the trustee or the official receiver of his interest in a property before the end of the period of three months beginning with the date of the bankruptcy, the period of three years mentioned in subsection (2)-
>
> (a) shall not begin with the date of the bankruptcy, but
>
> (b) shall begin with the date on which the trustee or official receiver <u>becomes aware</u> of the bankrupt's interest."

If the bankrupt informs their trustee or the OR of their interest in the property to which the provision applies within three months the bankruptcy that property will ordinarily revest in the bankrupt on the third anniversary of the bankruptcy.

Where the bankrupt does not inform the trustee or the OR of the interest within three months the three-year period will only start to run on the date the trustee or OR becomes aware of it.

The arguments

For the Trustee it was argued that the application had been issued within three years of the Trustee becoming aware of Ms Khilji's interest in the Property. For Ms Khilji it was argued that the Trustee was sufficiently *"on notice"* that Ms Khilji had an interest the Property from 28 September 2018 at the latest which was the date of her interview with the Official Receiver. If that was correct and Ms Khilji did enough to inform the OR of her interest on 28 September 2018 then as that date was within three months beginning with the date of the bankruptcy the three-year period on the third anniversary bankruptcy would mean that the Trustee's application was out of time. The Trustee's interest the Property would have revested in Ms Khilji approximately six months earlier. For Miss Khilji it was stated that should have been obvious that her interest as the Deceased's spouse in his estate and from her having made mortgage contributions post death that she had an interest in the Property.

In her statement to the OR Ms Khilji confirmed that the Property was in the sole name of the Deceased husband, and she stated, *"I don't think I was ever joint owner of this property"*. References were made to the letters sent by the Administrators solicitors to the Trustee's solicitors on the 17th of 27 September 2018 which enclosed office copy entries showing that Ms Khilji had registered occupational rights by virtue of her marriage to the Deceased under **section 31 the Family Law Act 1996**.

The nature of the interest

As to whether Ms Khilji had an *"interest in the property"* various different interests were referred to including;

1) Miss Khilji's entitlement under the Deceased's intestacy
2) her registration of matrimonial home rights
3) payment of the mortgage following the Deceased's death
4) the claimed common intention constructive trust

The quality of knowledge

Reference was made to the provisions of **section 307 IA 86** which enables the trustee to serve notice on the bankrupt vesting property in the estate that has been acquired by or devolved upon the bankrupt since the commencement of the bankruptcy. **Section 309(1)(a)** sets the time limit for the trustee to serve such a notice at 42 days. **Section 333(2)** imposes a duty on the bankrupt to "*give the trustee notice of",* such property as falls within section 307. After argument it was acknowledged that the provisions section 283 and sections 309 and 333(2) are significantly different in terms and that the giving of *"notice"* would not necessarily be sufficient to *"inform"* or make the trustee or OR *"aware".*

Interests that do not fall within section 283A(1)

Deputy ICC Judge Curl KC was unable to accept that Ms Khilji's interest in the Deceased's intestacy or registered matrimonial home rights were of themselves interests in the Property within the meaning of section 283A(1). It being well settled that the beneficiary's interest in an unadministered estate does not give rise to any legal or beneficial interest in any of the assets comprised in the estate. Further matrimonial home rights do not give rise to a beneficial interest in the Property capable of vesting in the bankruptcy estate at the commencement of the bankruptcy and are therefore not interests within section 283A(1), such rights are a charge on the interest of another, not an interest in the property.

The interest falling within section 283A(1)

Having already found that Miss kKhilji's interest in the Deceased's intestate estate is irrelevant and that similar considerations apply to matrimonial home rights, this only left the reference in the statement given Ms Khilji to the OR that she contributed to the mortgage after death of the Deceased. The Judge rejected the submission that the reference to contributions to the mortgage after the Deceased's death should have led to the inference that Ms Khilji might be able to formulate a claim under a common intention constructive trust. The Judge stating that contributions to the mortgage are not an interest in the Property within the meaning of section 283A(1) and are consistent both with setting up a claim to a beneficial interest under a common intention constructive trust and not doing so. By informing the OR that she had made contributions after the death of deceased Ms Khilji did not inform either Trustee or the OR of an interest in the Property within the meaning of section 283A(1) nor did the Trustee or the OR otherwise become aware of such an interest as a consequence.

Decision

Deputy ICC Judge Curl KC held that neither Trustee or the OR was informed or otherwise became aware that Ms Khilji had at the date of her bankruptcy an interest in the Property falling within the meaning of section 283A(1) of the IA86 any earlier than service on the Trustee of the defence and counterclaim dated 6 September 2019

None of the earlier pieces of evidence relied on by Ms Khilji came close to informing the Trustee or the OR of any such interest or was otherwise capable of causing them to become aware of one.

As time started to run no earlier than 6 September 2019 in causing the bankruptcy application to be issued on 11 January 2022 the Trustee acted within time and therefore no interest had revested in Ms Khilji.

Comment

- For Ms Khilji it was argued that if taken together the various individual pieces of evidence referred to by her counsel as "*onion layers*" were sufficient to inform the Trustee/OR of or such that they became aware of an interest in the Property. Fortunately for the Trustee that argument was rejected. Nevertheless, trustees should be aware of the significance of seemingly minor pieces of information and their cumulative impact when taken together in considering the possible existence of an interest in property arising under a common intention constructive trust.

- The submission of a more tailored questionnaire can in some cases flush out potential claims arising under common intention constructive trusts at an earlier stage, and before an application for an order for possession and sale has been issued.

Liquidation

Davidson v Looney [2023] EWHC 197 (Ch)

Misfeasance and a Director's loan account

Facts

This was an application by the liquidators of Kieran Looney & Co Ltd ("the Company") for a declaration that Kieran Looney ("Mr Looney") is guilty of misfeasance under **section 212** of the **Insolvency Act 1986** by causing the Company to make payments to him and to third parties for his benefit totalling £2,169,604 ("the Payments") and for an order that he pay such sum as the court thinks fit to the liquidators.

