Volume 15 Issue 4 **October 2015**

Tolley's Company Law and Insolvency

Bulletin Editor
Dr John Tribe
Kingston University

Dear Subscriber,

Welcome to the latest newsletter! The newsletter is as packed as a Christmas sales brochure!

Following the news section this newsletter contains six analysis pieces drawn from *Lexis@PSL Restructuring and Insolvency.* The first analysis piece by Louis Doyle of Kings Chambers, considers the judgment in *Hunt v Withinshaw (Former trustee in bankruptcy of Steven James Hunt)* [2015] EWHC 3072 (Ch), [2015] All ER (D) 253 (Oct) and the clarification it provides on the effect of disclaimer of onerous property in bankruptcy and the court's approach to vesting orders.

In *Taylor v The MacDonald Partnership* [2015] EWCA Civ 921, Lord Justice Kitchen had to decide whether to grant permission for a second appeal to be brought in respect of a discharged bankrupt's failed application to have her bankruptcy annulled. Stephen Leslie, solicitor in the Lexis®PSL Restructuring and Insolvency team discusses the judgment in our second analysis piece.

Do Law of Property Act (LPA) receivers owe any duties to a mortgagor who is subsequently adjudged bankrupt? In our third analysis piece Matthew Weaver, a barrister at St Philips Chambers, reviews the decision of the Court of Appeal in *Purewal v Countrywide Residential Lettings Ltd* [2015] EWCA Civ 1122, [2015] All ER (D) 60 (Nov).

In what circumstances can an insolvency practitioner (IP) against whom a misfeasance claim is made rely on the company's involvement in an illegal act as a defence to the claim? In our fourth analysis piece Ali Tabari, a barrister at St Philips Chambers, discusses the Court of Appeal's decision

in *Top Brands Ltd v Sharma (as former Liquidator of Mama Milla Ltd)* [2015] EWCA Civ 1140, [2015] All ER (D) 77 (Nov) and its implications for practitioners.

How is interest upon provable debts to be calculated, and debts in foreign currencies exchanged into sterling by trustees of insolvent estates? In our fifth analysis piece Donald Lilly of 4 Stone Buildings, says the ruling in *Re Estate of Platon Elenin (aka Boris Abramovich Berezovsky), Subnom Lockston Group Inc v Wood* [2015] EWHC 2962 (Ch), [2015] All ER (D) 231 (Oct) shows the importance of construing all insolvency law enactments within their context, and not in isolation.

What changes should insolvency practitioners expect in the revised statement of insolvency practice 9 (SIP)? In our sixth analysis piece Alison Curry, head of regulatory standards and support at the Insolvency Practitioners Association (IPA), evaluates the new SIP and explains how it emphasises the importance of narrative explanations provided to creditors.

This newsletter contains 11 summary reports of case law apposite to the jurisdictions of insolvency law and company law. There then follows details of one new apposite pieces of legislation.

I would be pleased to hear from subscribers who have any comments or suggestions regarding the content of this Newsletter, or any comments or queries on company law, insolvency law and practice and procedure in general in those areas. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of this newsletter: Dr John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, E-mail: j.tribe@kingston.ac.uk.

Dr John Tribe

Newsletter Editor

NEWS

(1) Insolvency Service publishes responses to consultation on collective redundancy

Misunderstandings around current legal requirements in collective redundancy consultations were highlighted in the responses to a consultation conducted by the Insolvency Service. As businesses are likely to be in financial distress by the time an insolvency practitioner is appointed, making constructive engagement with employees even more challenging, the Insolvency Service concluded that consultation needs to begin sooner wherever possible.

The government launched a call for evidence—'Collective Redundancy Consultation for Employers Facing Insolvency' in March 2015, which ran until June 2015. The consultation was aimed at interested groups including lawyers, insolvency practitioners and trade unions and aimed to better understand how collective redundancy consultation works in practice when a company is facing or has moved into formal insolvency.

Recent Employment Tribunal findings highlighted the need for government to look in more detail at the particular circumstances surrounding consultation in the face of, and during, insolvency.

In particular, views were sought on:

- existing understanding of the current requirements of consultation in an insolvency situation;
- factors which facilitate and inhibit effective consultation in an insolvency contex;
- the role of directors and insolvency practitioners in consulting within an insolvency context; and
- how timely notification is achieved in an insolvency context.

Responses

The responses have been considered under three common themes:

- current understanding of the requirements to consult in insolvency situations and sanctions for failing to consult;
- factors impacting on the notification process and sanctions for failing to notify; and
- whether there is a need for further guidance on how consultation and notification in an insolvency situation works.

Responses to the consultation revealed a number of main issues. For example, almost all respondents believed meaningful consultation with a view to reaching an agreement, particularly on ways to avoid or reduce dismissals, could often not happen in an insolvency situation.

Other emerging issues included:

- respondents believed tensions between employment law and insolvency law inhibit consultation when the company is in formal insolvency;
- uncertainty about when the requirement to consult and to notify begins;
- confusion as to how long consultation should last for with a number of respondents believing there to be a fixed statutory period;

- concerns were raised that disclosure about a company's financial difficulties could undermine rescue and survival of the business; and
- a lack of time and money was seen as a major inhibitor to beginning consultation by trade unions, employment and insolvency lawyers and insolvency practitioners.

Next steps

The government plans to undertake further work to see how best to address the points raised in the call for evidence.

(2) Number of people becoming insolvent on the rise

Compulsory liquidations have decreased and the total number of people who became insolvent in England and Wales went up compared to the previous quarter, the latest Insolvency Service statistical release revealed. The statistics cover July to September 2015.

The Statistics release contained the latest data on company insolvency and individual insolvency levels. The figures highlighted:

Companies

- the number of company insolvencies in England and Wales continued to decrease; and
- this decrease was mainly driven by a decrease in compulsory liquidations, which fell to the lowest level since Q3 1989.

Individuals

- the total number of people who became insolvent in England and Wales decreased compared with the same quarter in 2014, but increased compared with the previous quarter;
- this quarterly increase was driven by a rise in individual voluntary arrangements, the first such increase since Q2 2014; and
- the number of bankruptcies and debt relief orders continued to decline.

ANALYSIS

(1) Pier pressure—disclaiming onerous property in bankruptcy

Louis Doyle of Kings Chambers, considers the judgment in *Hunt v Withinshaw (Former trustee in bankruptcy of Steven James Hunt)* [2015] EWHC 3072 (Ch), [2015] All ER (D) 253 (Oct) and the clarification it provides on the effect of disclaimer of onerous property in bankruptcy and the court's approach to vesting orders.

The present case concerned a pier, the freehold of which was owned by Mr Hunt until he was made bankrupt and the freehold vested in his trustee in bankruptcy. Among other things, the Chancery Division dismissed Mr Hunt's application for a vesting order, holding that it would not be appropriate in all the circumstances to make an order vesting in Mr Hunt the pier or any part of it.

What was the background to the application?

The procedural background to the case is rather involved, but its essential elements require consideration. There is something in the observation that, as a litigant in person, Mr Hunt was granted a degree of leeway that might not have been shown by the court to a professionally represented litigant.

Mr Hunt acquired the registered freehold title to Colwyn Bay Pier on 8 April 2004. He was made bankrupt on 17 July 2008. At the date of the bankruptcy order the pier included a small accommodation unit which the borough council (Conwy) accepted amounted to a dwelling house and the sole or principal residence of Mr Hunt for the purposes of section 283A of the Insolvency Act 1986 (IA 1986).

On 8 July 2011, or at least by 12 July 2011, Mr Hunt's trustee applied for an order for possession and sale of the pier, so as to be within the three year period in which such an application must be made—with the consequence that the interest in the dwelling house did not re-vest in Mr Hunt on 16 July 2011. On 18 August 2011, the trustee signed a notice of disclaimer of the freehold interest in the pier and filed a copy of that notice with the court on 19 August 2011. Later on 19 August 2011, a district judge dismissed the trustee's application for possession and sale 'upon the trustee having disclaimed his interest in the pier pursuant to s 315 of the Insolvency Act 1986'. The trustee sent a copy of the notice of disclaimer to Mr Hunt on 22 August 2011, which Mr Hunt received on 24 August 2011.

On 14 November 2011, Mr Hunt—and his mother, who claimed a beneficial interest in the pier—applied for vesting orders under IA 1986, s 320. On 27 March 2012, acting on the basis that the disclaimer by the trustee had caused the freehold in the pier to escheat to the Crown, such that the registered title was liable to be closed, the Crown Estate Commissioners, exercising powers under the Crown Estate Act 1961 and section 79(1) of the Land Registration Act 2002, created a new freehold interest in the pier in favour of the Welsh Government which was transferred on the same date to Conwy—the transfer being subject to all third party interests in the pier—including the right of any person to obtain a vesting order.

On 17 August 2012, the county court judge dismissed Mr Hunt's application for a vesting order—as well as dismissing a host of other challenges

to the validity of the trustee's disclaimer—notwithstanding the vesting order application being predicated on the disclaimer being valid. Mr Hunt's mother's application was dismissed on 5 November 2012.

Mr Hunt appealed to the High Court. On 8 May 2013, Sir William Blackburne handed down judgment on the appeal which, save for remitting the trial of the vesting order application to the county court for re-trial on the footing that the county court judge had been in error in the factors he had considered in justifying the dismissal of Mr Hunt's application, dismissed all of the points taken by Mr Hunt.

The judgment of Sir William Blackburne is reported at *Hunt v Conwy County Borough Council* [2014] 1 WLR 254, [2013] All ER (D) 101 (May). The key points made, among others, in that judgment were as follows:

- first, it was not open to Mr Hunt to argue that the pier was not onerous property within IA 1986, s 315 (at para [35] 'I am also of the view that it was far too late, very many months later, when an application for a vesting order was before the court which assumed the validity of the disclaimer to seek to run an argument that, in truth, there was no valid disclaimer either because the property was not "onerous" within the meaning of s 315 or because the trustee's act in seeking to disclaim the property was in some other way open to challenge');
- second, a failure by the trustee to serve a copy of the notice of disclaimer on the Chief Land Registrar did not invalidate the disclaimer;
- third, Mr Hunt could not argue that the whole of the pier was a 'dwelling house' within the definition of that phrase in IA 1986, s 385(1), Mr Hunt having argued that the walkways of the pier were akin to decking and the foreshore a garden; and
- fourth, the court has power under IA 1986, s 320(3) to make a vesting order in relation to all of the disclaimed property or to a part of it.

Some eight months later, on 13 January 2014, Mr Hunt issued a fresh application in the county court arguing that the trustee's disclaimer had been invalid because the case came within IA 1986, s 318 (disclaimer of a dwelling house) with the result that there would not have been an effective disclaimer until a copy of the notice of disclaimer had been served on Mr Hunt. On that basis, Mr Hunt argued, the freehold interest in the pier had re-vested in him on 19 August 2011 when the application for possession and sale of the pier was dismissed by the district judge. That application was dismissed by the county court judge. Mr Hunt then set about an appeal. That appeal was dismissed on paper on 14 August 2014 by Peter Smith J. On 7 November 2014, Mr Hunt renewed his application

for permission to appeal at an oral hearing before Peter Smith J. His submission was that he had not argued the s 318 point before Sir William Blackburne because he had not thought of it at that stage. Peter Smith J granted permission to appeal.

On 16 January 2015 Conwy applied to be joined as a respondent to the appeal—which had been brought by Mr Hunt only against the former trustee. On 20 January 2015, Peter Smith J ordered that Conwy was to be joined as a respondent to the appeal and that the issues directed for re-trial in the county court be transferred to the High Court and heard with the appeal.

The appeal, the remitted trial and a further application for summary judgment issued by Mr Hunt on 9 October 2015 came on for hearing before Morgan J on 13 October 2015.

What issues did the case raise before Morgan J?

Having dismissed out of hand Mr Hunt's application for summary judgment against Conwy, Morgan J was faced with the merit of the appeal from the county court judge on the s 318 issue dismissed on 13 January 2014. Irrespective of the outcome of that application, the court then had to consider the factors relevant to the vesting order application.

What was the outcome?

Interestingly, on the s 318 point—had the dwelling house re-vested in Mr Hunt prior to the disclaimer becoming effective—Morgan J considered two leading textbook authorities and commentary by the Court of Appeal in *Lee v Lee* [2000] BCC 500, [2000] 1 FLR 92 (which had not decided the point) and found those sources to support Mr Hunt's case. The judge did not, however, determine the point in Mr Hunt's favour. The reason for that was that it was unnecessary to reach a determination given that the judge was not prepared to entertain the appeal in the light of the procedural background. There were three reasons for that—the fact that the point had not been taken when it ought to have been at the outset, the passage of time and the inconsistency as between the point taken on appeal and the subsisting application for a vesting order (at para [48] '… in those circumstances, it was plainly an abuse of process for Mr Hunt to bring a new application for a declaration on 10 December 2013 on a basis which was inconsistent with his own application for a vesting order and with the order he had obtained on 8 May 2013').

Accordingly, both the application and the appeal were dismissed as an abuse of the process of the court. It is also worth pointing out that the judge identified (at para [48]) that, even if Mr Hunt had applied as at 10 December 2013 to amend his application for a vesting order to include a claim that the disclaimer was effective, permission would most likely

have been refused in view of the fact that the issue involved disputed matters of fact which had not been investigated at the trial in August 2012. The s 318 point required proof that the dwelling house was the bankrupt's residence as at the date of the disclaimer, an issue of fact not tried or even in issue at the vesting order trial in August 2012.

As regards the vesting order application, and notwithstanding the judge acknowledging the view expressed by Sir William Blackburne to the effect that a vesting order will ordinarily be made in favour of an applicant where there is no competing interest to such an application, Morgan J dismissed Mr Hunt's application. What is of particular note in considering the factors relevant to this case—aside from the worsening physical state of the pier which was, based on expert evidence adduced by Conwy, found to be close to inevitable collapse—was the absence of funds on Mr Hunt's part to repair or renovate the pier and the council's application for planning consent to demolish the pier as part of its wider waterfront development scheme. The judge considered at para [79] that public interest was a factor that could be taken into account, and in particular the fact that the pier could not be restored at reasonable expense and would be subject to controlled demolition if left in the hands of Conwy. The judge was also influenced by the fact that in cross-examination Mr Hunt had made it clear that he expected to bring fresh litigation against Conwy in the event that the pier or any part of it was vested in him.

