Volume 15 Issue 5 November 2015

# Tolley's Company Law and Insolvency

**Bulletin Editor**
**Dr John Tribe**
Kingston University

Dear Subscriber,

Happy Christmas! I hope you have had an enjoyable and productive 2015. I wish you all the best for the New Year ahead. It is my pleasure to welcome readers to the latest newsletter! It is also the last hardcopy newsletter. In future the materials usually contained within this newsletter will appear online.

Following the news section this newsletter contains three analysis pieces drawn from *Lexis@PSL Restructuring and Insolvency*. In the first analysis piece Simon Mills, barrister at Five Paper, and Harold Brako, partner at Shoosmiths LLP, discuss *Capital For Enterprise Fund A LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch), [2015] All ER (D) 117 (Nov) and argue that the case serves as a reminder about the dangers of pleading a claim in conspiracy without first rigorously analysing the available evidence.

How will the court approach the 'deeds in the drawer' phenomenon? In our second analysis piece Josephine Hayes of Gough Square Chambers comments on the decision in *Swift Advances plc v Ahmed* [2015] EWHC 3265 (Ch), [2015] All ER (D) 177 (Nov) where the court considered fresh evidence at a late stage in the proceedings and set aside a transaction which was not recorded on any public register.

What are the challenges when bringing a claim under s 304 of the Insolvency Act 1986 (IA 1986)? In our third analysis piece Giselle McGowan, barrister at 9 Stone Buildings, considers the position following the decision in *Borodzicz v Horton* [2015] Lexis Citation 286, [2015] All ER (D) 03 (Dec).

This newsletter contains seven summary reports of case law apposite to the jurisdictions of insolvency law and company law and details of two pieces of legislation which affect the area.

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) Ministry of Justice ends the exemption for insolvency litigation from the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Following the announcement that the Ministry of Justice is ending the exemption for insolvency litigation from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 R3 have drawn attention to some interesting research conducted by Professor Walton. R3 notes: 'Recent research by the University of Wolverhampton showed that this exemption helps retrieve approximately £480m owed to creditors from rogue directors and others every year, with £1bn of new claims begun in 2014.'

Phillip Sykes, president of R3, the insolvency trade body, says:

> *'We are deeply disappointed by the Ministry of Justice's decision. It's a decision that flies in the face of all available evidence. The government is potentially writing off hundreds of millions of pounds per year owed to not just HMRC, but to hundreds, if not thousands, of ordinary honest businesses as well.'*
>
> *'The only winners today are the rogue directors and others who refuse to repay money owed to creditors after an insolvency. We're back to an uneven playing field, where rogue directors hold all the cards – and the cash.'*
>
> *'At no point has the government engaged with the arguments in favour of extending the exemption, nor has it carried out an impact assessment of what the end of the exemption would mean.'*
>
> *'The end of the exemption leaves a huge funding black hole for insolvency litigation. This is a blow to the wider business community and the insolvency profession.'*

As R3 note, 'The insolvency exemption from the LASPO Act provided that certain costs (e g the Conditional Fee Arrangement uplift) could

continue to be reclaimed from losing defendants in insolvency litigation. This sort of litigation is used to retrieve money owed to insolvent companies (which can be repaid to creditors) from individuals or organisations that are refusing to pay it back.

Without the exemption, the insolvency profession and business groups are worried that such insolvency litigation will be difficult to fund: there is often no money left in an insolvent company to fund legal action without the ability to reclaim costs.'

Professor Peter Walton of the University of Wolverhampton found that:

- CFA-backed insolvency litigation realises approximately £480m per year for insolvent estates (up from £160m in 2013), with around £115m of this owed to HMRC.
- CFA-backed insolvency litigation is currently used to pursue approximate claims in excess of £1bn per year—up from £300m per year in 2010.
- Approximately £240m of these claims relate to money owed to HMRC—up from £50m to 70m in 2010.
- CFA use in insolvency litigation (in compulsory liquidation cases) rose 39% from 2010 to 2014, while the total number of compulsory liquidations fell 22%.
- Third party funding is a relatively small part of the insolvency litigation market: approximately 160 cases per year use third party funding, realising £45m—out of a total of approximately 2,300 cases per year and around £480m of realisations.
- Without the insolvency litigation exemption from the LASPO Act, 51% of appointment takers responding to the survey say none of their cases would have gone ahead.

Were the insolvency exemption to end:

- 86% of respondents to the survey believe that less money would be returned to creditors;
- 63% would take on fewer 'no asset' cases; and
- 49% would stop or decrease litigation.

## (2) Law Society of Scotland gives up RPR status

Following an application by Law Society of Scotland to the Secretary of State for Business to give up its designation as a recognised professional body (RPB) for insolvency practitioners, the Secretary is making the

Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order 2015. The Order will take effect from 18 January 2016.

On 9 October 2015 the Law Society of Scotland informed the Secretary of State that it no longer wanted to be an RPB for the purposes of the IA 1986, s 391.

The Secretary of State has considered this request and is satisfied that it is appropriate to revoke this recognition in accordance with the procedure in IA 1986, s 391N.

The Secretary of State's reasons for making the Order include:

- the Law Society of Scotland has decided to stop acting as an RPB from the end of 2015 and has completed its internal procedures to sanction this decision;
- the Law Society of Scotland only regulates five Scottish solicitors who are insolvency practitioners, and considers this unviable. All the practitioners have been consulted and agree to the revocation of RPB status; and
- arrangements have been made for these insolvency practitioners to be regulated by the Institute of Chartered Accountants of Scotland.

## (3) Insolvency Service guidance explains legal changes

Guidance from the Insolvency Service explains the new regulatory objectives and sanctions introduced on 1 October 2015, and which include new powers for the Insolvency Service to take action against insolvency regulators and, where it is in the public interest, insolvency practitioners. It also sets out how the Insolvency Service intends to implement the changes.

Substantial changes to insolvency legislation came into effect on 1 October 2015, which include:

- the introduction of regulatory objectives for insolvency regulators;
- new powers for the Insolvency Service to take action against insolvency regulators and insolvency practitioners;
- changes to the way some fees and expenses are charged by insolvency practitioners;
- measures that will enable insolvency practitioners to specialise in either corporate or personal insolvency; and
- an end to the direct authorisation of insolvency practitioners by the Insolvency Service following a one-year transitional period.

***Issues covered by the guidance***

The guidance is intended to suggest how insolvency regulators might go about meeting the regulatory objectives, but will also be of interest to insolvency practitioners and the insolvency profession in general. The guidance:

- explains the new regulatory objectives;
- sets out the new powers of sanction available to the Insolvency Service; and
- provides an overview of how the Insolvency Service intends to implement the changes.

## (4) Individual insolvency rates published by Insolvency Service

The rate of total individual insolvencies per 10,000 adults in England and Wales fell to 21.8 in 2014 from 22.4 in 2013, having followed a decreasing trend since the peak of 30.9 in 2009.

The Insolvency Service has provided breakdowns of individual insolvencies in England and Wales, by region, county, unitary authority, and local authority levels. Age and gender breakdowns of individual insolvencies at regional level are also given. The statistics cover the calendar years 2000 to 2014, including data revisions from 2000 to 2013 where applicable.

The next insolvency update is set to be published in July 2016. The data shows:

- Total insolvency rates were highest in parliamentary constituencies by the coast, and in the South West, North East, Merseyside and parts of Yorkshire and East Midlands.
- Total insolvency rates were lowest in parliamentary constituencies in London, the South East and parts of the North West.
- Comparisons of rates between years at this local level should take into account that small changes in the number of insolvencies can have a large impact on the rate.

## (5) Insolvency Service: Director disqualifications 3 December 2015

A number of directors have been disqualified, and businesses liquidated, following investigations by the Insolvency Service.