Alternatively, a declaration that Mr Looney operated an overdrawn director's loan account ("DLA") which at the date of liquidation stood at £1,713,502, and for an order that he repay this sum.

Background

Mr Looney was the sole shareholder and director of the Company which carried on business as the provider of coaching services. On 22 February 2016 a winding up order was made against the Company on the petition of HM Revenue and Customs. Following the appointment of the liquidators a proof of debt was received from HMRC in the sum of £132,504. Shortly before trial Mr Looney submitted a proof of debt for £2,131,797.

Prior to liquidation the Company had filed accounts prepared by its accountants Fonseca and Co, the last of which was for the period ending 30 April 2015. These were referred to as ("the Original Accounts"). Following the winding up order revised accounts were filed by Mr Fonseca on behalf of Mr Looney for the previous four years. ("the First Revised Accounts"). On 2 June 2018 further revised accounts were submitted for the previous four years by Mr Fonseca ("the Second Revised Accounts) which showed that Mr Looney was owed the sum of £1,892,280.

The differences between the various accounts arose from a reallocation of income received and litigation expenses incurred, which had the effect of showing that the Company owed Mr Looney a revised sum after further transactions were included of £1,094,664.

The Payments

The liquidators analysed the Company's bank accounts and identified Payments totalling £2,169,604 having been made either directly to Mr Looney or transferred to third parties for his benefit. The bank statements also showed that Mr Looney paid into the Company sums totalling £550,800. The Payments themselves were divided into categories showing Payments to Mr Looney, Payments to third parties with no obvious connection to the business of the Company, transfers to Mr Looney and Payments categorised as "drawings" to third parties.

The issues

The issues to be decided were;

1. what was the nature of the Payments made to Mr Looney

2. in causing the Payments to be made to himself or for his benefit did Mr Looney act in breach of his fiduciary duty to the Company

3. if Mr Looney was in breach of his fiduciary duties were the breaches capable of being ratified by him

4. whether the claims for breach of fiduciary duty statute barred

5. whether Mr Looney is entitled to be excused from the breaches under **section 1157(1)** of the **Companies Act 2006 ("CA")**

6. if Mr Looney is not entitled to defence under **section 1157** what sum should he be ordered to pay to the liquidators

7. if the Payments to Mr Looney were in the nature of loans what the balance on his director's loan account is and whether there was a breach of **section 197** of the **CA**

Mr Looney argued that the Payments were in the nature of loans made by the Company to him and as such they formed part of his DLA and that his DLA was in credit. Mr Looney did not claim that the Payments were either dividends or director's remuneration.

A director of a company is a fiduciary of its assets. In **Colin Thomas Burke and others v John Morrison and others [2011] EWHC 804 (Ch)**, it was stated that once a liquidator has proved that a payment has been made to or for the benefit of a director, the evidential burden shifts to the director to explain what the payment was for.

The liquidators corresponded with both Mr Looney and Mr Fonseca but did not receive any proper explanation of the Payments. Mr Looney argued that the liquidators had failed to recover all the books and records from the Official Receiver including the electronic copy of the Company's SAGE records. The liquidators denied the allegation and the Judge accepted that the liquidators had received everything that the Official Receiver had received.

The Judge also rejected the contention that the Payments were made to Mr Looney in the nature of loans, this is because Mr Looney admitted taking money as and when he wanted to by drawing a cheque. Further the Payments were not reflected as forming part of Mr Looney's DLA in either the Original Accounts or the First Revised Accounts

Whether the payments were made in breach of Mr Looney's fiduciary duties

The claim under CA section 171

This provides that a director must only exercise powers for the purposes for which they were conferred. The relevant test to be applied was that set out in **Extrasure Travel Insurances Ltd and others V Alan Herbert Scattergood [2002] EWHC 3039 (Ch).** That test is an objective one in four stages;

1. identify the power whose exercise is in question

2. identify the proper purpose for which that power was delegated to the directors

3. identify the substantial purpose for which the power was in fact exercised

4. decide whether that purpose was proper

In essence the director is under a fiduciary duty to the company to apply its assets only for the proper purposes of the company

In **GHLM Trading Ltd v Maroo and others [2012] EWHC 61 (Ch)** the court considered where the burden of proof lay. Once it can be shown that a company director had received company money it was for him to show the payment was proper. The applicant must therefore prove the transfer of sums or assets belonging to the company and establish on a balance of probabilities that the assets or money in question belonged to the company. Once the applicant has established that the transfer of asset or payment of money belonged to the company, the second stage is engaged and that is that the evidential burden is on the respondent to prove that the payment or transfer was proper.

Decision

The liquidators were able to prove that the Payments were assets belonging to the Company and claimed that they represented an unlawful return of capital to Mr Looney. Mr Looney was not able to discharge the evidential burden and satisfy the court that the Payments were made for a proper purpose. Insofar as the Payments were made to Mr Looney, they were found to be unlawful distributions of capital to him. In relation to Payments made directly to family members whilst they were not an unlawful distribution of capital, they were nevertheless improper Payments.

Mr Looney did claim that two Payments were made for a proper paper purpose. The first being the sum of £167,758 to HR Owen dealership for the purchase of a car. This was purchased in Mr Looney’s name and when subsequently sold he retained the sale proceeds. The car was not reflected as an asset in any of the Company’s accounts. The purchase was found to be for an improper purpose to benefit himself and therefore an unlawful return of capital. The second payment of £39,762 was in respect of the motor yacht. Mr Looney was unable to to satisfy the evidential burden that the Payments were for a proper purpose.

The claim under CA section 172(1)

Under this provision directors are required to act in good faith in a way that would be most likely promote the success of the company for the benefit of the members. There was no evidence that Mr Looney considered the interests of the company in making the Payments. Having already found that the Payments were unlawful under **CA s171(b),** Mr Looney could not reasonably have believed that the Payments had been made to promote the interests of the Company.