Why is the case significant?

There are at least three reasons why this case matters.

First, the interplay between IA 1986, s 315 and IA 1986, s 318 remains unresolved, although the judgment does very much err in suggesting that Mr Hunt would have been right on his argument had he not raised it years down the line and in a way which, even for a litigant in person, entirely contradicted the rest of his case. At the same time, Morgan J identified that the re-vesting in Mr Hunt of the dwelling house only, some distance above the ground and on the seaward side of a seriously dilapidated pier, would be of no practical benefit anyway.

Second, the case includes a useful discussion of the limits of vesting orders in terms of imposing covenants such as easements on the Crown or the party against which a vesting order application is made. Although obiter, Morgan J's view was that there was no such jurisdiction under IA 1986, s 320.

Third, the case gives some indication of the limits of the court's willingness to be flexible when proceedings are brought by a litigant in person so as to maintain the integrity of procedural justice.

(2) Too late to annul a bankruptcy order?

In *Taylor v The MacDonald Partnership* [2015] EWCA Civ 921, Lord Justice Kitchen had to decide whether to grant permission for a second appeal to be brought in respect of a discharged bankrupt's failed application to have her bankruptcy annulled. Stephen Leslie, solicitor in the Lexis®PSL Restructuring and Insolvency team discusses the judgment.

Briefly, what were the facts of the case?

Mr and Mrs Taylor were said to have been in partnership together. The partnership got into financial difficulties. Individual voluntary arrangements (IVAs) were proposed by both Mr and Mrs Taylor, and these were approved by creditors in January 1996.

About four years after Mrs Taylor's IVA had been approved, the supervisor of her IVA petitioned for her bankruptcy due to Mrs Taylor being in breach of her IVA obligations. However, the terms of the IVA provided that the supervisor should not present any bankruptcy petition unless that had first been agreed upon by a meeting of creditors—no such meeting had taken place in this case.

Mrs Taylor was subsequently adjudged bankrupt, and discharged from her bankruptcy three years later.

Nine years after discharge, Mrs Taylor applied to annul her bankruptcy under section 282(1)(a) of the Insolvency Act 1986 (IA 1986) on the basis that the bankruptcy order ought not to have been made, relying upon a number of grounds. That application was dismissed—the district judge did not consider that any of the grounds had any substance, including that the supervisor did not have standing to present the bankruptcy petition as no meeting of creditors had been held. Mrs Taylor appealed.

The appeal was heard by His Honour Judge Hodge QC sitting as a Judge of the High Court. Judge Hodge found that the district judge had fallen in error in failing to have regard to the fact that no meeting of creditors had taken place. However, the district judge had said that, even if he had agreed that the bankruptcy order ought not to have been made, he would still have exercised his discretion against making the annulment order because of the fact that the application had been issued some 11 years after the bankruptcy order had been made, and no explanation had been given for that delay or why no application had been made before then. Judge Hodge considered that there was no reason to interfere with the district judge's exercise of his discretion.

Judge Hodge considered—but ultimately rejected—the other grounds of appeal raised by Mrs Taylor. The district judge had not fallen into error in refusing to accept that, at the time the bankruptcy order was made, any grounds existed by virtue of which it ought not to have been made, and in

any event the district judge was entitled and bound to take the view that the application had been made far too late to be made with any realistic prospect of success.

What were the legal issues that Kitchen LJ had to decide?

This was an application for permission to bring a second appeal. Accordingly, Mrs Taylor had to demonstrate that her appeal would raise an important point of principle or practice, or that there was some other compelling reason for the court to hear it.

What legal arguments were put forward?

By the time of the hearing before Kitchen LJ, Mrs Taylor's grounds of appeal were:

- Judge Hodge had fallen into error in failing to find that there were grounds existing at the time which meant that the bankruptcy order ought not to have been made—principally as a result of Judge Hodge's finding that the supervisor failed to hold a meeting of creditors in breach of the terms of Mrs Taylor's IVA; and
- the exercise of the discretion to refuse the annulment was plainly wrong—among other reasons, IA 1986, s 282(1) provides that an application may be made at any time (including after discharge). Therefore any reference to the length of time that had passed prior to the making of the annulment application should have no bearing on the exercise of discretion. Further, IA 1986, s 282(4) allows the court to validate all proper steps taken prior to annulment so as to ensure a just outcome.

What did Kitchen LJ decide, and why?

Kitchen LJ dismissed Mrs Taylor's application for permission to appeal, as it did not raise an important point of principle or practice and there was no other compelling reason for the court to hear it.

The decision appears to be very much based on the exercise of discretion to annul a bankruptcy order, rather than whether the bankruptcy order ought to have been made in the first place. As Mr Justice Morgan confirmed in *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch), [2015] All ER (D) 288 (Feb), even if the court decides that a bankruptcy order ought not to have been made, it still has a discretion not to make an annulment order.

In Kitchen LJ's judgment (at para [20]):

> '… both the district judge and Judge Hodge were entitled to conclude as they did that it is now far too late to make an order

> annulling Mrs Taylor's bankruptcy order, irrespective of whether that order ought not to have been made.'

Kitchen LJ accepted the submission made on Mrs Taylor's behalf that IA 1986 allows annulment applications to be made at any time, but that in this case there had been a change of circumstances since the bankruptcy order had been made. A considerable amount of litigation—and work undertaken by Mrs Taylor's trustee in bankruptcy—had taken place in the intervening period, which had resulted in significant costs being incurred, some of which were recoverable from Mrs Taylor through costs orders made against her that were unpaid. An annulment order would still result in further costs and expenses—probably more so than if the bankruptcy was not annulled—which would not be a just result.

What practical lessons can those advising take away from this case?

It is true that IA 1986 does not state a time limit by which an annulment application must be made. However, the prospects of success for an application made under IA 1986, s 282(1)(a) will usually, without a proper reason for any delay, decrease the longer the period between the date of the bankruptcy order and the issue of an annulment application is. Even if the bankruptcy order ought not to have been made, it does not automatically follow that it will be annulled—the court still retains a discretion and must exercise that discretion so as to achieve a just and proportionate result.

It was accepted by Judge Hodge that the supervisor had no authority under the terms of the IVA to petition for Mrs Taylor's bankruptcy. It was argued on behalf of the supervisor that he had authority anyway under IA 1986, s 264, and that IA 1986, s 276 conferred upon the court the power to make a bankruptcy order for failure to comply with the terms of an IVA. However, as the judgment in this case focussed on Mrs Taylor's delay in making her application, no decision was made as to whether, by itself, those statutory provisions would effectively override any failure by a supervisor to obtain creditors' consent to present a bankruptcy petition.

However, it must be recognised that Mrs Taylor's IVA, and the subsequent bankruptcy order made against her, occurred a long time ago. Practice and procedure has moved on, and it would perhaps be unusual nowadays for a supervisor to petition for a debtor's bankruptcy unless the creditors had so resolved.

(3) To whom do Law of Property Act receivers owe duties?

Do Law of Property Act (LPA) receivers owe any duties to a mortgagor who is subsequently adjudged bankrupt? Matthew Weaver, a barrister

at St Philips Chambers, reviews the decision of the Court of Appeal in *Purewal v Countrywide Residential Lettings Ltd* [2015] EWCA Civ 1122, [2015] All ER (D) 60 (Nov).

The Court of Appeal, Civil Division, dismissed the claimant's appeal against the dismissal of his claim for damages for breach of duty against the second and third defendant receivers. The judge had been right to dismiss the claim on the basis that any duties owed by the receivers in relation to an insurance claim had been owed exclusively to the claimant's trustee in bankruptcy, and the claimant had not produced the evidence necessary to establish his case on causation.

What was the background to the appeal?

The appellant, Mr Purewal, was the freehold owner of a buy-to-let property. The property was subject to a mortgage and, in circumstances where Mr Purewal fell into arrears under the mortgage, the mortgagee appointed LPA receivers over the property. The receivers informed Mr Purewal of their appointment and told him to cancel any policies of insurance he held over the property as the property would be subject to a policy of insurance taken out by the receivers during their appointment.

A leak occurred in the property which caused water damage throughout the property. The leak was reported to the receivers but they failed to notify their insurer and, as such, no successful insurance claim was submitted in respect of the damage. The property was therefore left by the receivers in a damaged state.

Mr Purewal was made bankrupt around the same time as the leak at the property. The official receiver (OR) was not appointed as trustee in bankruptcy until the leak had been reported to the receivers, but the breach of duty (ie the failure to notify the insurers) took place after vesting of the bankruptcy estate, including the property, in the OR.

The property was transferred back to Mr Purewal by the OR after Mr Purewal's discharge from bankruptcy. Mr Purewal issued proceedings against the receivers for breach of duty. The claim was dismissed at first instance but permission to appeal was granted by the first instance judge.

What were the legal issues the Court of Appeal had to decide?

The one fundamental issue to be determined by the Court of Appeal was whether the receivers owed a continuing duty to Mr Purewal after the property—and the equity of redemption—vested in the OR.

What were the main legal arguments put forward?

Mr Purewal sought to argue that a continuing duty in equity ought to subsist in his favour notwithstanding his bankruptcy given that he remained interested in the property for the period of his bankruptcy.

Mr Purewal's position was said to be similar—albeit not analogous—to the position of a guarantor of a mortgagor, to whom LPA receivers owe duties. While bankruptcy releases a bankrupt from the mortgage debt, the bankrupt remains as the mortgagor while undischarged and the mortgagee remains able to realise its security post discharge from bankruptcy and, as here, after a property has been re-transferred back to the discharged bankrupt.

The receivers argued, simply, that any duties owed to Mr Purewal followed the property and, as such, became vested in the OR. If Mr Purewal ceased to hold the equity of redemption in the property, no duties could subsist.

What did the Court of Appeal decide, and why?

It was common ground that the equity of redemption vested in the OR upon his appointment as trustee in bankruptcy. For that reason, the receivers undoubtedly owed duties to the OR. However, despite the fact that it remained perfectly possible for a bankrupt to retake the equity of redemption in a property after discharge from bankruptcy (whether automatically after three years in the case of a home, in circumstances where the bankruptcy produces a surplus, or if the property has no equity capable of being realised for the benefit of creditors) the Court of Appeal determined that a bankrupt is not owed duties by LPA receivers.

The Court of Appeal concluded that the dicta in *Medforth v Blake* [1999] 3 All ER 97 was to be construed in a narrow way and, as such, duties were owed only to the mortgagor and those with an interest in the equity of redemption. Despite the Court of Appeal in *Medforth v Blake* not facing this question in respect of bankruptcy, the Court of Appeal's conclusions in that case were to apply to bankrupts and—therefore—exclude them from the class of persons to whom duties are owed. The position of guarantors, in respect of whom duties are owed, was not analogous.

To what extent is the judgment helpful in clarifying the law in this area?

This was, prior to this decision, an issue which the courts had not previously considered. The law on the duties and liabilities of LPA receivers has been developed over the years by a relatively small number of authorities, and the question of a mortgagor and this issue was not one which had ever been addressed by the courts.

What practical lessons can those advising take away from this case?

The particular circumstances which existed in this case are unlikely to be common place. However, given the recent history of the property market and the fact that property owners have been made bankrupt after the appointment of LPA receivers over their property(ies), it is by no means

impossible for similar circumstances to exist whereby LPA receivers breach their duties of care while a property is vested in a trustee in bankruptcy and the property is then re-transferred to the discharged bankrupt. In those circumstances, no duty would be owed to the bankrupt and no direct claim against the LPA receivers would be possible. This is something which lawyers acting for bankrupts reclaiming properties from a trustee in bankruptcy may need to explore before the properties are re-transferred so that the bankrupt knows the precise nature of the asset that he is acquiring.

An observation by the Court of Appeal in respect of mortgage debt and bankruptcy is also worth bearing in mind from the point of view of a mortgagee. The Court of Appeal confirmed that mortgage debts are extinguished by discharge from bankruptcy (while the right to enforce security in respect of such a debt remains). As such, when (as is not uncommon) properties are re-transferred to bankrupts (or re-vest in them automatically) the bankrupt cannot be pursued for any shortfall in the mortgage whether that be immediately or in the future. The mortgagee's only remedy under the mortgage is to enforce the security.

(4) The illegality defence and misfeasance claims against IPs

In what circumstances can an insolvency practitioner (IP) against whom a misfeasance claim is made rely on the company's involvement in an illegal act as a defence to the claim? Ali Tabari, a barrister at St Philips Chambers, discusses the Court of Appeal's decision in *Top Brands Ltd v Sharma (as former Liquidator of Mama Milla Ltd)* [2015] EWCA Civ 1140, [2015] All ER (D) 77 (Nov) and its implications for practitioners.

The Court of Appeal, Civil Division dismissed the defendant former liquidator's appeal against an order that she contribute £548,074.56 to the assets of a company in creditors' voluntary liquidation (CVL) by way of compensation for her breaches of duty. The illegality defence could not apply, as there had been no inextricable link between the claim and the fraudulent conduct, and the policy of requiring liquidators properly to collect and distribute the assets of the company that had to prevail.

What was the background to the appeal?

Mrs Sharma was appointed as liquidator of a company, Mama Milla Ltd, which, it transpired, was used as vehicle for VAT fraud. As the company entered CVL, it received a sum of over £500,000 from a wholesaler with whom it dealt (Sert), that sum representing the only substantial asset of the company.

Contrary to the assertions of two creditors, who eventually brought this action, that sum was paid away by Mrs Sharma, on the seemingly-fraudulent instructions of Sert, to various bank accounts with no ostensible links to Sert or to the company itself. The instructions appeared to have been given on the false basis that Sert had made an advance payment for goods which were never delivered by the company, and that it was entitled to be repaid.

At trial, the performance by Mrs Sharma of her duties as office-holder was strongly criticised by HHJ Barker QC, sitting as a High Court Judge, and the paying away of that sum was found to amount to misfeasance under section 212 of the Insolvency Act 1986 (IA 1986) by reason of her negligence and breaches of fiduciary duty. Specifically, she made no proper enquiries about the recipients of the monies she was paying away, or the circumstances surrounding Sert's initial payments and the subsequent instructions that she ought to pay those sums away. She was ordered to repay the sum, plus additional sums, to the company.

For further reading on the first instance decision, see News Analysis: How will the court approach misfeasance cases against office-holders?

What were the legal issues the Court of Appeal had to decide?