***Disqualifications***

- Philip David Claremont Morris and William Edward Strutt, directors of Capital Acquisitions Ltd and City Asset Partnership Limited, both based in London, have been banned from acting as directors for 14 years and 13 years respectively after they were found to have sold £1.9m of Voluntary Emission Reductions, a type of carbon credit, to members of the public as an investment.
- Russell and Karen Bloore, two directors of IT consultancy Insight Computing Ltd, have been disqualified as company directors for five and three years respectively after they left a large tax bill unpaid, despite transferring nearly £1m out of the company and into their personal bank account.
- Peter Addinall, a director of electrical installation company AEC (Lincoln) Ltd, which went into liquidation in June 2013, has been disqualified from acting as a director for six years for failing to make sure the company's tax affairs were in order.
- Gurpreet Singh Chadda, unemployed, has received a 13-year bankruptcy restriction for breaching the Financial Conduct Authority regulations relating to 'sale and rent back' agreements, following an investigation by a specialist Insolvency Service team.
- David John Gillespie, managing director of stockbroking company Pritchard Stockbrokers Ltd, has been disqualified from acting as a director for eight years for causing the company to both mislead the Financial Standard Authority and to trade in breach of financial rules and regulations regarding the use of client money.
- Keith Ward, his wife Jacqueline Ward, their son Adam Ward and Adam's wife Meerka were all sentences at Worcestor Crown Court on 6 November 2015, having previously pleaded guilty to various offences relating to their conduct in the management and running of Gutterfast Ltd.

***Liquidations***

Eight interlinked companies involved in a scheme to trick the public into investing in carbon benefit units have been ordered in to liquidation in the High Court following an Insolvency Service investigation.

## (6) Insolvency Service confirms timetable of changes

Changes to insolvencies, the director disqualification process and the regulation of insolvency practitioners are being phased in until October 2016, the Insolvency Service (IS) confirms. They incorporate provisions of the Deregulation Act 2015 (DA 2015) and Small Business, Enterprise and Employment Act 2015 (SBEEA 2015).

Deregulation Act 2015 received Royal Assent on 26 March 2015. It aims to reduce the administrative burden on businesses, organisations and individuals across a wide range of sectors and areas of societies. It also repeals certain legislation which is no longer of practical use, and provides for exercise of regulatory functions.

Small Business, Enterprise and Employment Act 2015 also received Royal Assent on 26 March 2015. Among its provision are measures relating to insolvency and the disqualification from appointments relating to companies.

### *April 2016*

From this date, there will be a new approach to directors' conduct 'D'-reporting, which allows electronic submission of D-Returns.

### *October 2016*

From this date, the mandatory requirement to hold physical meetings in every case will be replaced with a process of deemed consent, or a decision-making process such as a virtual meeting, electronic voting, or a meeting by correspondence.

In addition, creditors will be allowed to opt out of receiving routine correspondence and office-holder reports, except any relating to payment of a dividend.

Individuals will also no longer be required to submit a Statement of Affairs to the official receiver when they are subject to a bankruptcy order made on the petition of a creditor, unless it is specifically requested by the IS.

### *Already in force*

From May 2015, fast-track voluntary arrangements were abolished and the requirement to seek sanction for most office-holder actions removed.

From October 2015, the following changes came into force:

### *Insolvency process*

- Changes aim to make it easier for people subject to bankruptcy orders to have access to basic banking facilities.

### *Director disqualification*

- The time limit within which disqualification proceedings must be taken following an insolvency increased from two to three years.
- The range of 'matters determining unfitness' that the court can take into account when determining whether a person should be disqualified as a director was broadened.

- The Secretary of State (SoS) can require any person to provide information for investigation purposes and make it easier to bring proceedings upon the basis of information provided by others, without the need to duplicate investigations.
- There is a new power enabling the SoS to seek a compensation order against a disqualified director where their misconduct has caused specific loss to one or more creditors.
- There are new grounds for bringing disqualification proceedings against persons convicted of company-related offences overseas and persons who have instructed a disqualified director.
- A provision was introduced to disqualify a person who gave an instruction or direction to a director who has been disqualified for carrying it out.

***IP regulation***

- The SoS will cease to authorise insolvency practitioners (IPs)—all IPs will now be authorised by a recognised professional body, with a transitional period of 12 months to allow existing IPs authorised by the SoS to seek alternative authorisation.
- IPs are enabled to be authorised either only in relation to companies, only in relation to individuals, or both.
- Regulatory objectives for the insolvency regime have been introduced.
- The SoS can apply to court to directly sanction an IP where it is in the public interest.

## ANALYSIS

### (1) The importance of evidence to support a conspiracy theory

Simon Mills, barrister at Five Paper, and Harold Brako, partner at Shoosmiths LLP, discuss *Capital For Enterprise Fund A LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch), [2015] All ER (D) 117 (Nov) and argue that the case serves as a reminder about the dangers of pleading a claim in conspiracy without first rigorously analysing the available evidence.

The Chancery Division considered whether there had been an unlawful means conspiracy in circumstances where the director of an insolvent company had conspired to transfer the assets of that company to a company that he controlled. The court held that, in the circumstances, the

claimants had failed to establish the loss they had alleged in the action they had brought for damages. Accordingly, the claim failed.

### *What was the background to the case?*

A software company (Qire) became insolvent, and a director and shareholder (Mr Cooper) was advised by an insolvency practitioner who suggested that Qire should enter into a pre-pack administration to enable its assets to be sold to a newco (Qivox), a company owned by Mr Cooper (30%), and one of Qire's principal creditors, Voxeo (70%). It was inevitable there would be a shortfall for the creditors, including the claimants. Bibby agreed to provide finance to Qire and Qivox by purchasing their debts, but Mr Cooper did not inform the board of Qire about the planned restructure. Bibby then purchased the debts of Qire and it entered administration. Qivox continued the business of Qire using its software, but Capital For Enterprise Fund (CFE) and Maven Capital Partners (Maven) blocked the sale of Qire's assets to Qivox. The claimants lost their £2m investment in Qire.

The claimants, as assignees, subsequently compromised any claims they had against Mr Cooper, Qivox and Voxeo and transferred Qire's software and intellectual property rights to Qivox in return for £595,000.

### *What was the main argument?*

CFE and Maven claimed the balance of their losses from Bibby on the grounds that Bibby's involvement in agreeing to fund Qire/Qivox in the pre-pack administration was part of a conspiracy between them, Mr Cooper and Voxeo to transfer the business and assets of Qire to Qivox by unlawful means that had the inevitable consequence of causing the claimants loss.

Bibby argued that its role in the restructure was a common commercial arrangement that was lawful. It did not know that the Qire board had not been informed about the restructure, and it denied that any loss was caused to the claimants as a result of what was alleged to have been the conspiracy because Qire was insolvent. In any event, Qire's assets were worth less than the £595,000 paid by Qivox and therefore the claimants could not have suffered any loss.

### *What were the legal issues the judge had to decide in this case?*

#### Unlawful means

The allegation of unlawful means raised two important points:

- Did the transfer of Qire's business to Qivox by a pre-pack administration involve unlawful means consisting of Qire breaching its obligations under its finance agreements with the claimants, and Mr Cooper breaching his fiduciary duties as a director of Qire?

- Was it sufficient for the claimants to prove Bibby knew the facts on the basis of which the acts were unlawful (per *Belmont Finance Corp v Williams Furniture Ltd* (*No 2*) [1980] 1 All ER 393), or was it a defence for Bibby to say it believed it had a lawful right to do what it was doing (per *Meretz Investments NV and another v ACP Ltd and others* [2007] EWCA Civ 1303, [2007] All ER (D) 156 (Dec))? Which of these conflicting decisions of the Court of Appeal should the judge follow?

**Causation and loss**

If the conspiracy was proven, did it cause the claimants any loss? Damage is the essence of a claim founded in conspiracy and, therefore, it is a defence for a defendant to show that no loss has been caused to the claimant—although the court is not limited to awarding only the loss that can be strictly proven.

***What were the main legal arguments put forward?***

**Unlawful means and breach of finance agreements**

Bibby argued that this could not count as 'unlawful means' because Qire was insolvent. As a result of the insolvency, in exercising their functions the directors were obliged to have regard to the interests of the creditors as a class, and were not entitled to have regard only to the interests of the members (*West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250). The directors were therefore obliged to put Qire into administration and thus the breach of the finance agreements was the inevitable consequence of protecting the creditors by formal insolvency process.

**Unlawful means and breach of fiduciary duties**

Bibby contended that Mr Cooper did not breach his fiduciary duties to Qire because, firstly, he did not act in a position of conflict by becoming a member of Qivox with the intention of seeking to purchase the assets of Qire in the pre-pack administration, or, secondly, he was not obliged to disclose his interest in Qivox to the Qire board because Qivox was not trading and was not in competition with Qire.

**Unlawful means and knowledge**

The claimants contended that it was sufficient for the claimants to prove that Bibby knew the facts on the basis of which the acts were unlawful (*Belmont v Williams*). Bibby submitted that this was not—or is not any longer—the law following the decision of the Court of Appeal in *Meretz Investments v ACP* in which the majority held that it would be a defence if an alleged conspirator believed he had a lawful right to do what it was doing.