The judge also considered the liquidators argument that Mr Looney had a duty to consider the interests of creditors from 30th April 2011 onwards as the Company was insolvent. In support of their argument the liquidators relied on the proof of debt from HMRC which showed outstanding liabilities for Corporation tax at that date. They argued that because those debts were not paid the Company was clearly cash flow insolvent. The Judge rejected that argument stating that it was unclear whether or not a dispute with HMRC had been taken into account and noted that the Corporation tax in question would not be payable until the end of January 2014. The Judge did accept that the Company was cash flow insolvent from about the end of January 2014 onwards.

The question of balance sheet insolvency was more difficult in view of the changes in the various accounts that had been filed and without proper accounts being drawn up. Nevertheless, from 31 January 2015 the Company was commercially insolvent and as such Mr Looney was under a duty to consider the interests of creditors (**BTI 2014 LLC v Sequana SA [2022] UKSC 25)**. There was no evidence that Mr Looney had considered the interests of creditors and as such he was in breach of his duty under **CA section 172 (1)**.

The claim for breach of duty under CA section 175(1)
On this point it was found that Mr Looney was in further breach of his duties to the Company in that there was clearly a conflict between how own interests and his duties.

Ratification

Could Mr Looney's breaches of duty be ratified by him?
CA section 239 says that a breach of duty by a director may be ratified, and he may therefore be excused if a resolution to this effect is passed by a majority of members of the company excluding any vote of the director if he is a member. **CA section 239(6)** provides that nothing in section 239 affects the validity of any decision taken by unanimous consent of the members of the company thereby preserving the principle in **Re Duomatic [1969] 2 Ch 365**. Under this principle director's misconduct may be ratified informally if the members unanimously consent to this. In order to do this the members must turn their minds to the conduct that is sought to be approved and have made a decision to approve it.

CA 236(7) preserves any rule of law as to acts that are incapable of being ratified. This preserves the rule of law where the wrong constitutes an unlawful return of capital and it will not be open to members to ratify. It also preserves the rule of law that where a wrong is committed in insolvency related circumstances which would require the director to consider the interests of creditors, such wrongs cannot be ratified by members as the company's interests in these circumstances are to be equated with those of its creditors and not its members. As such the breaches of duty were found not to have been ratified by Mr Looney.

Whether the claims are statute barred

Section 21(1) of the Limitation Act 1980 applies to trust property and provides for a six-year limitation period except in relation to two types of action. One of them is an action by a beneficiary under a trust to recover from a trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his own use **(section 21(1)(b)).**

In **Burnden Holdings v Fielding [2018] UKSC 14**, it was held that a company director as a fiduciary of the company's property is treated as being a trustee in possession of trust property from the outset. If he misappropriates that property any claim against him is not subject to any limitation period under **section 21(1)(b**)

Having found the misapplication by Mr Looney of Company monies meant that the claims for breach of fiduciary duty fell within section 21(1)(b)) and are not statute barred.

Should Mr Looney be relieved under CA 1157

On this it was found that Mr Looney had given no consideration at all to the interests of the Company and as such it will be difficult to excuse him under this provision and therefore relief would be refused.

The amount of compensation to be ordered under section 212

The deficiency in the liquidation was likely to be less than the amount of the Payments and Mr Looney as the sole shareholder would be entitled to receive by way of distribution any surplus.

Mr Looney sought to claim set off in respect of any award made against him against the balance due under his director's loan account, Mr Looney having made loan payments to the Company totalling £557,300. On this the authorities are quite clear Mr Looney can prove for those sums in the liquidation but cannot set them off against any award made under **section 212 (Manson v Smith [1997] 2 BCLC 161).**

The Directors Loan Account

Although there was no need to consider this question in view of the previous findings the Judge nevertheless considered the argument that the loans are in breach of **CA s197**. It was found that Payments claimed to be debited from Mr Looney's DLA were actually in relation to personal litigation in which he was involved. Mr Looney also claimed that he had purchased a yacht on behalf of the company. Whilst it was accepted that the yacht was purchased for the Company and that the sum of £930,000 should be credited to his DLA, Mr Looney failed to account for the sale proceeds of £800,000 and therefore that amount should be debited from the account.

In conclusion it was held that Mr Looney was not a creditor of the Company and in fact was a debtor in the sum of £1,580,502.

Comment

- As shown in this case when attempting to demonstrate cash flow insolvency it may not be sufficient to rely on a schedule of arrears of tax produced in support of a proof of debt lodged by HMRC debts were not being paid that were payable and due at the time.

Liquidation

Hunt v Ubhi [2023] EWCA (Civ) 417

Provisional liquidation and freezing injunctions

Facts

This was an appeal against an earlier decision to continue a freezing order against the applicant Mr Ubhi. The freezing order having been obtained by Mr Hunt as provisional liquidator of Black Capital an alleged insolvent partnership.

Background

A petition to wind up Black Capital was presented by a company controlled by the Mitchells. They had invested a total of £13,702,700 with Black Capital. The petition was presented under **article 7** of **The Insolvent Partnerships Order 1994 ("the 1994 Order").** It was said that Black Capital was a partnership between Mr Ubhi and Mr Patel. On the same day the petition was presented, without notice applications were made for the appointment of a provisional liquidator and freezing orders. Those applications were successful, and Mr Hunt was appointed provisional liquidator. The petitioners having given a cross undertaking in damages limited to £200,000. In turn Mr Hunt applied immediately for a freezing order to be made against Mr Ubhi and Mr Patel subject to a maximum sum of £19million. Mr Hunt gave a cross undertaking in damages in a restricted form as follows;

> "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make, save that this undertaking shall be limited to the amount of monies of the unpledged assets of Black Capital (in provisional liquidation) taken into the custody or under the control of the Applicant in the course of the liquidation less the costs, expenses or other disbursements of the liquidation"

On 20th September 2022 the petitioner presented bankruptcy petitions against Mr Ubhi and Mr Patel which were stated to have been issued under **article 8** of **the 1994 Order**. All of the petitions and an application to set aside a statutory demand came before Deputy ICC Judge Agnello KC who held that there was a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital. The Deputy ICC Judge dismissed the winding up petition and bankruptcy petitions and set aside the statutory demand.