In her skeleton argument for trial, Mrs Sharma—for the first time—pleaded a defence of illegality. She claimed that the misfeasance claim was, in reality, a claim by the creditors to obtain compensation for the loss of criminal property, because the company had been involved in VAT fraud—notably, she did not rely on the illegality of the fraudulent instructions she had received from Sert. She pleaded that, accordingly, the claim should be barred, as otherwise it would run contrary to the public policy of preserving the integrity of the legal system—in other words, allowing the claim would condone, or allow the company to profit from, being involved in criminal activity.

Judge Barker found that any illegality was peripheral to Mrs Sharma's breaches of duty, and that the defence did not assist her. She was granted permission to appeal on this point.

What were the main legal arguments put forward?

Mrs Sharma submitted on appeal that the company was a fraudulent enterprise from the outset, and that its only business was that of VAT fraud. She submitted that the test for the Court of Appeal was whether the claim was inextricably linked to the illegality, and attempted to distance the Court of Appeal from the test in *Tinsley v Milligan* [1993] 3 All ER 65, which said that the defence of illegality arose where the claimant needed to rely on the illegality itself to found a claim (the reliance test). Mrs Sharma submitted that the claim was so closely connected with the company's involvement in VAT fraud that, if the

Court of Appeal permitted recovery in the claim, it would appear to condone the illegality—regardless of the fact that this action was brought by creditors, the real beneficiary was the company which had carried out the illegality.

Mrs Sharma also submitted that the sum in question was criminal property for the purposes of section 340 of the Proceeds of Crime Act 2002 (POCA 2002), which meant that any recovery would—effectively—be paying compensation for the loss of criminal property. That, it was submitted, had two effects:

- firstly, the court cannot be seen to award compensation for such loss; and
- secondly, in fact, there was no loss to the company, because any sums gained by the company in the first place were tainted by criminality.

Finally, Mrs Sharma submitted that the illegal conduct should be attributed to the company, not its directors, and attempted to distinguish *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2015] All ER (D) 149 (Apr) which found against such a proposition.

What did the Court of Appeal decide, and why?

The Court of Appeal agreed almost entirely with the submissions of the respondents and dismissed the appeal.

The Court of Appeal found that it was bound by the reliance test in *Tinsley*, albeit doubted the clarity of the legal position when considering other authorities which suggested that an 'inextricable link' test might also be appropriate. Much like the judgment in Bilta, the Court of Appeal volubly highlighted the need for clarification of the illegality defence by the Supreme Court as soon as possible.

The key element of the judgment was the Court of Appeal's finding that the company's involvement in the VAT fraud was irrelevant to the misfeasance claim being brought against Mrs Sharma. In order to make out their claim, the respondents did not need to rely on any facts disclosing illegality by the company, and in fact some transactions by the company were genuine and unrelated to any fraud. Accordingly, there was no reliance by the respondents on illegality, nor was the basis of the claim inextricably linked to the illegality. There was no causative relationship between the illegality and the loss complained of, and the VAT fraud was described as a 'legally irrelevant aside'.

The argument relating to POCA 2002, s 340 was also rejected, as it would firstly have required a finding that the company or its directors were complicit in any fraud that Sert intended to carry out. That was not an argument which was advanced at trial, nor one on which Judge Barker

made any findings. In any event, POCA 2002 constituted a scheme of its own, and did not affect the principles of the illegality defence in the context of tort and contract law.

In relation to the argument about public policy, the Court of Appeal found that an equally important public policy was that enshrined in IA 1986, ss 107 and 212, which required a liquidator to comply with his statutory duties for the benefit of the creditors, particularly in circumstances where any illegality was peripheral to the office-holder's dereliction of duty. It would be illogical and impractical if HMRC, one of the creditors in this liquidation, were deprived of a share of the company's main asset as a result of the company perpetrating the fraud which caused HMRC to suffer loss in the first place.

Finally, there was no public policy reason for attributing to the company the dishonest intentions of the directors for the purpose of defeating the creditors' claims.

To what extent is the judgment helpful in clarifying the law in this area?

There are three main elements to the illegality defence which may be affected by this judgment:

- firstly, albeit temporarily, this judgment is helpful in determining that the balance between the 'reliance test' and the 'inextricable link' tests lie in favour of the former. It draws on the speech of Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2014] All ER (D) 328 (Oct), in which he explained that the logic of the test is to exclude the consequences of any illegal act which is merely collateral to the claim;
- secondly, on the attribution point, the Court of Appeal appeared to find that the dishonest conduct of the directors should not attach to the company, particularly when no dishonesty was alleged against Mrs Sharma and dishonesty was not the basis of the claim against her. It followed the approach encouraged by Patten LJ in Bilta, which was for a more nuanced approach to attribution, rather than the mechanistic application of a rule regardless of the circumstances and nature of the claim. Had the illegality been attributed to the company, arguably it could have given Mrs Sharma immunity if she acted in breach of her statutory duties, to the obvious detriment of the creditors; and
- thirdly, the importance of the statutory scheme governing the conduct of office-holders was explicitly given substantial weight, which will make future appellant arguments about contrary public policy difficult to sustain, save in exceptional circumstances.

As an aside, the Court of Appeal appeared to be of the view that the law on this topic has been muddled by parties' over-reliance on what are presented as principles of general application derived from *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] All ER (D) 330 (Jul)—the Court of Appeal reaffirmed that no such general principles can be derived from a case which turned very much on its own facts.

What practical lessons can those advising take away from this case?

The key lesson, unfortunately, is that reliance on an illegality defence will be a risky option until the Supreme Court clarifies the law. Instead of setting hard-and-fast rules, this judgment appears to affirm the importance of determining each case on its own facts.

At present, it seems clear that no respondent to a claim can rely on an illegality defence unless the claim itself has to rely on the illegality in order to succeed, following the reliance test in Tinsley.

When it comes to attribution, the courts will seek to apply a flexible and pragmatic approach which will, inevitably, be fact-specific. It is important to note that there is increasingly little use for the decision in *Stone & Rolls* unless the case is on all-fours with the factual background to that matter.

It is clear from this judgment, and others recently, that this topic urgently requires a review and clarification, so the message to practitioners at this stage must be: watch this space.

(5) Determining the debts of insolvent estates in foreign currencies

How is interest upon provable debts to be calculated, and debts in foreign currencies exchanged into sterling by trustees of insolvent estates? Donald Lilly of 4 Stone Buildings, says the ruling in *Re Estate of Platon Elenin (aka Boris Abramovich Berezovsky), Subnom Lockston Group Inc v Wood* [2015] EWHC 2962 (Ch), [2015] All ER (D) 231 (Oct) shows the importance of construing all insolvency law enactments within their context, and not in isolation.

The Chancery Division, in dismissing the applicant's challenge to the appointment of trustees to the insolvent estate of Boris Berezovsky, held that the date of the debtor's death was the date at which the assets comprising the insolvent estate were identified, and as at which the debts and liabilities were identified and quantified. That included the conversion of foreign currency debts into sterling and the date up to which interest might be proved, and after which statutory interest ran.

What was the background to the application, briefly?

Platon Elenin (formerly known as Boris Berezovsky) died in March 2013. In late 2014, the estate's general administrators, Nick Wood and Kevin

Hellard of Grant Thornton, presented a petition to place the estate into insolvent administration. An insolvency administration order (IAO) was made in January 2015.

At the first meeting of creditors, Messrs Wood and Hellard, along with another partner from Grant Thornton, Mike Leeds, were proposed to be trustees of the insolvent estate. Competing candidates from KPMG (the KPMG nominees) were also proposed. The chairman of that meeting calculated the debts of creditors for the purposes of voting on the basis that interest on those debts was provable only up to the date of Mr Berezovsky's death in 2013. He also used the date of death as the relevant time to convert debts in foreign currencies into sterling. On that basis, the votes of creditors supporting Messrs Wood, Hellard and Leeds represented a majority and they were accordingly appointed as trustees.

Two of the estate's creditors who supported the KPMG nominees, Lockston Inc and the Baltic International Bank (BIB), objected to the chairman's calculation of the creditors' votes, contending that the relevant date for the calculation of interest and foreign currency exchange was the date of the IAO in January 2015—rather than the date of death in March 2013.

If that were correct, the value of a number of creditors' debts would change dramatically—particularly those in Russian Roubles, given the devaluation of the Rouble since March 2013. On the basis of Lockston's and BIB's calculation of the votes, the majority of creditors had in fact voted for the KPMG nominees, not the trustees. Accordingly, Lockston and BIB sought declarations that the chairman's calculation of interest and foreign currency exchange had been incorrect and that the KPMG nominees had been duly appointed as the trustees of the estate.

What were the legal issues the judge had to decide?

There were broadly two legal issues. Firstly, whether, on a true construction of the IA 1986, the Insolvency Rules 1986, SI 1986/1925 (IR 1986) and the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999 (AIEDP 1986), the correct date for the calculation of provable interest or exchange of foreign currency debts into sterling was the date of the deceased's death or the date of the IAO.

Secondly, if either interest or foreign debts were correctly calculated as at the date of the IAO, whether the court must or should make a declaration that the KPMG nominees had been appointed as trustees of the estate.

What were the main legal arguments put forward?

Lockston and BIB relied on the AIEDP 1986, SI 1986/1999, Sch 1, Pt I, which provides that, when an IAO is made, each instance where the words 'commencement of the bankruptcy' appear within IA 1986, such words

are to be replaced with the words 'the date of the insolvency administration order'. AIEDP 1986, SI 1986/1999, art 3 also provides that IR 1986, SI 1986/1925 'shall apply accordingly'. Lockston and BIB therefore submitted that in IR 1986, SI 1986/1925 where the words 'commencement of the bankruptcy' appear, they should be amended to say 'the date of the insolvency administration order'.

Since IR 1986, SI 1986/1925, rr 6.111 (concerning the exchange of foreign currency debts) and 6.113 (concerning the calculation of interest on provable debts) provide that the relevant date for the calculation of interest and conversion of foreign currency debts is the date of the 'commencement of the bankruptcy', the correct date in the case of Mr Berezovsky's estate for such calculation is that of the IAO, not Mr Berezovsky's death.

Lockston then contended that, if their construction were correct, the Judge should declare the KPMG nominees as having been appointed, since the majority of creditors' votes would have been cast in support of them.

The trustees argued that the amendments to IA 1986 provided for under AIEDP 1986, SI 1986/1999, Sch 1, Pt I are subject to the opening caveat that such amendments take effect 'except in so far as the context otherwise requires'. In this case, the context did otherwise require because the date of death was the date at which provable debts were identified by virtue of AIEDP 1986, SI 1986/1999, Sch 2, Pt II, para 12. That provision specifically amends IA 1986, ss 283–285 so that the deemed date of the presentation of the petition and the making of the IAO is the date of death.

Consistent with the insolvency regime in other contexts, the date at which provable debts are identified should also be the date at which they are quantified. Therefore, IR 1986, SI 1986/1925, rr 6.111 and 6.113 should 'apply accordingly' so that the date at which interest accrues and foreign debts are converted is the same date as when the provable debts are identified, namely, the date of death.

In any event, even if their construction were not correct, the trustees invited the judge not to declare the KPMG nominees as appointed. There were a number of factors, including the disruption to the estate, which indicated that the court should not exercise its discretion to do so.

What did the judge decide, and why?

David Richards J (as he then was) agreed with the trustees' construction of IA 1986 and IR 1986, SI 1986/1925, as amended by AIEDP 1986, SI 1986/1999. He considered that Lockston's and BIB's construction was inconsistent with the fundamental feature of insolvency law that there is a single date for the ascertainment of liabilities, whereas the trustees'

construction produces a consistent basis for such ascertainment in the context of an IAO, when compared to other insolvency regimes. The judge also relied upon *Re Palmer (deceased) (a debtor)* [1994] Ch 316, [1994] 3 All ER 835 which held that AIEDP 1986, SI 1986/1999 had the effect so as to 'draw a line at the moment of death'. He also referred to, and relied upon the law and practice under the Bankruptcy Act 1914 and the Cork Report, which were consistent with the trustees' construction.

As a result of his decision on the construction of IA 1986, IR 1986, SI 1986/1925 and AIEDP 1986, SI 1986/1999, the judge was not required to make any determination in respect of the second issue listed above.

To what extent is the judgment helpful in clarifying the law in this area?

The judgment is helpful in both a narrow and wider sense. In the narrow sense, it provides guidance to trustees of insolvent estates on how to calculate interest upon provable debts, and when debts in foreign currencies should be exchanged into sterling. This is relevant not only to voting, as in this case, but also for the purposes of any distribution to creditors from such an estate.

It is also instructive in a wider sense, since it underlines the importance of maintaining a coherent and internally consistent relationship between the regimes relevant to the insolvent estates of deceased persons, and those applicable to insolvents generally. The court will not adopt a formalistic approach to the amendments effected by AIEDP 1986, SI 1986/1999, but instead will apply those amendments in a manner to ensure that consistency is maintained.

What practical lessons can those advising take away from this case?

The key practical lesson is the importance of construing all insolvency law enactments within their context, and not in isolation. The need for a coherent and consistent system of insolvency law means that when construing any part of that law, it is necessary to test the consistency of the obvious or literal construction against the operation of insolvency law as a whole. The court will be slow, as shown by this case, to adopt a literal construction of an enactment if that were to have the effect of creating an inconsistency or aberration within the wider body of insolvency law.

(6) Reporting on SIP 9

What changes should insolvency practitioners expect in the revised statement of insolvency practice 9 (SIP)? Alison Curry, head of regulatory standards and support at the Insolvency Practitioners Association (IPA), evaluates the new SIP and explains how it emphasises the importance of narrative explanations provided to creditors.

A revised SIP 9 places the emphasis upon the qualitative value of the information provided to creditors (and other interested parties) rather than the format in which the information is supplied, or suggested to be supplied. A consultation will run until 4 September 2015.

What are the key changes brought about by the new SIP 9 compared to the old SIP 9?

This revision of SIP 9 was necessitated by the Insolvency (Amendment) Rules 2015, SI 2015/443, which requires trustees, liquidators and administrators to provide an estimate of their time costs when approval of any part of their remuneration is sought on a time spent basis.

These new provisions are a result of the findings of the Kempson Report in 2013, which concluded that where there was insufficient creditor control of fees, then fees tended to be higher. Professor Kempson also noted that reports to creditors were typically formulaic, which discouraged meaningful engagement. In response to these findings, the Insolvency Service consulted in 2014 on proposals to ban time costs completely where there was no secured creditor in control. However, to the collective relief of the profession, these proposals were abandoned in favour of the current provisions that require practitioners to provide fees estimates.