### *What did the judge decide and why?*

Firstly, Qire breaching its finance agreements did not constitute unlawful means for the tort. Qire was not in a position to meet its obligations under the agreements because it was 'hopelessly insolvent' and 'could not meet its obligations to CFE or to its other creditors'. Indeed, 'the claimants had been giving consideration to whether itself to appoint administrators' and ultimately did so 'because Maven appreciated that Qire was hopelessly insolvent' (para [88]).

Secondly, Mr Cooper breached his fiduciary duties to Qire by planning and carrying into effect the formation of Qivox and the transfer to it of Qire's business, and that constituted unlawful means for the tort. The only persons who could benefit from the plan were Mr Cooper and Qivox, and he concealed the truth from the Qire board (para [89]).

Third, the judge held that he was bound to follow the decision of Norris J in *First Subsea Ltd v Balltec Ltd and others* [2014] EWHC 866 (Ch), [2014] All ER (D) 239 (Mar)—who at para [157] held he was bound to follow *Belmont v Williams* rather than *Meretz Investments v ACP*. Although Asplin J followed *Meretz Investments v ACP in Lictor Anstalt v Mir Steel UK Ltd and another* [2014] EWHC 3316 (Ch), [2014] All ER (D) 186 (Oct), First Subsea was not cited to her (paras [13]–[14]).

Fourth, Qire was hopelessly insolvent and, on any analysis, the best that could be hoped for was for the company to be placed into administration and for its assets to be sold, probably on a pre-pack basis (para [115]). The only purchaser was likely to be Voxeo, whose offer to purchase the assets had been blocked by the claimants. The highest offer for the assets was £150,000, so although the judge held that there was no evidence as to the true value of the assets, it was 'inconceivable that they could be worth more than the £595,000 paid' by Qivox (para [118]) and therefore the claimants failed to establish that they had been caused any loss and damage.

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

The decision is the second of two first instance decisions in which a judge has held that he was bound by *Belmont v Williams* rather than *Meretz Investments v ACP*, so that it is sufficient to prove that an alleged conspirator knows the facts on the basis of which the acts were unlawful, and it is no defence if he believed he had a lawful right to do what he was doing. Reversing *Belmont v Williams* will require further development of the law at Court of Appeal or—possibly—Supreme Court level (para [13]).

***What practical lessons can those advising take away from this case, especially in relation to pre-pack sales?***

In relation to pre-packs, three points arise:

- where one director of a company about to enter administration is the principal contact, ensure that they are not acting alone and that they are authorised to arrange for the qualifying floating charge holder to put the company into administration;
- where it is proposed that any of the directors/shareholders of oldco will not be involved in newco, ensure that they are aware of—and consent to—the proposed pre-pack and its terms; and
- failure to ensure transparency and bear in mind the requirements of Statement of Insolvency Practice 16 can give rise to suspicion, particularly in a connected party transaction.

This case serves as yet another warning about the dangers of pleading a claim in conspiracy without first rigorously analysing the available evidence. At the costs hearing, the judge noted that damage was an essential element of a conspiracy by unlawful means and that as the claimants had always been aware that Qire was insolvent, they should have been advised that there was no claim before the claim against Bibby was issued. The claimants were ordered to pay 70% of Bibby's costs, so their decision to launch speculative proceedings transpired to be an expensive one (see *Capital For Enterprise Fund A LP v Bibby Financial Services Ltd (Costs)* [2015] Lexis Citation 284, [2015] All ER (D) 222 (Nov)).

***Do you have any predictions for future developments?***

Although the case provides some helpful guidance as to the requisite mental element required on the part of conspirators to found the cause of action, it may be a long time before the tension between the conflicting Court of Appeal decisions in *Belmont v Williams and Meretz Investments v ACP* is resolved.

## (2) Deeds in the drawer

How will the court approach the 'deeds in the drawer' phenomenon? Josephine Hayes of Gough Square Chambers comments on the decision in *Swift Advances plc v Ahmed and another* [2015] EWHC 3265 (Ch), [2015] All ER (D) 177 (Nov) where the court considered fresh evidence at a late stage in the proceedings and set aside a transaction which was not recorded on any public register.

The Chancery Division set aside a deed purporting to place property into trust for the first respondent's wife. If the deed had been effective it would have defeated the claimant loan company's possession proceedings against

the first respondent. The court made an order restoring the position to what it would have been if the deed had not been made.

### *Briefly, what was the background to the application?*

The debtor, Mr Ahmed, was sole registered proprietor of two houses. In May and October 2007 the creditor, Swift, made him two loans each secured by a legal charge over one of the houses. After the debtor defaulted and Swift commenced claims in the county court for possession of the properties, the debtor's wife, Mrs Ahmed, produced a deed of trust dated December 2006 between the debtor and herself whereby she asserted that the debtor had transferred to her the entire beneficial ownership of both properties. Subsequently she produced a previous deed of trust in almost identical terms made in 1996, which related to one of the properties.

### *What were the legal issues the judge had to decide in this application?*

The application was under section 423 of the Insolvency Act 1986 (transactions defrauding creditors). The main issues were whether the debtor's purpose in entering into the transactions had been to place the assets beyond the reach of those who might have a claim against him. If so, then what relief should the judge grant to restore the position to what it would have been if the transaction had not been entered into? A subsidiary issue arose as to whether a transfer of the legal and beneficial interest in one of the properties to the debtor alone made in November 2006 by the debtor and his wife as joint proprietors, which the creditor found after the judge had reserved his judgment, should be admitted into evidence.

### *What were the main legal arguments put forward?*

It was common ground that the transaction was at an undervalue and that the debtor's purpose need not be the dominant purpose so long as it was substantial (*IRC v Hashmi* [2002] EWCA Civ 981, [2002] All ER (D) 71 (May)). The respondents relied on *Papanicola v Fagan* [2008] EWHC 3348 (Ch) and contended that the debtor's purpose was merely to provide financial security for his wife and family. Regarding admission of the transfer into evidence, Swift argued that the respondents were under a continuing duty of disclosure and relied on an order for specific disclosure which had been made, on CPR 31.11 and on *Vernon v Bosley (No 2)* [1999] QB 18, [1997] 1 All ER 614. The respondents argued that the fresh evidence should not be admitted as the trial had concluded. They declined to offer themselves for further cross-examination.

### *What did the judge decide, and why?*

The transfer should be admitted into evidence. The trial had not concluded. It would be an affront to common sense and to any sense of justice to exclude it (*Mulholland v Mitchell* [1971] AC 666, [1971] 1 All ER 307). The respondents could not properly object to its being adduced. Their evidence was liable to mislead and litigants had a continuing duty, having led the court to believe a fact was true, to correct it when they discovered it to be false (*Vernon v Bosley* (*No 2*)). The judge inferred from the evidence that the debtor understood the importance of being the beneficial owner but intended to keep the transaction private and control to whom it was disclosed. That gave rise to the inference that the substantial purpose test was satisfied.

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

The judgment contains useful guidance as to the inferences which may be drawn where a debtor chooses to undertake such a transaction without using a conveyancing solicitor and without recording the transaction in any public register, keeping the information under his control. It reaffirms that the debtor's purpose need not be the dominant purpose. It reaffirms that a trial is not concluded until judgment is delivered and that litigants are under a continuing duty of disclosure and a duty to correct their evidence if they subsequently discover it is liable to mislead the court.

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

The courts are unsympathetic to the 'deed in the drawer' phenomenon. Compelling evidence is likely to be needed to rebut the inference that a transaction at an undervalue which was not recorded on any public register when it might have been was for the purpose of prejudicing creditors. The courts also do not like to be misled. If while the court is considering its judgment it emerges that litigants have failed to comply with their continuing duty of disclosure or have failed to correct misleading evidence they have given, then the court should be informed immediately.

## (3) Liability of trustees and the discretion to manage the estate

What are the challenges when bringing a claim under section 304 of the Insolvency Act 1986 (IA 1986)? Giselle McGowan, barrister at 9 Stone Buildings, considers the position following the decision in *Borodzicz v Horton* [2015] Lexis Citation 286, [2015] All ER (D) 03 (Dec).

The Bankruptcy High Court granted the applicant discharged bankrupt permission to bring an action against the respondent, the released joint

trustee in bankruptcy, under IA 1986, s 304 for an order that he repay, restore or account for money or pay a sum by way of compensation in respect of misfeasance or breach of fiduciary duty in carrying out his functions as trustee. There was evidence to suggest that the applicant had a reasonably meritorious cause of action against the respondent on the basis of his having incurred and paid legal fees in excess of what he had had authority to incur.