One week later there was a hearing to consider whether the freezing orders should continue. By this stage Mr Hunt had given evidence to the effect that he considered that Black Capital had operated a Ponzi scheme. The Judge concluded that the freezing orders should continue, and it was against that decision that Mr Ubhi appealed.

Article 7 of **the 1994 Order** applies where the petitioner does not present a concurrent insolvency petition against any member or former member of the partnership. **Article 8** applies where there is a concurrent petition against a member of the partnership. Where a winding up order is made in respect of a partnership and there are no concurrent bankruptcy orders against its members the partners can be called upon to contribute to the extent necessary to pay its debts pursuant to **section 226** of **the Insolvency Act 1986 ("the 1986 Act**").

Where there is a concurrent bankruptcy order against a partner the position is less straightforward since the partner will not be treated as a contributory for the purpose of the 1986 Act "unless the contrary appears". By virtue of **section 150** of **the 86 Act** the power to make calls does not arise until after a winding up order has been made. Whether a petition is presented under article 7 or article 8, **section 135** of **the 1986 Act** empowers the court to appoint a provisional liquidator at any time after presentation of a winding up petition.

It is by no means rare for a provisional liquidator to issue proceedings on behalf of a company and apply for a freezing order. This often occurs in tax cases as occurred in **Abbey Forwarding Ltd v Hone (No3) [2014] EWCA Civ 711** in which both the application for a provisional liquidator and freezing order was backed by an indemnity from HMRC.

In **Revenue and Customs Commissioners v Egleton [2006] EWHC 2313 (Ch)** HMRC presented a winding up petition against the company based on unpaid VAT and themselves applied for and were granted freezing orders against the company's directors and others against whom it was said the company had claims as a result of their participation in VAT fraud. HMRC did not suggest that they themselves had claims against respondents but argued that a liquidator would be likely to bring proceedings in due course for the benefit of the company and its creditors. In that case Briggs J stated that the jurisdiction to grant freezing orders against third parties is not rigidly restricted by a requirement to show the third party is already in control or holding assets beneficially owned by the company.

Briggs J went further by stating "there are powerful reasons why, if freezing orders are to be obtained against potential judgement debtors of the company pending the making of a winding up order, it should be a provisional liquidator rather than the petitioning creditor who seeks and obtains them".

The current case was unusual in that the freezing order had been sought by the provisional liquidator within the winding up proceedings rather than through a separate claim. In particular it was noted that the terms of the freezing order were that it would continue until "judgement". However, the Deputy ICC Judge having given judgement on the winding up petition meant that the freezing order would have lapsed (absent the order continuing it) there being no future judgement in prospect by reason of any separate proceedings.

The issues

The issues on appeal were as follows;

1) Was the judge wrong to accept a limited cross undertaking from Mr Hunt?

2) Should the judge have set aside the freezing order and refused further relief on account of breaches of the duty of full and frank disclosure?

3) Was the judge wrong to hold there was a good arguable case that there was a relevant cause of action against Mr Ubhi justifying the grant of a freezing order against him?

The cross undertaking

For Mr Ubhi it was argued that the cross undertaking given by Mr Hunt was not acceptable, it being limited to the liquidation estate. At the original hearing, it was noted that Mr Hunt was representing a large number of creditors and not a single investor and that as Mr Hunt had only been able to identify minimal assets it would not be proportionate to require him to incur costs investigating the possibility of insurance to back up the cross undertaking in damages.

The court considered the case of **Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139** which is the leading authority on the provision of cross undertakings and damages. That case involved an insolvent bank where its liquidator had been granted a freezing order in aid of proceedings which they had brought against Mr Pugachev in Russia.

From that case the following points emerged;

1) The extent of the cross undertaking in damages which an applicant for an interim injunction is required to give is a matter of discretion for the judge who hears the application.

2) The “default position” is that a person applying for an interim injunction must give an unlimited cross undertaking in damages.

3) A cross undertaking is not required if the applicant is a law enforcement agency simply enforcing the law in the public interest.

4) It may be appropriate to to depart from the “default position” where the applicant has no personal interest and is claiming on behalf of others. The fact that the claimant is a liquidator of an insolvent company is a highly relevant factor.

5) The mere fact that litigation is being brought by a liquidator of an insolvent company does not compel the conclusion that the cross undertaking should be capped. The burden is on the applicant to show why they should not give an unlimited cross undertaking.

6) It can be relevant to consider whether one or more creditors could be expected to indemnify the applicant and whether or not the liquidator is being funded by a particular creditor. To discharge the burden, it may be necessary to show what efforts the liquidator has made to persuade substantial creditors for whose benefit the recoveries would enure to back the cross undertaking.

7) The availability of insurance is also a significant factor.

8) The defendant need not show that the freezing order is likely to cause loss before a cross undertaking of an unlimited amount is required.

9) The question of whether the cross undertaking should be of an unlimited amount is separate from whether the applicant should fortify the cross undertaking with security.

Decision

The Court of Appeal judgement was handed down by Lord Justice Newey. His findings were that there was no evidence that Mr Hunt had asked the petitioner to give him an indemnity in respect of a cross undertaking for the freezing injunction. There was evidence to suggest that the petitioners were in a position to provide at least a limited indemnity.

The fact that the provisional liquidator was acting in the interests of all creditors did not constitute sufficient reason to depart from the “default position” and accept the limited undertaking that was ordered.

To the extent that the Judge at first instance had attached significance to the lack of any specific losses that Mr Ubhi was likely to suffer as a result of the freezing order, he was mistaken in doing so as was held in **Pugachev** "it is fairness rather than likelihood of loss that leads to the requirement of a cross- undertaking".

A further problem was that the Judge's approach was such that it was not apparent that he appreciated quite how worthless Mr Hunt's cross undertaking was.

Whilst liquidators seeking to obtain injunctive relief might not have time to investigate the possibility of insurance, by the time the matter came for a hearing there had been ample time for such enquiries to have been made.

The argument that there had been a breach of the duty on the part of the applicant to give full and frank disclosure was not made out.

The appeal would be allowed, and the freezing order set aside.