In addition to accommodating these legislative changes, the new SIP 9 provides a significant shift in emphasis towards the importance of the narrative explanations provided to creditors. This largely reflects what creditors have said they wish to receive—less formulaic reporting, with meaningful explanations of:

- what has or will be done by the office holder;
- what the office holder has achieved or expects to achieve; and
- what the office holder expects the costs will be.

In keeping with the prevailing theme of transparency, the SIP contains a new provision:

> 'Where it is practical to do so, the office holder should provide an indication of the likely return to creditors when seeking approval for the basis of their remuneration.'

This reflects what creditors groups have reported—that this is the key piece of information from their perspective.

Notably, however, the principles of the SIP remain largely unchanged from the 2011 version.

Are there any significant amends to the draft SIP 9 released earlier in the year for purposes of the consultation? If so, why were these amends made to the final version?

There were a number of amendments to the consultation draft because of the consultation responses themselves. The responses were subject to detailed consideration by the SIP 9 working group, and a significant number were adopted. However, the fundamental substance of the SIP remains unchanged from the consultation draft, and most of the changes are merely to clarify what was intended, rather than to change the intended meaning. For instance, para 2 of the SIP now contains a specific statement that it does not seek to impose a requirement to produce a fee estimate where one is not required by statute. This was always the intention, but come consultation respondents had sought clarification of this.

In addition, the examples of common tasks against which time (and fee estimates) might be allocated have been brought in line with the categories used in previous versions of the SIP. The use of the word ‘part’ in this context is deliberate, in that it mirrors the wording of the rules (‘part’ being treated as synonymous with ‘category’ of time spent/work done).

The provision of an indication of the likely return to creditors is perhaps the most significant addition to the consultation draft, and reflects the wishes of creditors to be told at an early stage whether there is any significant prospect of a distribution to them.

Do you think that Insolvency Practitioner’s (IPs) duties have become more onerous because of the new SIP and the provisions in the Insolvency (Amendment) Rules 2015 relating to fees?

The Insolvency (Amendment) Rules 2015 clearly present practitioners with some new challenges. They now need to share more information with creditors at an earlier stage and manage the expectations of those creditors, while potentially delivering a message that the creditors do not want to hear (ie the likely absence of a return to them). This may not always be easy and will necessitate practitioners justifying to creditors their value as professionals.

However, while practitioners may not historically have been producing formal estimates of their fees, or indeed sharing this information outside of their practices, they may in many cases have been estimating the likely outcome of a case from a very early stage as part of the process of providing initial advice. Therefore, it is arguable that sharing this information might not represent a significant additional burden.

The SIP has been written in such a way as to guide practitioners as to the qualitative nature of what is required. In that sense, it is perhaps less

onerous than it could have been, as it does not specify a format or a detailed list of matters to be covered (as does SIP 16, for example). It seeks to encourage practitioners to take a meaningful approach to their compliance with the Insolvency (Amendment) Rules 2015. One size will most definitely not fit all in this context.

What do you think might cause most concern for IPs?

While there has been disquiet in the profession about the absence of a template or suggested format for fee estimates, this is fully intended to reflect the fact that a fee estimate in a simple case might be little more than a few lines of text, while such a brief explanation will almost certainly be inadequate in more complex scenarios. Explanations cannot be scripted in advance and the level of detail required will vary from case to case.

In essence, the IP's duties under the SIP are not necessarily more onerous, but they will need to exercise their professional judgment in deciding how to adequately meet them.

Are there any plus points that improve upon the original SIP 9?

The SIP clarifies that it is acceptable to provide creditors with a fee estimate within the pre-appointment stages—an attempt to assist practitioners in dealing with a drafting defect in the Insolvency (Amendment) Rules 2015, which requires the estimate to be provided by the office holder, which a prospective liquidator is not.

Is there any additional help or guidance available to IPs from their recognised professional body or from the Insolvency Service (or anywhere else) if there are any teething problems with the new process?

We are always happy to talk through any concerns our members have via our ethical and regulatory helpline and the Joint Insolvency Committee issued an explanatory note during the consultation stages of the SIP. However, broadly speaking, responses to the consultation indicated that it should not be necessary to issue guidance on SIP compliance—the SIP should be and hopefully is self-explanatory.

Is the new IPA handbook coming out this year, and if so, will the new SIP be covered in this?

The fourth edition of our IPA Handbook contains the new SIP 9, along with the recently issued SIPs 1 and 16.

CASE LAW

(1) Capital For Enterprise Fund A LP v Bibby Financial Services Ltd [2015] All ER (D) 117 (Nov), [2015] EWHC 2593 (Ch)

In the Chancery Division, Manchester District Registry, before Judge Pelling QC siting as a Judge of the High Court.

Company – Conspiracy – Unlawful means conspiracy – Proceedings relating to transfer of company assets to defendant company – Claimants alleging unlawful means conspiracy occurring where defendant conspiring to transfer assets of company to company he controlled – Whether ingredients of unlawful means conspiracy being made out.

Facts:

By a facility agreement entered into on 9 December 2009, the first claimant company, CFE, made available to a company, Qire, a loan facility totalling £650,000 (the CFE loan agreement). By a warrant instrument (the warrant) entered into at the same time as the CFE loan agreement, CFE was given the right to acquire 5% of the shares in Qire, in effect at par, which was exercisable in the event that 50% of the share capital in Qire became beneficially owned by a single person or group of persons acting in concert. That was the means by which CFE could benefit from the sale of Qire to a third-party investor. The expectation was that its shares would be purchased by such an investor at the difference between the value of its shares in any sale and the price payable by CFE under the warrant. The claimant companies claimed that the defendant company, Bibby, had conspired together with C, a director of and shareholder in Qire, and Voxeo, one of Qire's principal creditors, to transfer the business and assets of Qire by unlawful means, through a pre-packed sale in administration of Qire's business to Qivox, a company owned as to 70% by Voxeo and as to 30% by C. The unlawful means, it was alleged, had had the inevitable consequence of depriving the claimants of the benefits that they would otherwise have had as secured creditors of and investors in Qire. It was alleged that, at a meeting on 22 December 2011 (the meeting), it had been agreed between C, the representatives of Bibby, and T, who was the managing director of the company that would be supplying the administrator, that Bibby would enter into an agreement with Qire by which it would agree to supply asset finance services to Qire secured by a floating charge and would exercise its powers under the charge to place Qire in administration almost as soon as the relevant agreement between Bibby and Qire had been completed, as the means by which Qivox could then acquire Qire's principal business and assets from the administrator. Also present at the meeting was F, a business development executive who worked for a subsidiary of Bibby.

The claimants brought proceedings, which were settled in a settlement agreement. Under the agreement, Voxeo, Quivox and C gave the claimants £595,000. The claimants subsequently brought proceedings in the Chancery Division, seeking damages in respect of loss allegedly caused to them by the unlawful means conspiracy.

The issue was whether the unlawful means conspiracy had been made out. Consideration was given to, among other things, the fact that Qire had been hopelessly insolvent.

Held:

The claim would be dismissed.

(1) Regarding unlawful means, it was necessary to show that there had been, among other things: (i) the use of unlawful means; (ii) knowledge; (iii) the intention to inflict injury; and (iv) causation. It was long established that a director of a company could not obtain for himself any business advantage belonging to the company of which he was director but had for all times to act in what he considered to be good faith in the best interests of the company. The fact that Qire had been hopelessly insolvent was not exculpatory. The fact that a company was insolvent did not entitle a director, much less a director acting alone and without board approval, to operate in a manner that preferred the interest of one creditor over those of another and much less in a manner that defeated the interest of creditors generally (see [89], [90] of the judgment).

The common objective had involved the use of unlawful means in that it had necessitated C, as director, breaching his duties and obligations to Qire. It was obvious that C had breached those duties by planning and carrying into effect the formation of Qivox and the transfer to it of Qire's business. The only persons who could have benefitted from what had been planned had been Qivox and C. C had conducted the scheme throughout by concealing it from the board of the company (see [89] of the judgment).

West Mercia Safetywear Ltd v Dodd [1988] BCLC 250 considered; *First Subsea Ltd v Balltec Ltd* [2014] All ER (D) 239 (Mar) considered.

(2) On the current state of the law, it was not a requirement for liability to be established that the claimant proved that the defendant had known that the loss was to be caused by unlawful means, but rather it was sufficient if it was proved that the defendant had known of the facts which, in the event, had made the means used unlawful (see [91] of the judgment).

It was plain that J, C and F had been aware of the material facts relevant to C's breach of duty. Each had been aware by no later than the end of the meeting that: (i) Qire was insolvent; (ii) T was advising C; and (iii) nobody

else at Qire had been aware of the proposed restructure. On the evidence, each of C, J and F had known all the facts that had made what had been proposed unlawful by reason of the breach by C of his duties as a director of Qire. Each might not have known on the facts known to them that C had been acting in breach of his duties as a director of Qire, but ignorance of or failure to appreciate the unlawful nature of C's conduct did not provide a defence on the current state of the law (see [92] of the judgment).

(3) While intention to inflict injury on the claimant was a necessary ingredient of the cause of action, that did not have to be proved to have been intended as an end in itself if such injury was the necessary concomitant of seeking to gain from the conspiracy (see [94] of the judgment).

There was no evidence that Bibby had intended to inflict harm on CFE as an end in itself. However, the understanding of the parties at the meeting had been that the effect of the plan being carried into effect would have been to harm the second defendant, Maven. The need and willingness to conceal what had been proposed from Maven was entirely inconsistent with that being the state of mind of any of those attending the meeting on behalf of Bibby (see [93], [95], [96] of the judgment).

Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1985] 3 All ER 585 considered; *OBG Ltd v Allan; Douglas v Hello! Ltd (No 3)*; *Mainstream Properties Ltd v Young* [2008] 1 All ER (Comm) 1 considered; *Thames Valley Housing Association Ltd v Elegant (Guernsey) Ltd and Macpherson (part 20 defendant)* [2011] All ER (D) 241 (May) considered.

(4) Regarding causation, the claimants had not established that they had been caused loss or damage by the conspiracy as they had alleged. There had been no realistic prospect of the sums due under the CFE Loan Agreement being repaid or any gains being made by reference to the rights conferred by the warrants. The reality was that Voxeo would have perceived their best interests as being to acquire Qire's customer base and operating software and to do so via an administrator. Such an outcome would have resulted in the administrator having available to distribute what could be obtained for those assets. There was no evidence as to the true value of those assets particularly in the context of a sale by an administrator. However, it was inconceivable that they could be worth more than the £595,000 paid under the settlement agreement. In the result, therefore, the claimants had failed to establish that they or either of them had been caused the loss and damage alleged as a result of unlawful action taken pursuant to the agreement (see [117], [118] of the judgment).

Nicholas Trompeter* (*instructed by Rosenblatt Solicitors*) *for the claimants.

Simon Mills* (*instructed by Shoosmiths*) *for Bibby.

(2) Coilcolor Ltd v Camtrex Ltd [2015] All ER (D) 90 (Nov), [2015] EWHC 3202 (Ch)

In the Chancery Division, before Hildyard J.

Company – Winding up – Petition – Parties contracting for supply of metal goods – Dispute arising as to quality of goods being supplied by respondent company – Applicant company failing to make payments as required – Respondent making winding-up application against applicant – Applicant applying to restrain presentation of winding-up petition against it – Respondent serving statutory demand on applicant – Whether application should be allowed.

Facts:

The applicant company (the company) supplied high-quality pre-finished steel, including coating, profiling and slitting a wide variety of substrates. In 2004, the respondent company, Camtrex, began supplying steel coils to the company. The company failed to pay certain invoices in respect of supplies of steel by Camtrex to the company. It alleged that, from April 2015, it had detected an increasing number of what it regarded as defective steel coils supplied by Camtrex. Efforts were made to remedy the situation, but in August, the company was served with a statutory demand by Camtrex. Camtrex maintained that the complaints raised by the company had been, for the most part, contrived some time after the event and with a view to avoiding or delaying payment. It relied upon its standard terms and conditions which, it contended, had been incorporated in each and every of its contracts with the company. The company applied to the Companies Court to restrain the presentation of a winding-up petition by Camtrex.

The company submitted that the alleged debt to Camtrex was not bona fide and was disputed on substantial grounds, and/or there was a genuine and substantial cross-claim that exceeded the amount said to be due to Camtrex. Camtrex submitted that the debt to it was due, there was no genuine dispute founded on substantial grounds in that regard, and that there was no basis for any restraint on its right as a creditor to present a winding-up petition against the company based on the company's failure to pay long outstanding invoices. The central issues were: firstly, whether, at least at the present stage, there were any substantial grounds on which the company could dispute Camtrex's assertion that the terms and conditions on which Camtrex relied had come to be incorporated into the contracts between the company and Camtrex for each supply of goods; and, secondly, if they were, whether there was any substantial dispute that could not or ought not to be presently adjudicated as to their true meaning and effect. If those terms and conditions had been incorporated, and were to be given the meaning and effect contended for by Camtrex,

any dispute as to whether the goods supplied had been defective might not avail the company. Consideration was given to, among other things, the contract between the parties, including: cl 13.3, which purported to exclude all liability for any defects unless notification was made within seven days; cl 8.4, which purported to provide a right to the company to withhold payment in the case of goods not fit for purpose; and the purported exclusion by cl 13.14 of all warranties, terms and conditions and duties implied by law, especially having regard to the Unfair Contract Terms Act 1977. Thirdly, whether any of the terms and conditions it incorporated had been varied or waived.

Held:

The application would be allowed:

(1) Although solvency was not a defence to a petition based on an undisputed claim, and the court would always consider whether any dispute had real substance such as to make the Companies Court an inappropriate forum for its resolution, the court would also wish to be satisfied that the remedy was not being invoked as a means of putting pressure on a company of which the solvency was not in real doubt, and where there was a dispute as to indebtedness. Further, the remedy was ultimately discretionary; and the more obvious it was that the remedy was being threatened or pursued as a threat or to exert inappropriate pressure, the more likely the court would be to give the company the benefit of any reasonable doubt, both at the interlocutory stage of an injunction and subsequently, in determining whether its defences or cross-claims gave rise to a sufficiently substantial dispute to make the Companies Court process inappropriate (see [42] of the judgment).