### *What was the background to the case briefly?*

The respondent was the applicant's former trustee in bankruptcy. The applicant applied for permission to bring an application pursuant to IA 1986, s 304 that the respondent had misapplied, retained or become accountable for property in the bankruptcy estate and/or that the estate had suffered a loss in consequence of misfeasance and/or breach of duty by the respondent. The applicant's complaints related largely to the level of the respondent's fees, the sums paid to the respondent's solicitors and sums paid to the sole creditor in respect of costs claimed. Permission was required because the applicant was the bankrupt, the respondent had been released and the applicant was subject to a limited civil restraint order.

### *What were the issues that the Chief Registrar had to decide?*

Whether the applicant had a reasonably meritorious cause of action that the respondent had misapplied, retained or become accountable for property in the bankruptcy estate and/or that the estate had suffered a loss in consequence of misfeasance and/or breach of duty by the respondent in his management of the estate in:

- accepting the petitioner's claims pursuant to costs orders and in respect of petition costs in full rather than attempting to reach a lower settlement or requiring detailed assessment of the same and possibly paying VAT which the petitioner was not entitled to recover;
- paying sums to his solicitors which the applicant claimed were disproportionate to the work required;
- possibly incurring legal costs in respect of his application for possession and sale of the applicant's home in excess of the sum which he had been given authority to incur pursuant to sanction from the Secretary of State (the sanction point);
- paying costs for the conveyance of the applicant's home which she claimed were disproportionate; and
- claiming remuneration in the level claimed which the applicant claimed was not justified by the work required or done.

Further whether such an application was reasonably likely to result in a benefit to the estate.

### *Why did these issues arise in this case?*

The applicant claimed that, in exercising his discretion to manage the estate, the respondent had breached his duty of care and skill and become accountable for the sums paid. The respondent was expected to exercise proper commercial judgement and not to act regardless of expense. The applicant maintained that there was reasonable merit to an argument that, in acting as he had done, he had not exercised such commercial judgment and had not acted as a reasonably prudent man would have done as regards his own affairs.

### *What are the pertinent legal points that came out of the issues in this case? What did Mr Chief Registrar Baister decide and why?*

The Chief Registrar refused permission to bring an application on all complaints with the exception of the sanction point. He found that:

- The respondent's treatment of the petitioner's claims was a matter for his discretion—he had a choice whether to contest costs and took a view. There was insufficient evidence on the basis of which this commercial decision could be impugned.
- The decision to pay his solicitor's fees was a commercial one for the respondent to make—while there was evidence his solicitors did not cast a critical eye to whether time spent was well spent and properly chargeable, there was evidence of a fee reduction which implied some thought was given to the level of the charges. The Chief Registrar was satisfied that the decision to pay was within the respondent's discretion and there was insufficient material to justify the prosecution of an application to challenge this.
- On the material available it was impossible to conclude that the conveyancing charges were not a proper charge for the work undertaken.
- While there were aspects of the respondent's remuneration that were susceptible to criticism, the applicant's case was too broadly framed to be satisfied that an attack on the remuneration would succeed to any appreciable extent.

The Chief Registrar's conclusions were reached taking into account that the purpose underpinning a trustee's release was to wipe the slate clean so far as the trustee was concerned so that he could pay no thought to his previous conduct as trustee. While this was not absolute, none of the above justified a departure from that policy in this case.

However, as regards the sanction point, the effect of sanction was to put a cap on what the respondent was entitled to spend on the possession and sale application. It was not open to the respondent to ignore it and it was his duty to remain within the cap. From the evidence, the Chief Registrar drew the inference that this was ignored or overlooked. This issue went to the respondent's authority to incur fees beyond the limit of his sanction. There was evidence to suggest a reasonably meritorious case that the respondent had incurred and paid legal fees in excess of which he had been entitled to incur. Further, there was evidence that such an application may benefit the estate. Such a point was sufficiently important to be capable of being litigated notwithstanding the strong presumption which release gave rise to.

### *Did the fact that Mr Horton had been released as the trustee affect the case, and if so, how?*

Yes. The Chief Registrar considered that release gave rise to a strong presumption against allowing applications against trustees who had obtained their release. The purpose underpinning a trustee's release was to wipe the slate clean so far as the trustee was concerned so that he could pay no thought to his previous conduct as trustee (albeit it was not an absolute bar) and therefore there must be sufficient evidence to justify a departure from that policy. This was a factor the Chief Registrar took into account in refusing permission in respect of the majority of the issues raised.

### *What should practitioners acting for either side take away from this judgment?*

The additional difficulty in bringing an application against a trustee post-release given the presumption against allowing an application post-release as discussed.

That where sanction has been granted to a trustee by the Secretary of State to incur fees only in a certain sum, it is important for a trustee to ensure that his costs remain within that sum and to keep records demonstrating this.

Where permission is sought pursuant to IA 1986, s 304 to challenge a decision of a trustee which falls within the exercise of his discretion, the importance of (i) framing the issues as narrowly as possible to identify specific complaints rather than making general criticisms and (ii) obtaining sufficient evidence upon which a trustee's decision can be impugned at the permission stage of a s 304 application.

## CASE LAW

### (1) Re Premier Motor Auctions Leeds Ltd (In Liquidation) [2015] All ER (D) 126 (Dec), [2015] EWHC 3568 (Ch)

In the Chancery Division, Leeds District Registry, before Judge Behrens sitting as a Judge of the High Court in Leeds.

*Company – Liquidation – Expenses of liquidation – Liquidators applying to court for expenses of liquidation to be approved by court and for orders that application be heard in private and not be served on creditor until after final determination of proceedings – Whether relevant insolvency rules covering situation where all litigation expenses incurred on conditional basis and would only be paid in event that proceedings successful – Whether liquidators would have to have recourse to property comprised in or subject to creditor's floating charge in order to pay litigation expenses – Whether expenses to be approved in absence of creditor – Insolvency Act 1986, s 176ZA – Whether application to be served on creditor and be held in private – Insolvency Rules 1986, SI 1986/1925, rr 4.218A–E.*

***Facts:***

In December 2008, two companies (PMA and PMAL) were placed into administration. The administrators were employees of or partners in PricewaterhouseCoopers LLP (PWC). In June 2010, a compulsory winding-up order was made against each company. The applicants (the liquidators) were appointed as the companies' liquidators. PMA and PMAL and two other parties issued proceedings (the proceedings) against, among others, *PWC and Lloyds Bank plc* (*Lloyds*) for damages for fraudulent misrepresentation, conspiracy breach of duties of confidence and causing injury by unlawful means. It was contended that, by reason of the conspiracies and other alleged breaches by PWC and Lloyds, PMA and PMAL had suffered loss estimated to exceed £44m, by way of the destruction of their enterprise value. The liquidators applied for orders that: (i) the litigation expenses of the proceedings be approved and authorised by the court, pursuant to r 4.218E of the Insolvency Rules 1986, SI 1986/1925 (the Rules); (ii) the application be heard in private; (iii) the application and any order made should not be served on Lloyds until after the final determination of the proceedings and that it was not entitled to be heard on the application; and (iv) that they be given 14 days' notice of any application to inspect the application or the evidence in support of it.

The liquidators submitted, first, that they would have to have recourse to any recoveries made in the proceedings in order to meet the litigation expenses. It was not in dispute that Lloyds was a creditor within the meaning of r 4.218A(1)(b) of the Rules. The question arose as to whether

the rules covered the situation where all litigation expenses were incurred on a conditional basis and would only be paid in the event that the proceedings were successful. In particular, whether the condition specified in r 4.218B(1)(c) was satisfied, namely whether it could be said that the liquidators would have to have recourse to property comprised in or subject to Lloyds' floating charge in order to pay litigation expenses. Consideration was given to *Buchler v Talbot* [2004] 1 All ER 1289 (Buchler), which held that a liquidator was not entitled to claim his expenses in priority to the rights of the holder of a floating charge, and to s 176ZA of the IA 1986, which provided that the expenses of winding up had priority, in certain circumstances, over claims to property comprised in or subject to any floating charge (see [19] of the judgment). Second, consideration was given to whether service on Lloyds should be dispensed with. The liquidators submitted that Lloyds should not be served or was not entitled to be heard on the hearing of the application because: (i) information and documentation in the application and witness statement was confidential and potentially privileged; (ii) Lloyds could not possibly express an impartial view and could use the information to frustrate the proceedings; and (iii) due to the conditional nature of the costs and expenses incurred and the lack of sufficient other assets available, the issue only arose in circumstances where the proceedings had been successful against Lloyds. Third, the issue was whether the circumstances were so exceptional as to justify derogation from the open justice principle. Consideration was given to rr 4.218A–E of the Rules, CPR 39.2(3) and Article 6 of the European Convention on Human Rights (fair hearing).