Comment

- This case makes it clear that following the decision in **Pugachev** the burden is on the applicant/liquidator to demonstrate why the "default position" should be departed from in determining the terms of any cross undertaking in support of a freezing injunction.

- It was also suggested that the court should be slower to make a freezing order in favour of provisional liquidator where no separate claim is being initiated by him.

- The provisional liquidator's powers will be derived from the terms of the order making his appointment. It is therefore important that those powers adequately cover the actions that are to be taken and include for example the seeking of injunctive relief against third parties.

- On behalf of the provisional liquidator, it was submitted that Mr Ubhi would be a contributory and therefore liable to contribute to the partnership shortfall. However, it was noted that had Mr Ubhi been made bankrupt on the separate petition that was presented against him then the relevant provisions of **the 1994 Order** would have been **article 8**. This means that **section 221** of the **1986 Act** would be modified so as to include **section 221(7)** which provides *that "unless a contrary intention appears, a member of a partnership against whom an insolvency (i.e. bankruptcy) order has been made by virtue of article 8 of the [1994 order] shall not be treated as a contributory for the purposes of this Act"*. The meaning and effect of this provision was not debated before the Court of Appeal and remains unresolved.

Liquidation

Safe Depot Limited (in liquidation) v Esa [2023] EWHC 2011 (Ch)

Liquidators' claims against the director

This was an application by the liquidators of Safe Depot Limited (in liquidation) ("the Company") against Mr Esa and a company called Stone Key Ltd ("Stone Key"). The application alleged breach of duties owed by Mr Esa to the Company in which he caused it to enter into transactions at an undervalue, preferences and transactions defrauding creditors for the purposes of **sections 238, 239** and **423** of the **Insolvency 1986 ("IA 86")** together with wrongful trading under **section 214 IA 86**.

Facts

The Company was incorporated on 8th April 2002 and provided storage space for rent at three separate sites. The Company was wound up by its landlord on 24th July 2017 following which the joint liquidators were appointed on 14Th September 2017.

From 1st March 2015 Mr Esa was the sole registered director and shareholder of the Company. Mr Esa was also the sole shareholder and director of Stone Key from 19th September 2015.

Faced with cash flow problems it was alleged that Mr Esa caused the Company's assets to be disposed of and that the customer list for the Birkenhead premises was given to a company called Smart Storage for no consideration in November 2016.

In August 2016 Mr Esa caused the Company to transfer the business conducted from the Bury and Blackburn premises including the leases, and trade debtors to Stone Key for no consideration.

Whilst Mr Esa did not attend the trial, previously in interview he claimed that Stone Key provided consideration for the assets by paying the Company's creditors directly some £80,000 and collecting £54,000 of debtors on the Company's behalf.

The liquidators' claims

The liquidators claimed that the transactions involving the Company's assets were transactions at an undervalue or alternatively preferences or were transactions defrauding creditors.

They also claimed that Mr Esa breached his duties to:

1) act in accordance with the Company's constitution;

2) act in a way which he considered in good faith to promote the success of the Company whether for the benefit of its creditors or at all; and

3) exercise reasonable care and skill and diligence and to avoid a conflict of interest.

Finally, the liquidators alleged wrongful trading for the purposes of **section 214 IA 86** from 29th September 2016 or alternatively 21st November 2016. As at 29th September 2016 the Company's creditors stood at £111,693. By 22nd June 2017 they were £191,669 and as at the date of liquidation on 24th July 2017 a total £509,741.

By the time the matter came to trial the claim against Stone Key was stayed as that company had gone into creditors voluntary liquidation. Whilst Mr Esa did not file points of defence he had filed a witness statement and previously attended an interview with the Official Receiver. Mr Esa sought an adjournment on the grounds that his mental condition had deteriorated to a point where he was not capable of defending himself. However, the medical evidence provided by Mr Esa was considered inadequate and insufficient to justify an adjournment.

Before trial Mr Esa had produced a list of issues which contained some general allegations about the conduct of the liquidators and the accuracy of a transcript of an interview. There was also dispute over the books and records of the Company in respect of which “large tranches” remained missing. Evidence from a former employee was that the Company’s computer and certain records were removed from one premises and taken to another around 2017 but had since disappeared. It was noted Mr Esa appeared to have continued access to the Company’s records as he was able to send some draft management accounts printed on 3rd January 2019. On this point it was stated that once the liquidators had shown that Mr Esa or his corporate vehicle Stone Key had received property of the Company it was for him as a fiduciary to show the propriety of that receipt. **(GHLM Trading Limited v Maroo [2012] EWHC 61**). Once the liquidators have made out a prima facie case it was not open to Mr Esa:

> *“ to escape liability by asserting that, if the books and papers or other evidence had been available, [he] would have shown that [he was] not liable in the amount claimed”*

***(Re Mumtaz Properties [2011] EWCA Civ 6*10.)** :

Legal principles

Breach of duty

The liquidator may bring an application pursuant to **section 212 IA 86** where a director has:

> *“misapplied or retained, or become accountable for any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.”*

In such a case the court may require the director to repay, restore or account for money or property or contribute by way of compensation to the company’s assets.

The general duties owed by director of a company are contained in the **Companies Act 2006 (“CA 2006”**). The duties relied on in this case were **section 171:**

A director of a company must-

a) act in accordance with the company’s constitution, and

b) only exercise powers for the purposes for which they are conferred.

Section 172 CA 2006 states:

> *“(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…..*
>
> *(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company”*

Whether a director has acted in accordance with his duty is approached subjectively by reference to what the director himself believed. The question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind.

However, there are exceptions to the subjective approach as explained in **HLC Environmental Projects Ltd (in liq) [2013] EWHC 2876**, where three qualifications were identified;

a) Where the duty extends to consideration of the interests of creditors their interests must be considered as paramount and taken into account in the directors' exercise of discretion.

b) The subjective test only applies where there is actual evidence of consideration of the best interests of the company. Where there is no such evidence the proper test is objective, namely whether an intelligent and honest man in the position of director of the company could in the circumstances have reasonably believed that the transaction was for the benefit of the company.

c) Where there is a very material interest such as that of a large creditor which is unreasonably overlooked or not taken into account the objective test must be applied.