On the evidence, Camtrex had a strong case that the terms and conditions on which it relied had been incorporated into and had formed part of and had regulated the transactions between the parties. However, that was not the only issue: even if the terms and conditions were to be treated as incorporated, questions arose both as to terms that did not appear to be appropriate having regard to the communicated purposes for which the goods were to be supplied, and as to the meaning and effect of such terms and conditions in their factual context (see [49], [50] of the judgment).

Mann v Goldstein [1968] 2 All ER 769 applied; *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25 applied; *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26 considered; *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44 considered; *Re a Company (No 0012209 of 1991)* [1992] BCLC 865 considered; *Re a Company (No 6685 of 1996)* [1997] BCC 830 considered; *Re Pan Interiors* [2005] EWHC 3241 (Ch) considered.

(2) Regarding the interpretation of the relevant terms and conditions, a number of difficult questions arose. They included questions as to (i)

whether the provisions of cl 13.3 were really to be interpreted as excluding all liability, or a more limited interpretation; (ii) what, a matter of interpretation, might be the limits of the purported exclusion in cl 8.4 of any right to withhold payment in the case of goods not fit for purpose; and (iii) what might be the limits on the purported exclusion by cl 13.14 of all warranties, terms and conditions and duties implied by law, especially having regard to the Act (see [52] of the judgment).

(3) The issue of waiver or variation might be an alternative way of restricting the application of those generic terms and conditions, some of them arguably inappropriate and not in fact observed in the course of dealings, in the particular and specific context. That needed little elaboration: it required factual analysis of the way in which the individual contracts had in fact been performed, and the practices that had developed as a matter of course between the parties (see [53] of the judgment).

None of those inquiries of fact and context, and none of those difficult questions of contractual interpretation and statutory control, would be appropriate to be undertaken by the Companies Court in the context of a winding-up petition. They were far better dealt with by ordinary process and in the orderly way for which it provided, rather than under the treat and difficulties that even the presentation of a petition posed and triggered. A petition for winding up was not a suitable or even proper way to proceed (see [54], [55] of the judgment).

Per curiam: 'A winding-up petition should not be resorted to in such circumstances by those whose objective is not in truth the class remedy which a successful winding-up petition provides but to put pressure upon a company to pay lest the provisions for the protection of the class which are triggered by the mere presentation of a petition undermine its standing and its business. The circumstances, exemplified by the Cornnhill Insurance case, of a company using its prestige and solvency as if it clothed it with immunity from the process of a petition, despite delaying payment of an undisputed debt without condescending to any defence, are both exceptional and distinguishable Cornnhill Insurance case, of a company using its prestige and solvency as if it clothed it with immunity from the process of a petition, despite delaying payment of an undisputed debt without condescending to any defence, are both exceptional and distinguishable … In all the circumstances, I have reached the firm conclusion that the claims, defences and cross-claims which I have sought to describe in the present case should be adjudicated in the context of an ordinary action. They should not be pursued in a winding-up petition. That would, in my view, be an abuse.' (See [62], [63] of the judgment.)

David Alexander QC and Matthew Abraham (instructed by Temple Bright LLP) for the company.

Lance Ashworth QC and Steven Reed (instructed by Gateley plc) for Camtrex.

(3) Official Receiver v Norriss [2015] All ER (D) 69 (Nov), [2015] EWHC 2697 (Ch)

In the Chancery Division, Manchester District Registry, before Judge Hodge QC sitting as a High Court judge.

Company – Administration – Inquiry into company's dealings – Official Receiver seeking order that respondent Hong Kong resident produce witness statement and supporting documents detailing and exhibiting various matters – Whether court having jurisdiction – Whether appropriate to make order sought – Insolvency Act 1986, s 236.

Facts:

Omni Trustees Ltd (the company) was the trustee of an occupational pension scheme. In July 2014, at a time when the assets of the scheme held by the company amounted to some £8.6m, a little over £3.7m was transferred from the company to the Timoran Small Self-Administered Scheme located in Hong Kong (the Timoran SSAS). The transfer was effected by a firm of solicitors acting on behalf of the company. The Timoran SSAS apparently acted by the respondent, who was a Hong Kong resident. On the evidence, he appeared to be the principal, and possibly the sole, trustee of the Timoran SSAS. The applicant Official Receiver, in his capacity as the liquidator of the company, made an application, under s 236 of the IA 1986. The object of the present application was to find out what had happened to the sum of just over £3.7m that had been transferred to the Timoran SSAS. The Official Receiver made it quite clear that he was not seeking the examination of the respondent, either in the present jurisdiction or even in Hong Kong. What he was seeking was an order that the respondent was, within seven days, to produce to the Official Receiver's solicitors a witness statement, with supporting documents, detailing and exhibiting various matters.

It fell to be determined whether: (i) the court had jurisdiction to make the order sought; and (ii) if so, whether it was appropriate to do so.

Held:

The application would be allowed:

(1) Section 236(3) had extra-territorial effect and, provided the considerations identified in previous authority were satisfied, the court had jurisdiction to require a person resident outside the jurisdiction to submit to the court an account of his dealings with a company, or to produce any books, papers or other records in his possession or under his control relating to a company. Section 236 conferred a free-standing power,

independent of the power to summon a person to appear before the court for examination, to submit to the court an account of dealings and to produce books, papers and records (see [14], [21] of the judgment).

British and Commonwealth Holdings plc (joint administrators) v Spicer and Oppenheim (a firm) [1992] 4 All ER 876 applied; *MF Global UK Ltd, Re* [2015] All ER (D) 22 (Aug) not followed; *Tucker (a bankrupt), Re, ex p Tucker* [1988] 1 All ER 603 considered; *Mid East Trading Ltd, Re; Lehman Bros Inc v Phillips* [1998] 1 All ER 577 considered.

(2) The respondent fell within the scope of s 236(2). On the facts and the evidence, it would be appropriate for the court to exercise its powers under s 236 in relation to him in the manner sought by the Official Receiver. The present was a case where the Official Receiver reasonably required to see the documents he had identified in order to carry out his statutory functions. Production of the documents would not impose any unnecessary or unreasonable burden on the respondent in the light of the Official Receiver's requirements. The Official Receiver had discharged the onus of satisfying the court that the relief sought came within the powers conferred by s 236 and that, as a matter of discretion, it was appropriate to make the orders sought (see [8], [10] of the judgment).

Therefore, in the exercise of the discretion, an order would be made in the terms sought, although particular documents identified would be limited to those relating to the money paid into the relevant bank account of the Timoran SSAS from the account of the company (see [22] of the judgment).

British and Commonwealth Holdings plc (joint administrators) v Spicer and Oppenheim (a firm) [1992] 4 All ER 876 considered.

Lucy Wilson-Barnes** (**instructed by Wragge Lawrence Graham & Co LLP, Birmingham**) **for the Official Receiver.

The respondent did not appear and was not represented.

(4) Top Brands Ltd v Sharma (as former Liquidator of Mama Milla Ltd) [2015] All ER (D) 77 (Nov), [2015] EWCA Civ 1140

In the Court of Appeal, Civil Division, before Sir Terence Etherton C, Christopher Clarke and Lloyd Jones LJJ.

Company – Voluntary winding up – Liquidator – Judge ordering defendant former liquidator to contribute to company's assets for breaches of duty – Defendant appealing – Whether defendant having defence of illegality – Insolvency Act 1986, s 212 – Proceeds of Crime Act 2002, s 340(3).

Facts:

The first and second claimant companies were creditors of a company in creditors' voluntary liquidation (MML), which had subsequently been found to have been involved in VAT acquisition fraud. They were granted an order that the defendant former liquidator contribute £548,074.56 to MML's assets by way of compensation for her breaches of duty as liquidator, pursuant to s 212 of the IA 1986. The defendant appealed on the basis that she had a defence of illegality.

The defendant contended that the claim, under s 212, was in reality a claim to recover criminal property, as defined in s 340(3) of the POCA 2002, and for that reason, the judge should have dismissed the application as contrary to the public policy of preserving the integrity of the legal system. In particular, she contended that in tort claims other than for conversion of goods, the test for whether the claim was barred for illegality rested on two limbs: (i) the loss claimed had to be inextricably linked to the illegality; and (ii) the public policy of consistency, namely, that the court could not permit recovery of loss where that would give the appearance of condoning illegality, was not outweighed by some countervailing public policy.

Held:

The appeal would be dismissed.

The illegality defence could not apply on the facts of the present case. With respect to the first limb, as was apparent from the claimants' claim and from the judge's judgment, there had been no need for the claimants to rely upon any facts which disclosed illegality on the part of MML. Accordingly, on the facts of the case, there was no inextricable link between the claim or, specifically the loss claimed, and the fraudulent conduct of MML. Further, there had been no close connection or inextricable link between the relief claimed by the claimants and the illegal conduct of MML on the ground that the relevant sum was criminal property as defined by s 340(3) of POCA 2002. With respect to the second limb, the policy of avoiding the recovery of loss where that would give the appearance of condoning illegal conduct had no application on the facts of the present case. The fraudulent business carried on by MML prior to its winding up had had no causative relationship or close connection to the loss claimed and was simply a legally irrelevant part of the background in the context of describing MML's business prior to its winding up and the appointment of the defendant as its liquidator. Furthermore, there was another public policy in play on the facts of the present case which would be thwarted by an illegality defence. That was the policy requiring a liquidator properly to collect in and distribute the company's property among the creditors in accordance with the statutory scheme. In the light of the collateral, non-causal, connection between MML's

fraudulent business prior to liquidation and the breaches of duty by the defendant as liquidator and in disposing of the sum, it was plainly the policy of requiring liquidators properly to collect and distribute the assets of the company that had to prevail (see [39], [42], [47], [53], [54], [58], [59] of the judgment).

Hounga v Allen [2014] 4 All ER 595 applied; *Bilta (UK) Ltd (in liq) v Nazir* [2015] 2 All ER 1083 applied; *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338 distinguished; *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 4 All ER 431 distinguished; *Tinsley v Milligan* [1993] 3 All ER 65 considered; *Les Laboratoires Servier v Apotex Inc* [2015] 1 All ER 671 considered.

Per curiam: 'It would not be profitable on this appeal to consider in detail all the relevant case law and to state a conclusion on the principles currently binding on this court for two reasons. Firstly, I consider that, whatever is the correct approach to the defence, it plainly cannot apply on the facts of this case. Secondly, it is apparent from the differences of view in Bilta about the current state of the law that the proper approach to the defence of illegality needs to be addressed by the Supreme Court (conceivably with a panel of nine Justices) as soon as appropriately possible, as was expressly stated by Lord Neuberger (with whom Lord Clarke and Lord Carnwath agreed) at paragraph [15] of Bilta.' (per Sir Terence Etherton see [38] of the judgment).

Decision of Judge Simon Barker QC [2015] 2 All ER 581 affirmed.

James Morgan and Nicholas Brown** (**instructed by KW Law LLP, Warwick**) **for the first and second claimants.

The third claimant did not appear and was not represented.

Michael Soole QC and William Hansen** (**instructed by Saints Solicitors LLP**) **for the defendant.

(5) Purewal v Countrywide Residential Lettings Ltd [2015] All ER (D) 60 (Nov), [2015] EWCA Civ 1122

In the Court of Appeal, Civil Division, before Lord Justice Patten and Sir Stanley Burnton.

Mortgage – Receiver – Receiver's duties to mortgagor – Judge dismissing claimant's claim for damages for breach of duty against second and third defendant receivers – Whether receivers continuing to owe claimant duty following making of bankruptcy order – Whether claimant establishing causation.

Facts:

The claimant acquired a residential property on a buy-to-let basis. In 2009, he fell into arrears in respect of his mortgage payments and the

bank appointed the second and third defendants as receivers. The receivers informed the claimant that they had taken out their own buildings insurance over the property and that he should, therefore, cancel his own policy, which he did. In September, a bankruptcy order was made against the claimant. Later that month, the claimant visited the property and discovered that a water leak had caused a considerable amount of damage. He informed the receivers on the same day. The receivers' file contained nothing to suggest that any action had been taken before February 2010, when the claimant contacted them again. It was accepted at the trial that the insurance policy would have included a condition requiring that any claims made under it should be made promptly. The receivers appeared to have taken the position in 2010 that they could no longer pursue an insurance claim in respect of the damage which (subject to any excess) would, the judge found, have been likely to be covered by the policy. In April, the receivers' appointment was terminated by the bank. In April 2011, the claimant was discharged from bankruptcy. The claimant's evidence was that he carried out repairs to the property at his own expense, which were completed in May. In August, the claimant's trustee-in-bankruptcy transferred the property back to him for the nominal sum of £1. In 2013, the claimant issued proceedings against the receivers, seeking damages for breach of duty in the amount expended by him on the repair of the property. The first defendant was alleged to be vicariously liable for the receivers' breaches of duty. The breach complained of was the failure by the receivers to submit a timely claim on the insurance policy for the damage caused by the water leak. It was said that the receivers would either have been obliged or would have been authorised by the bank to use the money received to repair the property, thereby avoiding the necessity for the claimant to have carried out the repairs at his own expense. The judge accepted that, if the equitable duty was owed to the claimant, then it would have been a breach of that duty not to have made an effective claim on the insurance for the damage. However, he dismissed the claim on two grounds. First, in his view, any such duty ceased to be owed to the claimant (as opposed to his trustee-in-bankruptcy) following the making of the bankruptcy order. Second, the repairs were carried out by the claimant before the property had been transferred back to him by the trustee, and had been done as a volunteer without the agreement of the trustee. It would not, therefore, be equitable or fair to saddle the receivers with liability for the cost of repairs which had been carried out when the property did not belong to the claimant and which he was not asked to undertake. He also accepted the receivers' submission that, even had they made a timely claim for the insurance money and received a payment, there would have been no obligation on them to use the money for the repair of the water damage. The claimant appealed.

He submitted, first, that the vesting of title to the property in the trustee-in-bankruptcy had not deprived him of his legal status as mortgagor. He had remained liable under the mortgage during the period of his bankruptcy and, although the mortgage debt and interest had been provable in the bankruptcy, they had continued as liabilities until his discharge. Therefore, he continued to have an interest in the value of the security at the time when the receivers' breach of duty had occurred. Second, as to causation, the judge's reliance on his having been a volunteer had been misplaced. His claim was not one against the trustee to recover the sums he had expended in the improvement of the property. It was a claim for damages for breach of duty against the receivers. As against them, his loss was represented by the diminution in value caused by the receivers' failure to have made an insurance claim and to have expended the money received in the repair of the property. But for the receivers' failure to carry out the repairs, he would have received the property back from the trustee-in-bankruptcy in repair.