***Held:***

(1) Buchler was partially reversed by s 176ZA of the Act. While sub-s (1) of that section reversed the decision in Buchler, that reversal might be modified or restricted in accordance with sub-s (3) and the rules made thereunder. The relevant rules were rr 4.218A–E of the Rules (see [17], [18], [20] of the judgment).

In respect of the question of construction as to whether the condition specified in r 4.218B(1)(c) of the Rules was satisfied, the question was whether it could be said that the liquidators would have to have recourse to property comprised in or subject to Lloyds' floating charge in order to pay litigation expenses. If the answer to that question was no, the further question arose as to whether the court had any jurisdiction under r 4.218E(2)(a) at all. That was because the specified creditor was only identified under r 4.218B(2) after the date when the liquidator formed the opinion in r 4.218B(1)(c). However, the court was being asked to resolve the questions on a without notice basis without any assistance from the specified creditor, Lloyds, which had a serious financial interest in the outcome of the application. If the application was successful it would give priority to the liquidators in respect of up to £3m of legal expenses over

Lloyds' rights under its floating charge. In those circumstances it was necessary to consider whether it was appropriate to deal with the application in its absence (see [29], [30] of the judgment).

*Buchler v Talbot* [2004] 1 All ER 1289 explained; *Barleycorn Enterprises Ltd, Re, Mathias and Davies (a firm) v Down* [1970] 2 All ER 155 considered.

(2) Although there was power under r 4.218E(5) and (6) to dispense with service on and the attendance of the specified creditor the default position was that the specified creditor should be served and entitled to be heard. It followed that it was for the liquidator to justify the court exercising its discretion under the sub rules. The principle that both sides were entitled to be heard was an important and fundamental principle of English law. It was in accordance with Article 6 of the Convention. It was settled law that a judge should not entertain an application of which no notice had been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there had been literally no time to give notice before the injunction was required to prevent the threatened wrongful act (see [31]–[33] of the judgment).

Applying settled law to the evidence, the grounds did not come within a measurable distance of justifying excluding Lloyds from participating in the present application. It was by no means clear that any of the evidence was confidential or privileged. Plainly Lloyds would have full knowledge of the realisations from the administration and the allegations in the pleadings. The liquidators were obliged to inform Lloyds of the existence of a conditional fee agreement. It was accepted that the draft costs schedule was at the moment privileged. There was no reason why confidential information should not be dealt with in a manner similar to that envisaged in r 4.218C(2). The fact that Lloyds might not be impartial was not a reason for exclusion from the hearing. It was a feature of almost all of the litigation that came before the courts that the parties were not impartial. It was not made clear how Lloyds could use the application to frustrate the proceedings. The conditional nature of the costs and expenses incurred was relevant to the jurisdiction of the court to make an order under r 4.218E. It was not relevant to the question of whether Lloyds were entitled to be heard. Lloyds should have been sent copies of the application and was entitled to be heard (see [34]–[37], [39] of the judgment).

The application would be either dismissed or adjourned to enable it and the evidence in support to be served on Lloyds (see [40] of the judgment).

*National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] 1 WLR 1405 applied.

(3) With respect to publicity, the general rule was that a hearing was to be in public. It was settled law that hearings in private under CPR 39.2(3)

were derogations from the principle of open justice and had to be ordered only when it was necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) were entitled to have protected by such means. When such orders were made they had to be limited in scope to what was required in the particular circumstances of the case. Derogations from the fundamental principle of open justice could only be justified in exceptional circumstances when they were strictly necessary to secure the proper administration of justice (see [41] of the judgment).

The court was not satisfied that there was any real confidentiality in relation to any of the material before the court with the possible exception of the draft costs schedule. It was not satisfied that the circumstances of the case were sufficiently exceptional to justify derogation from the open justice principle (see [42] of the judgment).

The applications for privacy would be dismissed (see [43] of the judgment).

*G v Wikimedia Foundation Inc* [2009] All ER (D) 92 (Dec) considered; *V v T* [2014] All ER (D) 293 (Oct) applied.

***Simon Passfield (instructed by Temple Bright LLP) for the liquidators.***

## (2) Centaur Litigation SPC (in liquidation) v Terrill [2015] All ER (D) 52 (Dec), [2015] EWHC 3420 (Ch)

In the Chancery Division, before Norris J.

*Practice – Pre-trial or post-judgment relief – Freezing order – Claimant Cayman companies being in liquidation – T being individual behind each company's sole corporate director – Liquidators of companies considering T having committed serious breaches of duty – Claimants seeking order from English court assisting them and Grand Court of Cayman in recognising liquidators' representation of companies and proper standing – Claimants seeking freezing order against T – Whether orders should be granted – Insolvency Act 1986, s 426(4).*

### *Facts:*

The three applicant companies (the companies) were Cayman companies that carried on business as mutual funds ostensibly engaged in the funding of litigation. The companies each had a sole corporate director. T was the individual behind that corporate director in the case of all three companies, being its sole director and shareholder. At the time of the proceedings, the companies were all in liquidation. In 2014, it was discovered during a restructuring with an individual, S, that the companies' books were in a poor state. T was required to make a statutory declaration explaining what he knew about the companies. In June 2014,

S, commenced proceedings in the British Virgin Islands against T. S procured that provisional liquidators be appointed over the companies. The liquidators considered that T had committed serious breaches of duty and had personally profited from transactions at the expense of investors. T did not provide the liquidators with the information that they required and went missing. He was located in England in August 2015. The companies applied to the court of England and Wales: (i) to deal with a request from the Grand Court of Cayman under s 426 of the IA 1986, to render assistance to the Grand Court of the Cayman and its joint official liquidators by recognising their representation of the Centaur companies and their proper standing to seek the present interim relief; and (ii) whether the freezing order should be granted.

In order for the freezing order to be granted, it had to be established that T had owed the fiduciary duties set out in the particulars of claim: (i) that T had been a *de facto* director of any of the companies; (ii) that there was a good arguable case, and that there were assets on which an injunction could bite; and (iii) the ends of justice were likely to be defeated if an injunction was not granted. Consideration was given to two possible objections to the grant of the injunction: (i) delay in bringing the application; and (ii) that the proceedings were being brought by three insolvent companies acting by their joint liquidators.

***Held:***

The application would be allowed.

(1) The present case was a plain one in which the English court ought to assist the Grand Court of the Cayman and the liquidators by recognising their representation of the companies and their proper standing to seek the present interim relief (see [29] of the judgment).

The order sought under s 426 of the Act would be granted (see [27] of the judgment).

(2) On the evidence, T had held himself out as a director of the companies in a sufficient number of instances for him to have been a *de facto* director. It was well arguable that the transactions in which T had been involved were transactions from which he had personally benefited and had been, in any event, transactions that could only have been entered into in breach of duty. There was therefore a good arguable case. Further, there were assets upon which an injunction could bite. Regarding the ends of justice, there had to be a connection established between properly founded allegations of dishonesty and the grant of the relief sought. The evidence demonstrated on T's part a willingness to conceal transactions beneficial to himself. The evidence properly founded the inference that he would be prepared to evade not only findings of liability, but also enforcement of any judgment against him (see [35], [37]–[40] of the judgment).

Subject to two possible objections, the freezing order would be granted (see [41] of the judgment).

*Thane Investments Ltd v Tomlinson* [2003] All ER (D) 496 (Jul) considered; *Jarvis Field Press Ltd v Chelton* [2003] All ER (D) 478 (Oct) considered.

(3) The first possible objection was the question of delay. In that respect, there was no ground for withholding relief otherwise available on the grounds of delay. The whereabouts of T had not been known until information had been acquired that he had been in England and Wales. The second objection might be that the proceedings had been brought by three insolvent companies acting by their joint liquidators. Although the companies were insolvent, they were not without assets. While an undertaking offered on behalf of the insolvent companies might place T at risk, he had only himself to blame for that. The situation of confusion had been brought about by the companies' corporate director, whose human agent had been T. The court was not dissuaded from granting an injunction because it could only be supported by a cross-undertaking from an insolvent company (see [43], [45], [46] of the judgment).