The duty to creditors is engaged where the directors know, or ought to know, that insolvency is imminent or that it is probable that the company will enter into insolvent liquidation **(BTI v Sequana [2022] UKSC 25)**

Section 174 CA 2006 provides;

(1) A director of a company must exercise reasonable care, skill and diligence.

Section 175 CA 2006 sets out that;

(1) A director of a company must avoid a situation in which he has or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

Transactions at an undervalue and preferences

Section 238 IA 86 provides:

(4).....a company enters into a transaction with a person at an undervalue if –

a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or monies worth, of the consideration provided by the company.

Section 239 IA 86 provides

(4)……. A company gives preference to a person if –

a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and

b) *the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.*

To be a preference the transaction must have taken place at a "relevant time." A transaction does not take place at a relevant time for the purposes of **section 238 or 239** unless the company –

a) *is at that time unable to pay its debts within the meaning of section 123 …or*

b) *becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference.*

*but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company***.**

Section 240(2) IA 86

Stone Key was connected with the company by reason of the control of both of them by Mr Esa (**sections 249 and 435 IA 86**).

Transactions defrauding creditors

Section 423 IA 86 deals with transactions defrauding creditors as follows:

(1) *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 the value, in money or money's worth of the consideration provided by himself…………….*

(3) *In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose-*

(a) *of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*

(b) *of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make*

Wrongful trading

Section 214 IA 86 provides as follows;

(1) *Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.*

(2) This subsection applies in relation to a person if –

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time;

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the conditions specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors……..

Insolvency

In interview with the Official Receiver Mr Esa when referring to having bought out his brother in 2014 said that the Company *"had no value to be shared out"*. Subsequently when interviewed by the liquidators on Skype Mr Esa referred to the Company having cash flow problems as far back as 2014. The Company's accounts for the year ending 28th February 2015 showed a loss of £66,044. For the year ended 29th February 2016 they showed a loss of £333,738 and balance sheet net assets of £71,330.

The Company had received a summons for unpaid non domestic rates on its Blackburn premises issued on 28th April 2017 for the period back to 1st April 2016. The Company entered into a payment plan with it's landlord on 19th August 2016 for insurance premiums. Around the same time the Company consulted debt advisers. A winding up petition was presented on 30th November 2016 for unpaid rent but was subsequently paid and dismissed. A further statutory demand was served on 21st April 2017 for unpaid rent. Two debt collection agencies wrote to the Company concerning VAT arrears on the 25th and 26th of April 2017. The Company was ultimately wound up on 2nd June 2017.

The assets transferred

The liquidators claimed that the Birkenhead customer list was given to a company called Smart Storage for no consideration. Whilst there was no doubt that this had taken place it was difficult to place any value on the list without the benefit of expert evidence.

A further claim was that the business conducted at Bury and Blackburn was transferred to Stone Key in August 2016. The dispute was what happened to any consideration received for the transfer? In interview Mr Esa had claimed that Stone Key had paid some of the creditors of the Company of £80,000 in total. It was claimed that Stone Key collected debtors on behalf the Company of £54,000. There was little or no evidence to support this having taken place.

Decision

ICC Judge Mullen on the claim that Stone Key had paid £80,000 to the Company's creditors and collected £54,000 pounds of book debts held that he was not satisfied that there was any consideration paid by Stone Key for the transfer of the Bury and Blackburn business or that it collected any book debts on behalf the Company.

In the absence of evidence as to the value of the company's goodwill and leasehold property in particular, the value of trade debtors was taken as the value that had been transferred to Stone Key in respect of the business.

The transfer the business for no consideration took place at a time when the Company was unable to pay its debts and within two years of the winding up order.

There was no evidence of the transfer discharging an existing debt for the purposes **section 239 IA 86**. The transaction amounted to a transfer at an undervalue for the purposes **Section 238 IA 86.**

There was nothing to suggest that Mr Esa considered the interests of creditors or indeed considered his duties under **section 172 CA 2006** or at all.

Considering the exercise of the duty objectively and applying the standard of a reasonable director, Mr Esa put himself in a position of conflict between him and his interests and those of the Company.

The evidence was not sufficient to establish a purpose of putting assets beyond the reach of creditors for the purposes of **section 423** of the **IA 86**

By the end of September 2016 Mr Esa knew or ought to have known that there is no reasonable prospect of the Company avoiding insolvent liquidation and as such the requirements of **section 214** were made out as at 29th September 2016. The total deficiency claim included the landlord's claim for dilapidations which would have arisen in any event and therefore would be excluded.

The Company was unable to pay its debts as they fell due by April 2016 and having held as above Mr Esa must compensate the Company for a total sum of hundred £136,858.

Comment

- There were some valuation issues in this case which could have been alleviated with the use of expert/opinion evidence. On this occasion the court was prepared to take a pragmatic approach to such matters.

- When calculating the deficiency/loss for wrongful trading this case demonstrates that it will not necessarily include a landlord's claim for dilapidations.

- The director challenged the accuracy of the transcript of the Skype interview. Whilst the judge was willing to accept the transcript as an accurate record of what took place, the mere fact of the challenge shows the need to ensure that records/transcripts are kept of all interviews/meetings.

- This case contains a useful explanation of the expression "*every step with a view to minimising the potential loss to the company's creditors*" at paragraph 33.

Liquidation

Re Torotrak Plc (in liquidation) [2023] EWHC 115 (Ch)

Distribution of surplus to members

An application was issued by the liquidators of Torotrak Plc ("the Company") for directions under **section 112** of the **Insolvency Act 1986** as to how the surplus of £304,859 in the creditors voluntary liquidation of the Company may be distributed amongst its members.

Facts

The Company first entered administration on 8 December 2017, eventually being converted to a creditors voluntary liquidation. The Company had some 8,759 members nearly all of which were individuals. Because of the large number of members, it was estimated that after costs were taken into account a very small dividend of 0.64p in the pound would be payable to each member at best. In view of this the liquidators proposed an alternative that they make a distribution to the top 81 members who would receive a dividend of more than £25. The justification for the proposal being that it would significantly reduce the associated costs.