Held:

The appeal would be dismissed.

(1) Previous authority served to emphasise that the duty was owed to the mortgagor if and to the extent that he retained an interest in the equity of redemption. In the case of the bankruptcy of the mortgagor, that ceased to be the case. The equity of redemption became vested in the trustee. Although the mortgagor retained a legal liability under the charge, that was limited and finite in nature. Upon discharge, it was automatically extinguished. The mortgagor walked free from the mortgage and the benefit of the equity of redemption remained vested in the trustee for the benefit of the general creditors. It was true that, in the event of a surplus in the bankruptcy, the trustee was under an obligation to return that surplus to the bankrupt. However, the bankrupt had no right to the mortgaged property as such and his interest in any possible surplus could be and was protected by the duties which the receivers and the mortgagee would owe to the trustee-in-bankruptcy in relation to their management of the property and its realisation. There was no authority which supported the receiver's duty being owed to a bankrupt mortgagor, nor was there any justification for imposing such a duty. The mortgagor had ceased to have any interest in the equity of redemption and his ultimate entitlement to any surplus in the bankruptcy did not require the imposition of a duty to anyone beyond the trustee. Further, the bankrupt mortgagor was not in the same position as a guarantor. Unlike the guarantor, his liability could not extend beyond his discharge from bankruptcy and, to the extent that it continued to exist until then, it was more theoretical than real. He could not be sued for the mortgage debt and would have no personal liability for any shortfall in the security.

Furthermore, any surplus on a sale of the security would go to satisfy the claims of the unsecured creditors (see [18], [20], [26] of the judgment).

In the present case, the judge had been right to dismiss the claim on the basis that any duties owed by the receivers in relation to the insurance claim had been owed exclusively to the trustee-in-bankruptcy (see [22], [26] of the judgment).

Standard Chartered Bank Ltd v Walker [1982] 3 All ER 938 considered; *Medforth v Blake* [1999] 3 All ER 97 considered; *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 4 All ER 484 considered.

(2) With respect to causation, for the claim to succeed, it would be necessary for the claimant to establish that, but for the breach of duty, the property would have been repaired. That pre-supposed that the receivers would have been obliged to spend the insurance money on making good the water damage. There was no evidence to show that the bank would necessarily have directed the receivers to expend the money on repairs, as opposed to the reduction of the mortgage liabilities and subsequent events strongly suggested that the bank would have sought to reduce its exposure. The claimant had not produced the evidence necessary to establish his case on causation (see [22], [24], [26] of the judgment).

Matthew Weaver (instructed by Sydney Mitchell LLP) for the claimant.

Mark Halliwell (instructed by Quality Solicitors Lockings) for the defendants.

(6) Secretary of State for Business Innovation and Skills v PAG Management Services Ltd [2015] All ER (D) 74 (Aug), [2015] EWHC 2404 (Ch)

In the Chancery Division, before Mr Justice Norris.

Company – Compulsory winding up – Just and equitable – Secretary of State seeking order respondent company be wound up on basis expedient in public interest – Whether just and equitable to wind up respondent – Insolvency Act 1986, ss 87(1), 91, 92, 124A.

Facts:

The respondent company was incorporated to manage and coordinate a business rates mitigation scheme to exploit a statutory exemption for the benefit of associated companies in the group of which it formed part and also for third-party clients. The scheme operated by the respondent incorporating a special purpose vehicle (SPV) and the respondent's clients granting leases to the SPV. The landlord would waive the right to receive sums due under the lease and the SPV would be placed in members' voluntary liquidation, making it exempt from national non-domestic rates

(NNDR). The respondent would receive a percentage of the NNDR saved under an agreement with the landlord. The Secretary of State presented a petition, under s 124A of the IA 1986, seeking an order that the respondent be wound up on the basis that it would be expedient in the public interest.

The Secretary of State contended that: (i) the leases granted by landlords to the SPVs were shams; (ii) the statutory declaration of solvency required for a members' voluntary liquidation could not properly be given because the SPV's director as a pure figurehead without any real knowledge of the assets or liabilities of the SPV; (iii) the scheme involved a breach of s 87(1) of the Act; (iv) the scheme involved a breach of ss 91 and 92 of the Act; (v) the scheme involved an abuse of the insolvency legislation; (vi) the respondent's business was artificial and demonstrated a lack of commercial probity; and (vii) an amalgam of abuse of the insolvency legislation and lack of commercial probity having regard to the elements of the scheme.

Held:

The claim would be allowed.

Even if the Secretary of State thought it expedient in the public interest to wind up a company, the court still had a discretion whether or not to make an order. Before making an order, the court had to be satisfied that it was just and equitable to wind the company up. The burden of proof lay on the Secretary of State to persuade the court, having proved matters of fact to the requisite civil standard, that it was just and equitable to wind the company up. The court had to balance competing considerations why the company should be wound up and why it should not be wound up upon a consideration of the totality of the evidence. As a result of undertaking that exercise, the court had to be able to identify for itself the aspects of the public interest which would be promoted by making a winding-up order in the particular case. It was not necessary for the business of the company to involve illegality. Where the business of the company did not involve the commission of illegal acts or breaches of regulatory requirements, the company might nonetheless be wound up if its business was inherently objectionable because its activities were contrary to a clearly identified public interest. Such conduct was sometimes described as disclosing a lack of commercial probity and, while that frequently might involve preying on the public and inducing individual members of the public to participate in transactions which were without benefit to them, it could also involve prejudice to the public generally. However, in making the judgment whether a business was inherently objectionable, the court had to be careful of being priggish. To wind up an active and solvent company was a serious step, and the court had to be

satisfied that reasons of sufficient weight had been advanced to justify taking that course (see [5] of the judgment).

All but the Secretary of State's final contention would be rejected. On consideration of all the evidence, it was just and equitable that the respondent be wound up because its activities were contrary to a clearly defined public interest, and because, on balance, the public interest was better served by winding up than by any other outcome. There was a clear public interest in ensuring that the purpose of liquidations was not subverted as it was by treating a company in liquidation as a shelter. That misuse of the insolvency legislation demonstrated a lack of commercial probity. In its own way it also subverted 'the proper functioning of the law and procedures of bankruptcy'. The respondent was an active and solvent business and, of itself, the promotion of tax mitigation schemes was not an inherently objectionable activity. However, the respondent's business model involved a misuse of the insolvency legislation. The Secretary of State had established that it was just and equitable to wind up the company, and that the discretion conferred by s 124A of the Act should be exercised in that way (see [43], [45], [48], [50], [55], [62], [63], [65], [69] of the judgment).

Jacob (Walter L) & Co Ltd, Re [1989] BCLC 345 applied; *Senator Hanseatische Verwaltungsgesellschaft mbH, Re* [1996] 4 All ER 933 applied; *Forcesun Ltd, Re; Re Tidesdale Ltd* [2002] All ER (D) 323 (Feb) applied.

Paul Chaisty QC and Lucy Wilson-Barnes (instructed by Wragge Lawrence Graham & Co LLP) for the Secretary of State.

David Chivers QC and Jack Rivett (instructed by Irwin Mitchell LLP) for the respondent.

(7) Wilson and Sharp Investments Ltd v Harbourview Developments Ltd [2015] All ER (D) 08 (Nov), [2015] EWCA Civ 1030

In the Court of Appeal, Civil Divisio, before McCombe, Gloster LJJ and Sir Colin Rimer.

Company – Winding up – Petition – Injunction – Judge dismissing appellant's application for injunction to restrain respondent from presenting winding-up petition against appellant based on alleged debt – Whether proposed petition debt being disputed on substantial grounds – Whether respondent should be permitted to enforce interim payment obligation by way of winding-up petition, given it being insolvent and in creditors' voluntary liquidation – Whether appellant having serious and genuine cross-claims exceeding sums alleged to be outstanding.

Facts:

The appellant property developer and the respondent building contractor entered into two contracts for the development of student accommodation (the contracts). Both contracts were subject to the JCT Intermediate Building Contracts with Contractors Design (2011) Edition Conditions. In August and September 2013, four interim certificates were issued. It was the appellant's case that those interim certificates substantially overvalued the respondent's works. That was disputed by the respondent. However, the appellant did not issue any pay less notices and, accordingly, did not dispute that the sums certified became payable. One of the interim certificates was paid in full. In January 2014, the respondent wrote to the appellant, giving notice of the respondent's intention to terminate the contracts. The appellant replied to the respondent, terminating or purporting to terminate the respondent's employment under the contracts. In April, the appellant wrote to the respondent setting out the detail of its cross-claims, as then valued. The letter concluded by stating that the interim certificates had overvalued the works by an amount in excess of the amounts outstanding under the certificates and that there were other claims for damages. The respondent notified the appellant that it would present a petition for the winding up of the appellant. The appellant applied for an injunction to restrain such action. However, prior to the hearing, the respondent obtained a moratorium to enable it to put forward to its creditors proposals for a company voluntary arrangement (CVA). The proposals showed that the respondent was insolvent. The proposals for a CVA were rejected by the respondent's creditors. The respondent subsequently gave notice that a meeting of creditors was to be held on 11 July for the purposes of appointing a liquidator for the purpose of winding up the respondent's affairs and distributing its assets. Following the hearing on 10 July, the judge dismissed the appellant's application for an injunction.

The issues were, first, whether the proposed petition debt was disputed on substantial grounds. The appellant contended that the sums set out in the interim payment certificates were no longer payable after the respondent had entered creditor's voluntary liquidation (CVL) on 25 July 2014. That argument was based upon clauses in the contracts that stated: 'As from the date the Contractor becomes insolvent … the Employer need not pay any sum that has already become due' (for cls 8.5.3 and 8.7.3, see [40] of the judgment). The appellant submitted that the judge had wrongly rejected its construction of the contract. Second, whether, in accordance with what was said to be the established practice of the Technology and Construction Court (the TCC) not to enforce interim payment obligations in favour of insolvent contractors, the respondent should not be permitted to enforce an interim payment obligation by way of a winding-up petition, given that it was insolvent and in CVL. Third, whether the

appellant had serious and genuine cross-claims which exceeded the sums alleged to be outstanding under the interim payment certificates.

Held:

The appeal would be allowed.

(1) On the true construction of the contracts, the judge had been wrong to have concluded that cls 8.5.3 and 8.7.3 could have no application if the contracts had already been terminated prior to the insolvency. Given his incorrect approach to the construction of the contracts, the judge had come to the wrong conclusion as to whether payment of the debts due under the interim certificates had been disputed in good faith and on substantial grounds. Given the realities of the situation, and the almost inevitable defence open to the appellant in the event that a resolution was passed for the CVL of the respondent, the only course available to the judge had been either to adjourn the application to await the outcome of the meeting of creditors or to restrain presentation of the petition pending the outcome of such meeting, with liberty to apply in the event that no resolution was passed for the winding up of the respondent (see [48], [55], [73], [74] of the judgment).

Accordingly, the appeal would be allowed on the first ground. Given that the respondent had, in fact, gone into voluntary liquidation after the hearing on 10 July, the discretion would be re-exercised by granting a permanent injunction restraining presentation of a petition against the appellant based on the interim certificates (see [56], [73], [74] of the judgment).

(2) In the absence of a contractual right entitling the employer to refuse payment under interim certificates in the event of the insolvency of the contractor, there was no absolute rule that the TCC would necessarily decline to give summary judgment or restrain presentation of a winding-up petition based on an adjudication, merely because the contractor was insolvent. Whether or not the court would adopt such a course would be dependent on the facts of the particular case. Accordingly, the appeal on the second ground would be dismissed (see [60], [73], [74] of the judgment).

(3) It was established law that the fact that a proposed petition debt was not disputed (or acknowledged) did not prevent the debtor raising a cross-claim in defence of a winding-up petition. The fact that an employer had been obliged to make an interim payment did not preclude him from challenging disputed items at a later stage (see [65], [66], [73], [74] of the judgment).

The judge's approach had placed far too much emphasis on the fact that, earlier in the chronology, there had been no dispute by the appellant that payments under the interim certificates had been due. The present was a

classic case where, based on the evidence before the court, which necessarily had not been tested by cross-examination or any kind of exploration of the evidence in depth, the judge, in accordance with well-established principles, should have concluded that there had been substantial disputes between the parties which could not be appropriately determined in winding-up proceedings. Accordingly, he should have granted the injunction sought, restraining the issue of a winding-up petition. The judge had erred in principle in his approach to his consideration of the appellant's cross-claims. He had taken into account matters that he should not have taken into account and had left out of account relevant matters. On any analysis, his decision had been wrong because he had failed to balance the various factors fairly in the scale (see [64], [71], [73], [74] of the judgment).

Therefore, the appeal on the third ground would be allowed and, on a re-exercise of the discretion, the injunction sought would be granted (see [72]–[74] of the judgment).

Bayoil SA, Re, Seawind Tankers Corp v Bayoil SA [1999] 1 All ER 374 considered; *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2004] 1 All ER 529 considered; *R & S Fire and Security Services Ltd v Fire Defence plc* [2013] 2 BCLC 92 considered.

Krista Lee (instructed by BPL Solicitors Ltd) for the appellant.

Clifford Darton (instructed by Watkins Ryder LLP) for the respondent.

(8) Sahaviriya Steel Industries UK Ltd v Hewden Stuart Ltd [2015] All ER (D) 148 (Oct), [2015] EWHC 2726 (Ch)

In the Chancery Division, before Judge Pelling QC sitting as Judge of the High Court.

Company – Winding-up – Disposition of property following petition to wind up company – Validation by court – Respondent petitioning to wind up company – Company seeking court's validation in respect of certain payments intending to make – Whether validation should be granted – Whether proceedings to be held in private – Insolvency Act 1986, s 127 – CPR 39.2(3).