The relief sought would be granted (see [46] of the judgment).

*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] 2 All ER (Comm) 816 considered.

***Felicity Toube QC and Ryan Perkins (instructed by Hogan Lovells International LLP) for the claimants.***

## (3) Hawkes v County Leasing Asset Management Ltd [2015] All ER (D) 73 (Dec), [2015] EWCA Civ 1251

In the Court of Appeal, Civil Division, before Jackson, Briggs and King LJJ.

*Company – Restoration to register – Period of limitation – Appellants appealing against judge's limitation direction in company's favour – Whether judge erring in exercise of discretion – Companies Act 2006, s 1032(3).*

### *Facts:*

The respondent, H, was the sole director and shareholder of a company (the company). By 2004, the company was in serious financial difficulty and the Revenue and Customs Commissioners petitioned to wind it up. H obtained the assistance of the third appellant, K, and the fifth appellant, C, in constructing a transaction whereby the company would sell its assets to the second appellant, CLL, on the basis that CLL would then lease the assets back to two new companies formed by H, namely, MPG and Q, with their liabilities under the leaseback agreements being guaranteed by

H. The transaction was, in part, funded by the first appellant, CLAM. The sale and leaseback went ahead, but the company was placed into administration, with V appointed as administrator and subsequently liquidator. V achieved no tangible result for the company from his investigation of the sale and leaseback transaction before it was dissolved nearly four-and-a-half years after the time for the pursuit by proceedings of any causes of action of the company against C, K, CLL and CLAM would ordinarily have started running. By that time, H's attempt to continue the company's business had failed, with the result that CLL and CLAM had commenced proceedings against MPG and Q for rental arrears, and against H upon his guarantees. In September 2010, H applied for the restoration of the company to the register and, just as the primary limitation period for the company's claims was expiring, he applied for a limitation direction, suspending the running of time for the bringing of claims by the company. His defence and counterclaim were upheld on the ground that he, MPG and Q had entered into the transactions in reliance upon misrepresentations for which CLL and CLAM were responsible. In October 2011, the restoration order was made for the purpose of the continuation of the company's liquidation under a new liquidator, N. N assigned the company's causes of action against CLL, CLAM, K and his wife, and C and his wife to H. With respect to H's application for a limitation direction in the company's favour, the judge considered that observations in *Regent Leisuretime Ltd v NatWest Finance (Formerly County NatWest Ltd)* ([2003] All ER (D) 385 (Mar)) (Regent), drawing a distinction between cases in which the applicant for restoration was a third party creditor and those in which the applicant was acting on behalf of the company itself, were obiter. On that basis, she made a limitation direction in the company's favour. The appellants appealed.

The issue for determination was whether the judge had erred in exercising her discretion to make a limitation direction. Consideration was given to s 1032(3) of the Companies Act 2006 (the 2006 Act).

***Held:***

The appeal would be allowed.

The decision on the discretion issue in Regent had been part of the ratio decidendi. Accordingly, the court was bound by the dicta about the exercise of the discretion to make a limitation direction in favour of a company to the effect that: (i) it might only be exercised in exceptional circumstances; (ii) its effect was completely to override the statutory limitation regime; and (iii) fairness would generally require that the company, like any other claimant faced with a limitation defence, should be left to attempt to meet that defence by recourse to the statutory regime. A rule requiring the presence of exceptional circumstances did not, on its own, provide much assistance, beyond making it clear that the burden of

demonstrating the existence of such circumstances had to lie on the company seeking the limitation direction. In a case where a limitation period expired while the company was, in fact, dissolved, the court had to ask itself whether, had it not been dissolved, the company or any assignee of the cause of action would have commenced the relevant proceedings within time which, ex hypothesi, continued to run against the company. Putting it another way, the question was whether the dissolution of the company had been the real cause of its being disabled from pursuing its claim. If, had it not been dissolved, the court concluded that it would probably have failed to pursue its claim in time anyway, then the causative prerequisite implied in the language of s 1032(3) of the Act was missing (see [24], [25], [27], [30], [31], [51], [52] of the judgment).

There were a number of serious difficulties with the judge's approach. First, she had concentrated almost exclusively on an analysis of the reasons why the company had not pursued the claims by the time of its dissolution, to the exclusion of any analysis whether the claims would probably have been pursued, had the company not been dissolved, either by the company or by H as its assignee, before the expiry of the relevant limitation periods. Second, the judge had found that H had not established, on the balance of probabilities, that V had done anything wrong and that there had been no more than a possibility that he had done anything wrong. Third, although the relevant possibility had included the sub-possibility that misconduct by V might have been improperly influenced by C, the judge had given no consideration to the question whether it had, therefore, been just to deprive K, CLL and CLAM of a litigation defence, even though no allegation that C and he had acted upon V in combination had been pursued. A conclusion that there had only been a possibility that V had misconducted himself was a wholly inadequate basis upon which to found a conclusion that a limitation direction in favour of the company or its assignee should be made. A party seeking to discharge the burden of showing why it would be just to enable it to avoid the consequences of the limitation regime had to do better than that. The court was concerned with probabilities, not possibilities. The combined effect of the shortcoming in the judge's analysis, both by having given no consideration to an important question and having placed inappropriate weight upon a mere possibility, compelled the conclusion that the judge's exercise of her discretion could not stand. Therefore, the question had to be reconsidered by the court on the basis of the facts found and not found by the judge. On the necessarily hypothetical assumption that the company had not been dissolved, there was nothing in the evidence to suggest that H would have brought about the institution of proceedings, whether on the company's behalf or by himself after assignment, before they had become statute-barred. Accordingly, the application for a limitation direction fell at the first hurdle. Having put the company and all interested parties in the position which they would have enjoyed if there had been no

dissolution would not, probably, have led to the claims being pursued in time. However, even on the alternative hypothesis that they might have been, nothing in the evidence, still less the facts found by the judge, disclosed circumstances which would make it just to give the company or H as its assignee a second chance after expiry of the limitation periods (see [41]–[45], [47], [48], [51], [52] of the judgment).

The limitation direction made by the judge would be set aside (see [50]–[52] of the judgment).

*Regent Leisuretime Ltd v NatWest Finance (Formerly County NatWest Ltd)* [2003] All ER (D) 385 (Mar) applied; *Tyman's Ltd v Craven* [1952] 1 All ER 613 considered; *Kenyon (Donald) Ltd, Re* [1956] 3 All ER 596 considered.

***Christopher Boardman* (*instructed by Summers Nigh Law LLP, Northampton*) *for CLAM, CLL, K and K's wife.***

***Geraint Jones QC and Mark Brittain* (*instructed under the Direct Access Scheme*) *for C and C's wife.***

***Bridget Williamson* (*instructed by Shakespeares Martineau LLP*) *for H.***

## (4) Re Helen Irene Borodzicz, Borodzicz v Horton [2015] All ER (D) 03 (Dec), [2015] Lexis Citation 286

In the Bankruptcy Registry of the High Court, before Chief Registrar Baister.

*Bankruptcy – Trustee in bankruptcy – Duty in administering estate – Respondent having been joint trustee in bankruptcy of applicant's estate – Applicant's property having been subject to possession and sale order in bankruptcy – Bankruptcy ending and respondent being released from duty – Applicant seeking permission to bring action against respondent in respect of misfeasance or breach of fiduciary duty – Applicant contending solicitors' costs being excessive – Applicant contending respondent having owed duty of care and skill to her given surplus in bankruptcy estate – Whether applicant should be given permission to pursue action – Insolvency Act 1986, ss 304, 330(5).*

### *Facts:*

A bankruptcy order was made against the applicant, accordingly, joint trustees in bankruptcy were appointed, one of whom was the respondent to the present proceedings. At the first meeting of creditors, a resolution was passed: '[t]hat in accordance with Rule 6.138(2)(b) of the Insolvency Rules 1986 the Joint Trustees' remuneration be fixed by reference to the time properly spent by the Joint Trustees' [sic] and their staff in attending to matters arising during the bankruptcy and be payable at the Joint Trustees' discretion as and when realisation allow'. The respondent

applied for sanction from the Secretary of State to make an application for an order for possession and sale of the applicant's flat. Sanction was granted on the basis that costs were not to exceed £4,500 exclusive of VAT and disbursements. The joint trustees applied for possession and sale of the applicant's flat. The judge made an order for possession and sale of the property and that the joint trustees' costs of and occasioned by that application be an expense of the bankruptcy. The flat was sold. After all of the debts and expenses had been paid, there was a surplus in the bankruptcy of around £38,000. A cheque in that sum was sent to the applicant. The applicant considered that the costs and expenses of the bankruptcy charged to the estate by the respondent had been disproportionate having regard to the fact that there had been only one creditor and one main asset, her flat, to realise. The total claimed in respect of remuneration and expenses had been almost £184,900 (about 66% of realisations). Of that sum, the trustees' remuneration amounted to nearly £40,000 and solicitors' costs £55,135. The applicant considered that the solicitors' fees raised questions of proportionality in circumstances where a firm of central London solicitors had been used, with a great deal of partner time, on what had been a straightforward application for sale of the flat. The applicant sought permission to bring an action against the respondent under s 304 of the IA 1986 for an order that he repay, restore or account for money or pay a sum by way of compensation in respect of misfeasance or breach of fiduciary duty in carrying out his functions as trustee. Permission was required because the application was to be made by a bankrupt and/or was made after the respondent's release as trustee, further, because a restraint order had previously been made against the applicant.