The liquidators also sought an increase in their remuneration which had previously been capped at £260,000. That fee was approved by creditors on the basis that the distribution that would ultimately be made would be between no more than 100 members. In the event that the court did not allow such an approach and required distribution to all members then the liquidators sought the court's approval for an increase in their remuneration. There being no remaining creditors as they had all been paid.

In support of the application the liquidators addressed the practical difficulties that they faced. These included the fact that members were situated in the United Kingdom, the United States of America and other countries. There were problems in obtaining up-to-date upstate details for members. This meant not only the cost of writing to all known members but also following up on those where letters were returned, or they had since passed away.

The liquidators having sent progress reports to creditors had received only one objection to the proposed distribution. This came from a shareholder who had 1000 shares which would entitle him to a distribution of 38p or less. The member objected strongly stating that he believed that all shareholders should be treated equally.

The issues

Counsel for the liquidators identified the issues as follows;

1) Whether further steps should be taken to trace members, what steps are proportionate, and how the cost of taking those steps should be financed?

2) To whom the liquidators may make a distribution of the surplus, and when?

3) In what proportions liquidators may make any such distributions?

4) Generally, in respect of the proposed distribution of the surplus by the liquidators?

The liquidators relied on **section 112** of the **Insolvency Act 1986** which enables liquidators to apply to court to determine any questions arising in the winding up of a company and argued that this enabled the court to make the direction sought with regard to the distribution of the surplus.

If the company were being wound up at the court, it would settle a list of contributories with power to rectify the register of members in all cases where rectification was required and would cause the company's assets to be collected and applied in discharge of its liabilities. The court, as well as the liquidator, retains the power to adjust the rights of contributories. In a winding up by the court the liquidator could apply to the court for an order authorising the return of capital.

Reference is made to the decision in **Re Powertrain limited [2015] EWHC 3998 (Ch**). In that case Newey J referred to the need for liabilities to be dealt with within a reasonable time and the fact that Parliament cannot have intended that liquidation's last forever. In that case the liquidation had been running for 10 years against the five years of the present case.

Counsel for the liquidators drew attention to **section 107** of the **Insolvency Act 1986** which provides;

> "…..the company's property in a voluntary winding up shall, on the winding up, be applied in satisfaction of the company's liabilities pari passu and, subject to that application, shall (unless the articles otherwise provide) be distributed among the members according to their rights and interests in the company."

The Company's articles at article 184 stated;

> "Subject to the provisions of the Statutes and to any special rights for the time being attached to any class of shares, on return of assets on liquidation or otherwise the surplus assets of the Company remaining after payment of its liabilities shall be distributed to be paid up on the ordinary shares of the Company then in issue."

Section 250 of the **Insolvency Act 1986** was also relevant in that it provides the person who is not a member of the company but to whom shares in the company have been transferred or transmitted by operation of law, is to be regarded as a member of the company, and that references to a member or members are to be read accordingly. Counsel for the liquidators pointed out that the relevant date for ascertaining who is a member of the Company is the date of the commencement of the relevant winding up.

Attention was drawn to Re **Border Counties Farmers Ltd [2017] EWHC 2610 (Ch)** in which the position of untraced and unresponsive members in a members voluntary winding up was considered. In that case the question was whether section 112 the Insolvency Act 1986 gave the power to direct that the proceeds of uncashed cheques should be re-distributed amongst known members. On that occasion taking into account section 107 it was found that the court is not permitted to make any adjustments to the rights and interests of members in the company.

Reference was made to cases dealing with the prescribed part. **Re Courts plc [2008] EWHC 2339 (Ch)** and **Re International Sections Limited [2009] EWHC137 (Ch),** those cases being authority for the proposition that is not possible to limit distribution out of the prescribed part to only a limited number of shareholders who would stand to benefit most even though the costs of such a distribution would reduce the distribution to a small dividend only.

Decision

Having accepted that the provisions of **section 107 Insolvency Act 1986** prevented the court authorising a limited distribution to certain members only under **section112** Judge Hodge KC directed his attention to an appropriate solution.

He ordered that the liquidators write to the known shareholders at their last known address inviting claims to be made within an appropriate period of time and making it clear that no such claims will be considered after the cut-off date.

The letter would refer to the limited amount likely to be payable by way of dividend and should stipulate what evidence was required in the case of a person whose had succeeded to any interest of a deceased or dissolved member of the Company.

Further, a single advertisement will be placed in the London Gazette containing a similar cut-off date and claims information.

A portal will be maintained by liquidators carrying similar information to the letter and Gazette notice.

The increase in the liquidators' remuneration was approved and additional work would be on a time cost basis in relation to the distribution of the surplus.

The Judge also gave the liquidators prospective relief in respect of the distribution of the surplus with regard to any subsequent proceedings for negligence, default, breach of duty or breach of trust. This being consistent with the equitable jurisdiction that had been recognised in the case of trusts under the **Re Benjamin** jurisdiction.

Comment

- This case confirms that the Court will not order any deviation from section 107 of the Insolvency Act 1986 on the grounds that the costs of distribution would substantially reduce the amount distributed if not eliminated entirely.

- The finding in this case echoing previous authorities that the court will not deviate from the application of **section 176A(2)** to provide that distribution the prescribed part should be made to a reduced number of creditors on the grounds of cost.

- Use of the portal for communications with creditors/members excludes it's use for giving Notice of an intended dividend - **Rule 1.50(2) Insolvency (England and Wales) Rules 2016.**

Liquidation

Tradition Financial Services Ltd v Bilta (UK) Ltd [2023] EWCA Civ 112

S213 claims dissolution and limitation.

Facts

This case concerned claims brought by the liquidators of various companies against Tradition Financial Services Limited ("**TFS"**). They included claims under **section 213 (2)** of the **Insolvency Act 1986** against TFS as an outsider on the grounds that it was knowingly party to the carrying on of the business in a fraudulent manner.