Facts:

The applicant company (the company), which was wholly owned by a Thai registered company, was engaged in the manufacture of steel slab, as well as the manufacture of coke and iron and the generation of electricity. The company's financial position deteriorated and it became technically and commercially insolvent. The company sought either to restructure its finances (Plan A) or to negotiate the sale of part of the business and assets, in order to preserve its coke and power businesses (Plan B). If

either Plan A or Plan B could be achieved, there would be no funds to meet the claims of unsecured creditors because the company's assets would be used to fund distributions to the company's secured creditors (Outcome C). The respondent company presented a winding-up petition against the company. Consequently, any payment made by the company after the presentation of the petition was void, under s 127 of the IA 1986, unless the court ordered otherwise. The company applied for an order, under s 127, validating certain payments that it intended to make, in particular to meet the cost of purchasing coal in order to keep its coke ovens in operation, to meet its wage bills and to meet incidental expenditure in connection with those operations. Two earlier applications under s 127 had been granted. The first two applications had been heard in private, pursuant to CPR 39.2(3)(c), on the ground that they involved confidential information, which would be damaging if made public. The company further applied for the present application to be heard in private.

The company submitted that grant of a further validation order was necessary to enable either Plan A or Plan B to be effected to allow for the best prospect for unsecured creditors to recover anything. The first issue was whether a further validation order, under s 127, ought to be made. Consideration was given to the grant of validation in respect of the first two applications based on the fact that the company had either been in receipt or was likely soon to be in receipt of substantial tax rebates. The question was whether a further validation order should be made where the remained confident that it would receive, in the very near future, a very substantial further tax rebate. Consideration was also give to the fact that the company had reduced the sums for which validation was being sought to a sum that did not exceed the sums available to the company even if the expected tax rebate was left out of account. The second issue was whether the present application should be heard in private under CPR 39.2(3)(c).

Held:

The application would be granted.

(1) In respect of applications for validation orders, the default position was that, where a company was insolvent, its assets had to be distributed to its creditors pari passu and the purpose of the general rule in s 127 of the IA 1986 was to preserve the assets of an insolvent company so that they could be distributed in that manner. However, there would be occasions when it might be beneficial for the company and its unsecured creditors that a company was permitted to dispose of its assets or continue its business in the ordinary course during the period after the presentation of a winding-up petition and before any winding-up order was made. Where that was so, the court could validate such payments. In considering whether to make a validation order, the court had to always

do its best to ensure that the interests of unsecured creditors would not be prejudiced (see [13] of the judgment).

In respect of the first two applications, the court had been satisfied, on the evidence, that its discretion should be exercised by making the validation orders sought because the company had been either in receipt or was likely soon to be in receipt of substantial tax rebates, which together with the proceeds of sale of the coke manufactured in its coke ovens equalled or exceeded the expenditure that the company sought validation in respect of. Thus the planned expenditure would not increase the indebtedness of the company and would further the interests of the unsecured creditors by enhancing the chances of the company delivering at least Plan B. The position in relation to the present application was more difficult because, while the company remained confident that it would receive, in the very near future, a very substantial further tax rebate, that could not be guaranteed. If receipt of the rebate was delayed, or was for a lesser sum than anticipated, then the effect of granting the validation order sought initially on the present application would have been to increase the level of unsecured debt of the company. However, in the light of the reduction of the sums for which validation was being sought to a sum that did not exceed the sums available to the company even if the expected tax rebate was left out of account, a further validation order would be made in modified terms (see [11], [14], [15], [17] of the judgment).

Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814 applied.

Under CPR 39.2(1), public hearings were the default position that should usually be adopted. Where the court decided to depart from the general rule, it should permit only the minimum interference necessary to deliver the objective to be secured by departing from that principle. In the present case, if the applications were to succeed it was necessary for the company to set out in detail and with absolute candour the nature of Plans A and B and the gravity of the situation posed by Outcome C. That of necessity involved the company disclosing in its evidence a significant amount of detail most of which was obviously commercially confidential. To permit such material to be disclosed at a public hearing would damage that confidentiality and might impact adversely on the delivery of Plan A or B. That would not have been, and was not, in the interest of anyone, including, but not limited to, the unsecured creditors of the company. In the circumstances, the judgment would be delivered in public and would not set out in any detail the level of indebtedness suffered by the company or how it was planned that Plan B should be delivered, as that would be to breach to commercial confidences that led the company to apply for the hearing of the applications in private and to the making of orders that the applications be heard in private (see [1], [16] of the judgment).

Giles Maynard Connor* (*instructed by Addleshaw Goddard LLP*) *for the company.

The respondent did not appear and was not represented.

(9) Re Sahaviriya Steel Industries UK Ltd; Subnom Official Receiver v Sahaviriya Steel Industries Public Co Ltd [2015] All ER (D) 269 (Oct), [2015] EWHC 2877 (Ch)

In the Chancery Division, Manchester District Registry, before Judge Pelling QC sitting as Judge of the High Court.

Insolvency – Company – Restoration of services – Steel company being wound up by court – Liquidator being appointed and applying for order for restoration of company's access to IT system (the system), or for order for inquiry into company's dealings – Liquidator further applying for orders directing hearing to be held in private, granting permission to serve application on respondent out of jurisdiction and for permission to serve proceedings out of jurisdiction by an alternative means – Whether application should be granted – Insolvency Act 1986, ss 233, 236.

Facts:

Following an earlier judgment (see [2015] All ER (D) 148 (Oct)), an order was made winding up a company, Sahaviriya Steel Industries UK Ltd (the company), and the applicant was appointed as liquidator. In the present proceedings, the liquidator sought to have the company's access to an IT system (the system) restored. Accordingly, he applied for an order, under s 233 of the IA 1986. Alternatively, he applied, under s 236 of the Act, for an inquiry into company's dealings. The liquidator further applied for: (i) an order directing that the hearing take place in private; (ii) an order granting permission to serve the application on the respondent out of the jurisdiction; and (iii) for permission to serve the proceedings out of the jurisdiction (Thailand) by an alternative means.

Firstly, the liquidator contended that the hearing should be in private because: (i) the evidence involved revealing information that might adversely affect the negotiating position of the liquidator in his attempts to sell some or all of the company's business and assets to a third party; (ii) the evidence involved revealing information that might adversely affect their negotiating position in such attempts; and (iii) that it was necessary to explore technical issues concerning the operational management of the company's plant. Secondly, the issue was whether the court had jurisdiction to give permission to serve the applications, under ss 233 and 236 of the Act, out of the jurisdiction. Consideration was given to r 12A.20 of the Insolvency Rules 1986, SI 1986/1925 (the Rules), and to CPR 6.38, which provided that, '(1) Unless paragraph (2) or (3) applies, where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve

any other document in the proceedings out of the jurisdiction'. Consideration was also given to CPR Pt 6 Practice Direction 6B—Service Out of the Jurisdiction (PD6B). Thirdly, the issue was whether permission should be granted to serve the proceedings out of the jurisdiction by an alternative means. Fourthly, whether the orders sought under ss 233 and 236 of the Act should be granted.

Held:

The application would be granted.

(1) In respect of the application for the hearing to take place in private, the court acceded to the application on the second ground since it was clear that it would have to explore, in the course of the hearing, in some detail, the risks posed for the plant and for those in work at, and lived in proximity to it in the event that access to the system was not restored. There was a significant risk that the liquidator would feel inhibited in discussing those issues frankly if there was a risk of his responses receiving publicity, particularly if reported out of context (see [4] of the judgment).

Accordingly, the order, under s 233 of the Act, would be granted and it would be directed that the hearing take place in private pursuant to CPR 39.2(3)(g) (see [1], [4] of the judgment).

(2) Paragraph 3.1(20) of PD6B provided the court with jurisdiction to give permission to serve applications, under ss 233 and 236 of the Act, out of the jurisdiction if otherwise the circumstances justified the making of such an order. That was because, pursuant to r 12A.20 of the Insolvency Rules 1986, CPR Pt 6 was applied to the service of documents in connection with insolvency proceedings outside England and Wales, subject to any necessary adjustments. The effect of CPR 6.38 was to apply to such applications the rules set out in CPR Pt 6 PD6B. Paragraph 3.1(20) of PD6B conferred jurisdiction on the court to give permission to serve proceedings out of the jurisdiction that were brought under an enactment which allowed those proceedings to be brought where those proceedings were not covered by any other grounds set out in PD6B. That provision applied to applications made under ss 233 and 236 of the Act (see [5]–[7] of the judgment).

The evidence established a strong prima facie case that the liquidator was entitled to apply for relief under s 233. The real issue was whether s 233 of the Act had extraterritorial effect. If it did not then the relevant test for service out would not be satisfied. There was a serious issue to be tried as to whether s 233 had extraterritorial effect. The case was sufficiently strong to justify the exercise of the court's discretion by giving permission because, among other things, there was no evidence that Thailand insolvency law had a provision similar in effect to s 233 of the Act or if it did

whether that provision was capable of having extraterritorial effect according to the law of Thailand. Further, the seat of the insolvency process concerning the company was exclusively England and Wales. The circumstances that led to the making of the application were of such potential gravity that justice required that permission be granted. Access to the system was necessary in order that the plant and in particular the coke ovens forming part of the plant could be managed safely on an ongoing basis in the interests of creditors, employees operating the site and the wider public (see [8]–[10] of the Act).

It followed that permission would be granted for the application, evidence in support and the court's order to be served on the respondent out of the jurisdiction (see [1], [5] of the judgment).

(3) English law permitted proceedings to be served out of the jurisdiction by an alternative means unless the law of the country in which service was to take place positively prohibited service by the alternative means proposed (see [14] of the judgment).

There was no evidence that suggested that the proposed form of service was illegal according to the law of Thailand and there was some authority in England and Wales that such a method had been adopted in the past without it being suggested that service in that manner was illegal. The order sought would be made because it would ensure that the respondent got speedy notice of the application and the order that had been made and thus would be able to apply to vary or discharge the order made and to respond to the applications made in early course. If service took place by the alternative method proposed, the proceedings and the order made would come to the attention of the respondent. It was also appropriate for notice of the proceedings to be given to the relevant officials employed by the respondent by e-mail. It was critically important, given the issues that arose in the present case, that the respondent was given notice of the orders that had been made and the applications that were being made and thus had an opportunity of responding at the earliest opportunity (see [14]–[16] of the judgment).

David Mohyuddin (instructed by DWF LLP) for the applicant.

The respondent did not appear and was not represented.

(10) Barclays Bank plc (trading as Barclays Global Payment Acceptance) v Registrar of Cos [2015] All ER (D) 279 (Oct), [2015] EWHC 2806 (Ch)

In the Chancery Division, Leeds District Registry, before Norris J.

Company – Administration order – Administrator – Company entering administration – S having formerly acted as administrator – Most significant creditor, Barclays, presenting petition for restoration of company to

register and immediate winding up – Company being restored to register – S applying for order seeking review or rescinding of restoration order – Whether S having standing to seek relief – Whether restoration order to be rescinded – Whether winding-up order to be made – Whether petition to be treated as being presented on day other than that when presentation made – Insolvency Act 1986, Sch B1 – Companies Act 2006, s 1029(1)(b),(2) – Insolvency Rules 1986, SI 1986/1925, r 4.47.

Facts:

Client Connection Ltd (the company) was incorporated in 2008. It managed payment protection insurance claims. Cash flow problems resulted in the directors putting the company into administration in October 2012. They appointed the third respondent, S, as the administrator. The object of the administration was to achieve a better realisation for the creditors than if the company had immediately gone into liquidation. S assumed certain obligations in pursuing that objective (see [5], [6] of the judgment). Following S's work, there was no return at all for the creditors, with claims totalling £3.196m. It was not possible to be confident that S had got to the bottom of events so that she could explain to the creditors why they would receive nothing in relation to their debts. The most significant creditor was the petitioner, Barclays Bank plc (Barclays), which had a claim of just over £2m in respect of 'chargebacks' due to it. On 15 January 2015, it presented a petition, seeking the restoration of the company to the register and for its immediate winding up. Barclays also sought further relief, including unspecified relief to allow further sums to be recovered and distributed to the creditors. S was not served with papers relating to that application. Barclays proposed that W be appointed as liquidator. In March, the district judge made an order restoring the company to the register (the restoration order). S made an application for an order that the restoration order be reviewed or rescinded.

A number of questions were to be determined. Among other things: (i) what standing S had as a former administrator to seek any relief; (ii) whether there was any jurisdiction to rescind the restoration order; (iii) whether the restoration order was erroneous in the circumstances; (iv) whether a winding-up order ought to be made; and (v) whether the petition should be treated as if it had been presented on some day other than the 15 January 2015. S submitted that, as a former administrator, she fell within the general category with which s 1029(2) of the Companies Act 2006 concluded, namely a 'person appearing to the court to have an interest in the matter'. Consideration was given to r 7.47 of the Insolvency Rules 1986, SI 1986/1925, which provided for a court's review of any order made in the exercise of its insolvency jurisdiction, and s 1032 of the Act.

Held:

(1) A former administrator would not automatically appear to the court to have an interest in the matter of the restoration of a dissolved company. In general, the interests of a former officeholder in the affairs of the company would be extremely limited (see [19] of the judgment).

On the facts of the case, S did have an interest in the matter, especially in correcting evidential material so that, had she been served with the application and evidence before the restoration order had been made, she would have been entitled to appear at the hearing and assist the court (see [19] of the judgment).

S had standing to make an application in relation to the relief already granted and to intervene in the application regarding further relief (see [20] of the judgment).

Top Brands Ltd v Sharma; Mama Milla Ltd (in creditors voluntary liquidation), Re [2015] 2 All ER 581 considered.

(2) On the proper application of the legislation, r 7.47 of the Insolvency Rules 1986 was of no assistance to S. However, it would be unjust to dispose of her application on that ground. In the circumstances, it would be assumed that S had appealed the restoration order as someone adversely affected by it, although not then a party to the proceedings. The hurdle to be surmounted was technically different from that under r 7.47 of the Insolvency Rules 1986 but, on the facts, not materially so (see [22], [23] of the judgment).

Accordingly, there was a jurisdiction to exercise (see [23] of the judgment).

(3) Restoring to the register a company which had been dissolved at the end of an administration was one of the specific circumstances contemplated by s 1029 of the Act. The only question was whether the court considered it just to do so. Further, putting on one side blatant ‘fishing expeditions’, winding up could be justified by the recovery of the company’s books, documents and records, and by enquiry into them and investigation of the transactions so disclosed which credible evidence established would merit examination. That was so even if it could not be demonstrated (as at the date of restoration) that assets were likely to be recovered: it could still be ‘just’ to require explanation (but equally it might sometimes be oppressive to do so). Winding up had a wider purpose than simply the collection, realisation and distribution of assets. In a business model where the income was generated by ‘upfront fees’, the work was possibly outsourced, and substantial indebtedness would be generated by ‘chargebacks’ for fruitless or inadequately performed work (and where there were significant recent distributions to shareholders). In that situation, it would not be improper for a very substantial creditor to seek restoration to facilitate investigation into potential recoveries (in

relation to which steps it would either have to invest its own money or persuade third-party funders of the underlying merits of the claim). Nor were recoveries dependent on upon being able to 'backdate' the petition (see [25], [35] of the judgment).