It was common ground that the court had to consider, first, whether the applicant had a reasonably meritorious cause of action, second, whether prosecuting the proposed application was reasonably likely to benefit the estate and, third, any other relevant factors. The applicant submitted that the respondent had had a duty to account for the way in which he had exercised his powers and had been expected to exercise proper commercial judgement, not to act regardless of expense in exercising his managerial discretion. He had had a duty of care and skill both to the creditors and, by virtue of s 330(5) of the Act, given the surplus in the bankruptcy estate, a statutory duty to her as the bankrupt.

### *Held:*

The applicant's complaints regarding the respondent's remuneration and the conveyancing fees did not satisfy the relevant test. Subject to one issue, the respondent's decision to pay the solicitor's fees had been within the ambit of his discretion and there was insufficient material to justify the prosecution of an application to upset his decision. The one troubling aspect of the legal fees related to the costs that had been charged in

respect of the possession proceedings. The effect of the sanction had been to put a cap on what the respondent had been entitled to spend. It had not been open to him to have ignored it. Indeed, it had been his duty to see that the costs had remained within the budget he had been given. It was troubling that no separate account had been rendered in respect of the possession proceedings that made clear that the solicitor's costs and disbursements had been within budget or had amounted to less than the cap imposed. They were not clearly identified, so there was no way of knowing whether they had been treated separately or considered separately and, therefore, dealt with properly. It could be inferred that the cap imposed when sanction had been given had either been ignored or overlooked. That went to the respondent's authority to incur fees beyond the limit of his sanction. There being evidence, then, to suggest that the applicant had a reasonably meritorious cause of action against the respondent on the basis of his having incurred and paid legal fees in excess of what he had had authority to incur, the first part of the relevant test was satisfied. Without proper bills that broke down the solicitor's costs by reference to the possession proceedings and by reference to the other work for which they had charged, it could not be certain that the applicant's proposed application would result in benefit to the estate, but it could be said that there was evidence that pointed in that direction. The point was sufficiently important to be capable of being litigated, notwithstanding the strong presumption to which release of a trustee gave rise (see [52]–[54], [56]–[58] of the judgment).

The application would be allowed to the extent that it sought recovery of such sum (if any) as might be justified as being due to the estate as a result of what any inquiry might reveal as to how the possession application costs had been dealt with and as to any resulting effect on the overall sums charged (see [59] of the judgment).

*Brown v Beat* [2001] All ER (D) 275 (Dec) applied; *Debtor, Re, ex p Debtor v Dodwell (Trustee)* [1949] 1 All ER 510 considered; *Mirror Group Newspapers plc v Maxwell* [1998] 1 BCLC 638 considered; *Engel v Peri* [2002] All ER (D) 285 (Apr) considered; *McGuire v Rose (former trustee in bankruptcy of McGuire)* [2013] EWCA Civ 429 considered; *Oraki v Bramston* [2015] All ER (D) 175 (Jul) considered.

***Giselle McGowan* (*instructed by Simon Rodkin Litigation Solicitors*) *for the applicant.***

***Chantelle Staynings* (*instructed by Gordon Dadds LLP*) *for the respondent.***

## (5) Re Snelling House Ltd; Alford v Barton [2015] All ER (D) 22 (Dec), [2015] Lexis Citation 278

In the Chancery Division, Companies Court, before Chief Registrar Baister.

*European Union – Regulations – Interpretation of regulations – Applicant liquidators obtaining judgments concerning alleged improper payments – Applicants seeking certified copies of judgments to enable enforcement proceedings to be commenced in Spain – Court holding no certificates required – Applicants disagreeing – Whether applicants requiring copies of judgments to commence proceedings in Spain – Council Regulation (EC) No. 1346/2000 – Regulation (EC) No 44/2001 – Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – CPR 74.13.*

***Facts:***

The applicants were the joint liquidators of Snelling House Ltd (the company). In November 2011, a judgment was given in which it was declared that various payments to the third respondent by the company had been transactions at an undervalue and were void as against the applicants. The court stated that, in authorising such payments, the first respondent had been guilty of misfeasance, breach of duty and breach of trust. The first and third respondents were ordered to pay various sums to the applicants. In March 2012, the rest of the proceedings were disposed of in a second judgment. The applicants attempted to enforce the two judgments in Spain were unsuccessful, one reason therefore being the lack of certificates from the court. They sought certified copies of the judgments under CPR 74.12 and 74.13, to enable them to take enforcement proceedings in Spain against the first, second and fourth respondents. The Companies Court held that no certificates were required, because judgments in insolvency proceedings ought to be recognised automatically in the European Union member states to which the Council Regulation (EC) No 1346/2000 (the Insolvency Regulation) related. The applicants disagreed. The application was adjourned generally with liberty to restore to enable the issue to be argued more fully.

The applicants submitted that the effect of Article 25 of the Insolvency Regulation was to adopt the procedures and mechanisms of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions of Accession to it (the Brussels Convention), regarding the enforcement of judgments to which the Regulation applied. In summary, the applicants submitted that, whether or not the judgments in the case were within the scope of Regulation (EC) No 44/2001 (the Judgments Regulation), the enforcement provisions of the Judgments Regulation would apply, so that the court had to grant a certificate on the application of an interested party. Consideration was given to CPR 74.13, which set out the evidence required in support of an application for certificates.

***Held:***

The application would be allowed.

(1) The effect of Article 25 was to adopt, regarding the enforcement of judgments to which the Insolvency Regulation applied, the procedures and mechanisms of the Brussels Convention. The reference to the Brussels Convention, however, had to be presently read as a reference to the relevant provisions of its successor, Articles 38–58 (but excluding Article 45(2)) of the Judgments Regulation (see [9] of the judgment).

(2) On its true construction, Article 54 of the Judgments Regulation imposed an obligation on the court or competent authority in the issuing member state to provide a certificate on the request of an interested party. There was no discretion (see [15] of the judgment).

In the present case, whether or not the judgments were within the scope of the EC Regulation on Insolvency Proceedings or the Judgments Regulation, the enforcement provisions of the latter applied. The effect of Article 54 of the Judgments Regulation was that the court had to grant a certificate on the application of an interested party. The need for such a certificate was irrelevant: there was no discretion to refuse one. Further, the evidence in the present case fulfilled the requirements of CPR 74.13 (see [20], [21] of the judgment).

***Andrew Scott (instructed by Capital Law LLP) for the applicants.***

***The respondents did not appear and were not represented.***

## (6) Re Armstrong Brands Ltd (In Administration) [2015] All ER (D) 172 (Nov), [2015] EWHC 3303 (Ch)

In the Chancery Division, Birmingham District Registry, before Judge Purle QC sitting as a Judge of the High Court.