The second issue concerned the effect of the deeming provision in **section 1032 (1)** of the **Companies Act 2006** which applies to a company following its restoration to the register after a period of dissolution. Determination of this issue would decide whether the claims were statute barred or could be proceeded with.

Chronology

23 October 2009	Vehement creditors voluntary liquidation
25 November 2009	Bilta wound up
27 October 2010	Western wound up
8th November 2011	**Claims under s213 before this date statute barred**
19 March 2012	Nathanial wound up
8 June 2015	Inline wound up
8 November 2017	Claim issued

Earlier claims had all been issued within the limitation period and had been dealt with. The most recent claim alleged that TFS was involved in dishonest assistance and the breach of fiduciary duty by the directors of the claimant companies. Secondly claims were brought by the liquidators alleging participation by TFS in the fraudulent trading of the businesses of the companies pursuant to **section 213** of the **Insolvency Act 1986**.

The various companies had been involved in Missing Trader Intra-Community fraud ("MTIC"). This is where goods are imported from another country within the EU meaning they are sold and purchased free of VAT. The company then sells the goods within the EU subject to VAT, but fails to account to HMRC for the VAT. The particular business in this case was spot trading carbon credits under the EU Emissions Trading Scheme ("EUAs"). Spot trading in EUAs within the EU prior to 2009 attracted VAT. TFS brokered the deals for various companies selling or buying EUAs. In carrying out this function TFS did not conduct any due diligence enquiries into the business being transacted by the companies.

Section 213 Insolvency Act 1986 provides;

1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

The issue on appeal was the scope of the words *"any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned"*. TFS argued that the phrase was restricted to persons exercising management or control over the company in question. At first instance the judge had rejected this argument and this became the subject of the appeal.

The court reviewed a number of decisions under section 213 from which it was noted that in **Re Maidstone Building Provisions Ltd [1971] 1 WLR 1085** the court considered the role of the company secretary who was also its financial adviser. Pennycuick VC commented that *"a secretary while merely performing the duties appropriate to the office of secretary, is not concerned in the management in the company. Equally I think he is not concerning in carrying on the business of the company"*. In order to bring a person within the section you must show that he is taking some positive steps in carrying on the company's business in a fraudulent manner

In **R v Kellard [1995] 2 Cr APP 134** a Mr Wright was charged with fraudulent trading. Mr Wright was neither a director nor employee of the companies concerned and could not be regarded as exercising a controlling or managing function or as one who was running the business. Nevertheless, Mr Wright was found guilty as he was acting on behalf the company in question and that he was "assisting" in the carrying on of the business.

Lord Justice Lewison found that the decision in **Re Murray-Watson Ltd (unreported) 6th April 1977** provided support for the view that in order to be liable under section 213 the defendant must have been party to the carrying on of a fraudulent business: and not merely a party to fraud. What must be established is that the company's business (or a discrete part of that business), taken as a whole, had been carried on fraudulently

In **Bilta (UK) Ltd v NatWest Markets Ltd [2020] EWHC 546** Snowden J said that the statements in **Bank of India V Morris [2005] EWCA Civ 693** were clear Court of Appeal authority for the proposition that section 213 is not limited to those who have been involved in the management of the company whose businesses business has been carried on with intent to defraud, but potentially extends to outsiders who deal with the company.

Dissolution and limitation

It was common ground that the cause of action under section 213 can only be made in the course of winding up by a liquidator. That cause of action arises when a winding up order is made or company goes into voluntary liquidation. Once the cause of action has arisen liquidator has six years to bring the claim. The claim was issued on 8 November 2017 and therefore in the case of any of the companies where the winding up order was made before 8 November 2011 the cause of action under section 213 was statute barred. That applied to the claims made by the liquidators of Bilta, Weston and Vehement.

In the case of Nathanial and Inline whilst the liquidators' claims under section 213 were not statute barred, the claims brought by the companies themselves sought to rely on **section 32** the **Limitation Act 1980** to postpone the running of time. That section pauses the running of time where the cause of action is based on the defendant's fraud which the claimant could not have discovered with reasonable diligence. This meant that the effect of restoration to the register had to be considered which is covered by **section 1032** of the Companies Act 2006 which provides;

> (3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

The claimant's arguing that the companies were deemed to have continued in existence with the same directors who were in office at the date of dissolution. Those directors were the wrongdoing directors whose knowledge of the wrongdoing could not be attributed to the relevant company and therefore during the period of dissolution and restoration the company could not have discovered the fraud and brought the claim earlier. They claimed that as the fraud could not have been discovered during the period of dissolution the court should make a direction under section 1032 to the effect that time did not run during the period of dissolution And therefore the claims were not statute barred.

At first instance the judge rejected that argument stating that the claimant should rely on the normal rules of limitation.

Decision

On the first question of whether TFS fell within the scope of section 213, the Court of Appeal stated that there was nothing to prevent the taking of a wider approach to section 213. Further there is no requirement for a person to fall within the scope of section 213 that they should have a controlling or managerial function within the company. Determination of whether an outsider can be said to be party to the carrying on by a company of a fraudulent business may well be a question of fact and degree which requires careful analysis. The appeal by TFS against the order finding that they were a person caught by S213 was dismissed.

In considering the deeming provision as argued by the claimant companies and its effect on the period of between dissolution and restoration Lord Justice Lewison pointed out that it is not inevitable that the directors in office at the date of dissolution would have remained in office and that such an approach is wrong. The correct approach being to ask what would have happened during the period of dissolution if the dissolution had not occurred. In other words, would proceedings have been issued in the usual manner were it not for dissolution. In order to determine this evidence would need to be available to show that it was the dissolution itself that prevented the company issuing their claims. The companies had not provided any such evidence and the provisions of section 1032 would not to be available to direct that time stopped running for limitation purposes during the period of dissolution.

Comment

- This case demonstrates the wide category of parties who may be found to be in breach of the provisions of s213 of the Insolvency Act 1986

- Whilst reliance on section 32 of the Limitation Act 1980 in cases of fraud can be used to pursue what would otherwise be statute barred claims this case puts a limitation on the use of that provision in cases where the company in question has been subject to a period of dissolution followed by restoration and liquidation.