There was no reason in principle why restoration should not be granted on the application of Barclays. On the evidence, Barclays only had to persuade the court that it had been just to make the order. It had done so, and S's evidence provided no further light on those matters. The district judge had correctly restored the company to the register, and S had demonstrated no ground for setting aside his order (see [29], [32], [37] of the judgment).

Oakleague Ltd, Re [1995] 2 BCLC 624 applied; *Mirror Group (Holdings) Ltd, Re* [1993] BCLC 538 considered; *Top Brands Ltd v Sharma; Mama Milla Ltd (in creditors voluntary liquidation), Re* [2015] 2 All ER 581 considered.

(4) The answer to the fourth question was plainly in the affirmative. An order would be made winding up the company (see [39] of the judgment).

(5) The object of s 1032 of the 2006 Act was to put the relevant company and all other persons in the same position as nearly as they might be as if the company had not been dissolved, and there was no reason why a liquidator of the company should not fall within that entirely general category. A direction could be given that the period between the date of dissolution and the date of restoration should not be counted for the purposes of any enactment as to the time within which proceedings might be brought by the company. However, the jurisdiction had to be exercised with extreme caution. It was by no means a routine ancillary order made on the occasion of a restoration (see [49]–[51], [58] of the judgment).

The court was being asked to create a seamless insolvency by deeming the petition to have been presented on a date other than the actual date of presentation. It was clear that it should not treat the petition as having been presented on the date that the administration had commenced. It was not possible to pretend that there had been no administration and, in the circumstances, it was not possible to have a simultaneous administration and liquidation. The real question was whether the clock could be turned back to the date of dissolution, and what its effect would be. What W needed was a direction that created a seamless insolvency, so that he could avail himself of the period that had been available to the previous office holder. It was not just to make any such direction in the present case. Firstly, the evidence did not state what it was that had been discovered after the dissolution which made all the difference, and explain why Barclays had not applied to suspend the dissolution and petition for a winding up within the three months after registration of the notice and before dissolution, but now felt able to do so. Secondly, if there were

transactions which warranted further investigation, then the counterparties to those transactions (or the recipients of company money) were known. Yet no notice of the application had been given to the affected persons, other than to the directors. Fairness required that third parties who would be prejudiced by the direction sought ought to be given the opportunity to be heard (see [47]–[49], [52], [59], [60] of the judgment).

A winding-up order would be made, but no direction would be made under s 1032(3) of the Act (see [61] of the judgment).

Darrell v Miller [2003] All ER (D) 123 (Nov) distinguished; *Regent Leisuretime Ltd v NatWest Finance (Formerly County NatWest Ltd)* [2003] All ER (D) 385 (Mar) considered; *Re G-Tech Construction Ltd* [2007] BPIR 1275 considered; *Hellas Telecommunications (Luxembourg) II SCA (in admin), Re; Weather Finance III SARL (in admin) v Hellas Telecommunications (Luxembourg) II SCA (in admin)* [2011] All ER (D) 57 (Dec) considered; *Jodrell v Peakstone* [2012] EWHC Civ 380 considered; *Davy v Pickering* [2015] All ER (D) 238 (Feb) considered.

Steven Fennell* (*instructed by Eversheds*) *for Barclays.

Louis Doyle* (*instructed by Saints Solicitors*) *for S.

(11) Hunt v Withinshaw (Former trustee in bankruptcy of Steven James Hunt) [2015] All ER (D) 253 (Oct), [2015] EWHC 3072 (Ch)

In the Chancery Division, before Morgan J.

Bankruptcy – Trustee in bankruptcy – Vesting of property in trustee – H appealing against dismissal of application for declaration pier vesting in him – H applying for order striking out local authority as respondent to appeal – Whether vesting order should be granted – Insolvency Act 1986, ss 283A, 315, 318, 320.

Facts:

The present case concerned a pier, the freehold of which was owned by H until July 2008, when he was made bankrupt and the freehold vested in his trustee in bankruptcy (the trustee). It was accepted that the unit of accommodation on the pier was a dwelling house, which was the sole or principal residence of H in July 2008, so that the interest in the dwelling house was governed by s 283A of the IA 1986. In July 2011, the trustee applied for an order for possession of the pier. On 18 August, the trustee signed a notice of disclaimer of the freehold interest in the pier. On 19 August, an order was made dismissing the application for possession. In November, H applied, pursuant to s 320 of the Act, for a vesting order in relation to the freehold title to the pier. The application was prepared on the basis that the freehold had been effectively disclaimed by the

trustee. In March 2012, acting on the basis that the disclaimer had caused the freehold in the pier to escheat to the Crown, the Crown Estate Commissioners created a new freehold interest in the pier in favour of the Welsh Government, which transferred the same to a local authority (Conwy). In August, H's substantive application for a vesting order was dismissed. H appealed. Following judgment in May 2013, the court ordered that H's application for a vesting order be remitted, but the determination was to be limited to two issues, namely: (i) whether the court ought to exercise its discretion, under s 320(3) of the 1986 Act, in favour of H on the basis that he had standing to apply for a vesting order, under s 320(2)(c); and (ii) if the court would exercise its discretion to make a vesting order, whether it should relate to the dwelling house, the pier or some other part or parts of the pier and upon what terms. However, in December, before any hearing in relation to the questions remitted, H issued a new application, seeking a declaration that the disclaimer was invalid. The sole respondent to that application was the former trustee, who had been released in January 2013. In January 2014, the application was dismissed. There were before the present court: (i) an appeal by H against the order of January 2014, dismissing his application for a declaration that the pier vested in him under s 283A of the Act; (ii) an application by H for relief, including an order striking out Conwy as a respondent to the appeal; and (iii) two issues directed to be tried by the order of May 2013.

The issues included, first, whether Conwy should be removed as a respondent to the appeal. Second, as to the appeal, whether the application seeking a declaration that the disclaimer was invalid and the appeal against the dismissal of that application were an abuse of process. Consideration was given to s 318 of the Act, concerning disclaimer of a dwelling house. Third, whether a vesting order should be made in favour of H and, if so, the extent of the property to be vested by such order. Conwy relied heavily on the fact that the pier was in a dangerous condition and could collapse at any moment, and submitted that the consequences of making a vesting order should be considered against that background.

Held:

(1) Conwy was the obvious respondent, both to H's appeal and to his application for a vesting order. It had been correctly joined as a respondent to the appeal. There had been no appeal against the order joining Conwy and there had been no possible grounds for such an appeal. Further, there had not been a change of circumstances which would arguably allow the present court to vary or revoke the order for joinder. H's application was hopeless, totally without merit and would be dismissed (see [38] of the judgment).

(2) With respect to the appeal, H plainly had not adopted the correct approach to raising a point as to the effect of s 318 of the Act. Instead of having applied for permission to amend his application for a vesting order, he had simply started a new inconsistent claim. If H had applied, as at December 2013, to amend his application for a vesting order to include a claim that the disclaimer had been ineffective, it was expected, in the circumstances, that permission would have been refused. A refusal of permission to amend would have meant that it was not open to H to take his point on s 318 of the Act. In those circumstances, it had plainly been an abuse of process for H to have brought a new application for a declaration in December 2013 on a basis which had been inconsistent with his own application for a vesting order and with the order he had obtained in May 2013 (see [47], [48] of the judgment).

Accordingly, the appeal against the dismissal of the application dated December 2013 would be dismissed on the basis that both the application and the appeal had been an abuse of the process of the court (see [49] of the judgment).

(3) Standing back and weighing the total, or almost total, lack of benefit to H from a vesting order and the adverse consequences of such an order so far as the public interest, represented by Conwy, was concerned, it was plain that the scales came down very heavily in favour of not making a vesting order in respect of the dwelling house, even if all of the difficulties about ancillary property or ancillary rights could be overcome. Further, making a vesting order to give H a nuisance value wholly unconnected with the occupation of a dwelling house or the normal value of a dwelling house was outwith anything that had been contemplated by s 320 of the Act. If it would not be right to make a vesting order in respect of the dwelling house, it was remarkable to think that the court would then vest in H the whole pier. If the pier was vested in H, he would be the owner of an interest with no value or a negative value. The result of the vesting order would be liable to delay the time when the pier was demolished in the public interest and increase the cost to Conwy, which would be ultimately borne by the rate payers and charge payers. The vesting order would give H nuisance value, but it would not be right for the court to exercise its discretion in order to confer a nuisance value on H at the expense of the public interest. Therefore, there were good reasons for refusing to make a vesting order of either the dwelling house alone or of the whole of the pier. It would not be appropriate in all the circumstances to make an order vesting in H the pier or any part of it (see [81]–[85], [87] of the judgment).

Therefore, H's application for a vesting order would be dismissed (see [87] of the judgment).

H appeared in person.

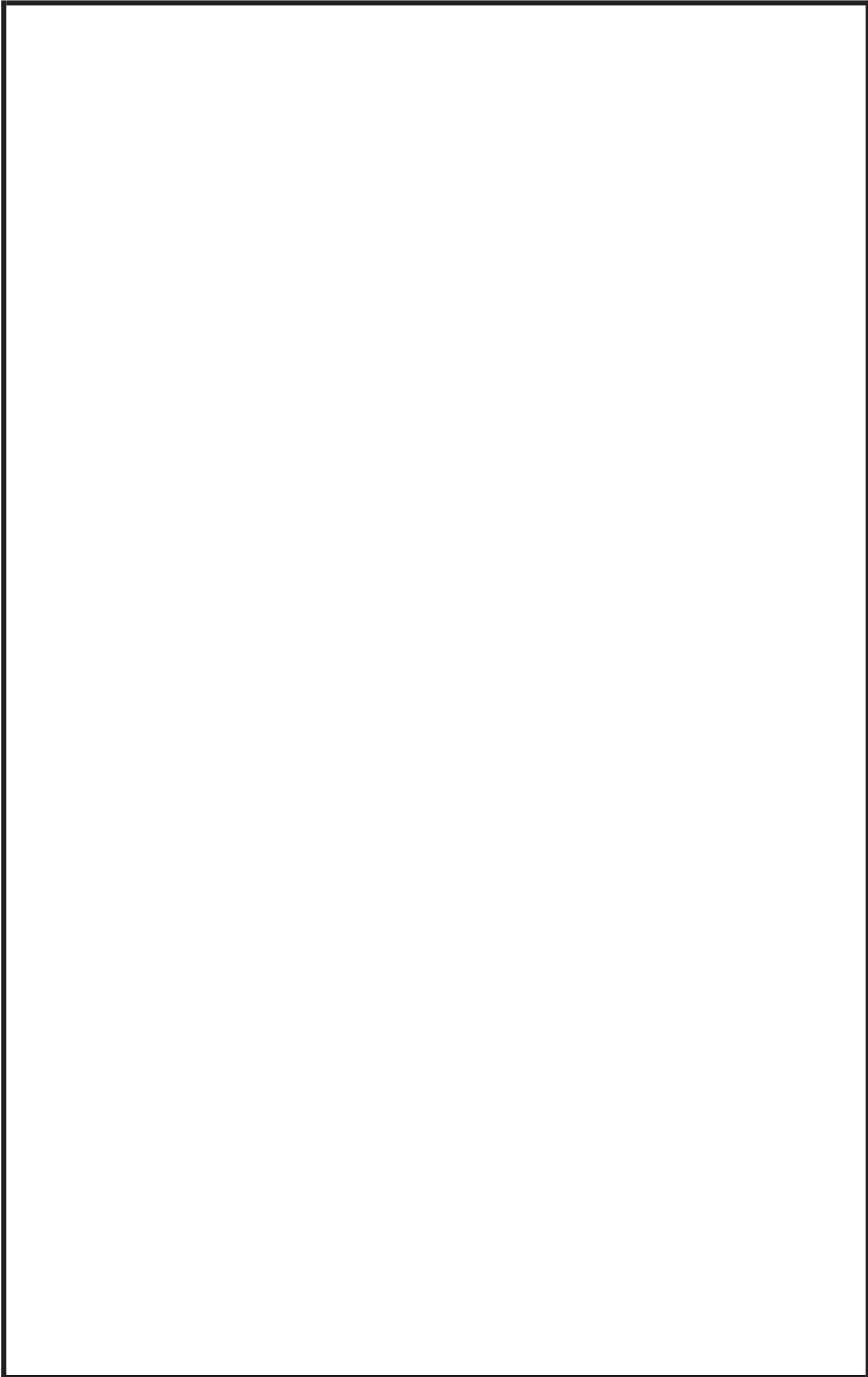
Graham Sellers (instructed by DWF LLP) for the trustee.

Louis Doyle (instructed by Head of Legal and Democratic Services, Conwy County Borough Council) for Conwy.

LEGISLATION

(1) Bankruptcy (Scotland) Bill

A Bill for an Act of the Scottish Parliament to consolidate the Bankruptcy (Scotland) Act 1985, the Bankruptcy (Scotland) Act 1993, Part 1 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, Part 2 of the Home Owner and Debtor Protection (Scotland) Act 2010, the Bankruptcy and Debt Advice (Scotland) Act 2014, the Protected Trust Deeds (Scotland) Regulations 2013 and related enactments.



Correspondence about this bulletin may be sent to Sarah Hanson, Content Acquisition and Development Specialist, LexisNexis, Lexis House, 30 Farringdon Street, London EC4A 4HH (tel: +44 (0)12 4260 9117, email: victoria.burrow@lexisnexis.co.uk). If you have any queries about the electronic version of this publication please contact the BOS and Folio helpline on tel: +44 (0)845 3050 500 (08:00–18:00 Monday – Friday) or for assistance with content, functionality or technical issues please contact the Customer Service teams between 08:00–18:30 Tel: +44 (0)800 007777; Email: contentsupport@lexisnexis.co.uk

© Reed Elsevier (UK) Ltd 2015
Published by LexisNexis (www.lexisnexis.co.uk)