*Company – Administrator – Appointment – Validity – Company entering into loan agreement with individual (JB), under which JB agreeing to lend company money – Company purportedly granting debenture to JB as security for loan – Loan agreement and debenture being signed by then sole director of company (A) and company secretary on behalf of company but being given later date – A not being director of company at later date – Whether debenture being signed on behalf of company by 'two authorised signatories' – Whether debenture being valid and entitling JB to appoint administrators as qualifying floating charge – Whether appointment of administrators valid – Companies Act 2006, s 44.*

***Facts:***

Section 44 of the 2006 Act provided that a document was validly executed by a company if it was signed on behalf of the company by two authorised signatories. In the present case, a company (the company) entered into a loan agreement with JB on 15 September 2008 (the loan agreement), under which JB agreed to lend the company a sum of money

in the form of cash and stock. On that date, the company purportedly granted a debenture to JB (the debenture) as security for payment of the money due under the loan agreement. The loan agreement and debenture were expressed to be executed as deeds by the company 'acting by two directors or a director and the company secretary', and were signed by A, the sole director of the company at the material times, on behalf of the company, and by T, as a director or company secretary. On 17 April 2014, JB, as a qualifying floating charge holder, appointed administrators to the company. An issue arose as to whether the debenture was valid so as to entitle JB to appoint administrators, as a qualifying floating charge holder. The dispute arose because A had not been a director of the company on 15 September 2008 when the loan agreement had been entered into and the debenture had been granted. However, there was evidence that the debenture and loan agreement, although dated 15 September, had, in fact, been signed on behalf of the company in early June 2008, when A was still a director of the company, but had been dated 15 September. There was evidence that, in June 2008, the company's secretary, T had signed a letter purporting to authorise A to sign the documents on the company's behalf and that that letter of authority had been authorised by the board of the company, as recorded in the minutes of that meeting. The administrators applied to the court for a declaration as to the validity of their appointment.

The issues for consideration were whether the charge had been validly executed by the company and whether the original appointment of administrators of the company, by JB, as the holder of a qualifying floating charge, pursuant to para 14 of Sch B1 to the IA 1986, was valid. Consideration was given to whether the acts carried out by the administrators, including an extension of the administration, pursuant to para 76(2)(b) of Sch B1, had been valid. In particular, a question arose as to whether the debenture had been valid given the fact that it had been signed on behalf of the company in early June 2008, notwithstanding that it had been dated 15 September. Consideration was given to s 46(2) of the 2006 Act.

### *Held:*

On the evidence, the court was persuaded on a balance of probabilities that the loan agreement and debenture had both been signed, though not then dated, when A had still been a director of the company. In those circumstances, s 44 of the 2006 Act had been complied with. What the section required was that the documents be 'signed' by two authorised signatories. In the present case, that meant one director and one company secretary. Both the loan agreement and the debenture were signed by a person who was at the time he signed a director, as well as by the company secretary. That was enough. It did not matter that the transaction completed later, when the director signatory was no longer a director.

Execution and delivery, though presumed unless a contrary intention was proved to be simultaneous under s 46(2) of the 2006 Act, need not be. In the present case, the contrary intention was proved. JB had not been ready to proceed, and the loan and debenture had not been authorised by JB until 15 September 2008. It would make no sense for the company to deliver the loan agreement and debenture (except possibly as escrows) unless and until the loan, or at least a commitment to make the loan, had been forthcoming. That did not occur until 15 September 2008. The later delivery of the loan agreement and debenture as a deed did not require any form of execution but merely required board authority. The minutes of 1 September 2008 were sufficient for that purpose as the debenture had been accepted by the board, thereby implicitly authorising its delivery, as well as the loan agreement, as the debenture secured sums due under that agreement (see [23]–[25] of the judgment).

It followed that JB, as the holder of a properly executed and authorised qualifying floating charge, had had power to appoint administrators on 17 April 2014, and that the appointments, and all ensuing acts, were valid (see [28] of the judgment).

***Simon Passfiled (instructed by Browne Jacobson) for the administrators.***

## (7) Re FI Call Ltd; Apex Global Management Ltd v FI Call Ltd [2015] All ER (D) 183 (Nov), [2015] EWHC 3269 (Ch)

In the Chancery Division, Companies Court, before Hildyard J.

*Company – Insolvency – Winding up – Joint venture between companies – Second defendant company counterclaimaing seeking winding up of company set up as part of joint venture to develop and market internet telecommunications technology – Whether just and equitable for company to be wound up – Companies Act 2006, ss 994, 996 – Insolvency Act 1986, s 122.*

***Facts:***

The first claimant, a Seychelles company (Apex) and the second defendant company, a British Virgin Islands company (Global Torch), set up the first defendant company (Fi Call Ltd) to develop and market internet telecommunications. Apex was wholly owned by the second claimant (Al), who was its sole shareholder. Global Torch was owned by the third defendant, Prince A, who was also the chairman of Fi Call Ltd, and by two others, who were not part of the proceedings. The joint venturers fell out and brought cross-petitions alleging unfairly prejudicial conduct of Fi Call Ltd's affairs, under ss 994–996 of the 2006 Act. Global Tech brought a petition against Apex and Al (the Apex parties). Apex brought a petition against Global Torch, the third defendant, Prince A, AA, the

fifth defendant, Prince M (the Global Torch parties). The Global Torch parties contended that the joint venture concerning Fi Call Ltd had been entered into by them on the basis of a number of misrepresentations by Al on behalf of Apex. A number of share purchase agreements (SPAs) had been entered into, pursuant to which third parties had paid substantial sums to Apex and Global Torch. The Global parties contended that it became evident that the technology which the Apex parties purported to invest into Fi Call Ltd had been nowhere near as advanced as they had asserted. It was also alleged that the Apex parties had failed to account for very substantial sums paid to Apex, which was allegedly due and owing to Global Torch by Apex pursuant to an SPA (the Al Shehri 2011 SPA). Global Torch alleged, under s 996 of the 2006 Act, that Fi Call Ltd's books and records had been inadequate. It brought a petition, under s 122(1)(g) of the IA 1986, and counterclaim seeking: (i) the winding up of Fi Call Ltd on the ground that it was just and equitable to do so; (ii) an account of moneys paid out of, or due or belonging to, Fi Call; and (iii) equitable compensation or damages. Reliance was placed on the alleged covert and unlawful removal of AA as director and signatory, the seizure of control of Fi Call Ltd's sister company, Fi Call Seychelles, and the appropriation of the moneys in the company's account. Other applications were made by Prince A, to set aside a judgment in default, and by Apex, to resurrect a petition, pursuant to s 994 of the 2006 Act, in respect of Fi Call Ltd, which had been struck out.

The main issue was, among other things, whether Fi Call Ltd should be wound up and whether the Apex parties should be ordered to make restitution. It was admitted that, among other things, there had been a breakdown in trust and confidence between the Apex parties and Global Torch and that Fi Call Ltd had been unable to trade and its goodwill had been destroyed.

### *Held:*

Section 122(1)(g) of the IA 1986 provided that a company might be wound up by the court if the court was of the opinion that it was just and equitable that the company should be wound up. A petitioner for a winding-up order had to show that he had a 'sufficient interest' in the form of some tangible and substantial benefit to accrue to him by virtue of his membership if the order was made. The court would consider, not only alternative remedies, but also whether the petitioner had some improper or collateral purpose in seeking liquidation, or is behaving unreasonably. Section 994 of the 2006 Act expressly required the petitioner to establish three things: (i) that the matters of which he complained were either actual or proposed acts or omissions of the company or consisted of the conduct of the company's affairs; (ii) that those matters had caused prejudice to his interests as a member of the company; and (iii) that the prejudice was unfair. The remedies, under s 994

where a petition was well founded, were discretionary and the court's discretion had to be exercised judicially and with a view to remedying as fairly as possible the unfairly prejudicial conduct that had been portrayed. The jurisdiction extended to requiring reimbursement to the company of sums due to or held on trust for it, or for some other form of equitable compensation to the company, even though a derivative action would ordinarily be the appropriate process for such relief. It would extend also to adjusting the proportion of distributions upon a winding up of the company, even though, the court should not ordinarily make a winding-up order pursuant to s 996, given the specific provisions for such a remedy and the careful protections relevant to the exercise of such jurisdiction (see [37], [49]–[51] of the judgment).

The two statutory remedies relied upon by Global Torch (ss 994 and 122) ran in parallel; but they were not coterminous. On the evidence, it had been established that the Global Torch Parties had been misled and induced, both to invest in Fi Call Ltd and then to fund its activities on a false basis. As to s 996, Global Torch's allegation that Fi Call Ltd's books and records had been inadequate was well established and fully exemplified by the lack of any proper record as to the fact and basis of the admitted payment by Prince A. The accounting deficiencies, for which the Apex Parties were primarily responsible and answerable, constituted unfairly prejudicial conduct within the scope and meaning of s 994 of the 2006 Act. Section 996 of the 2006 Act provided the court with broad powers in those circumstances, broad enough to give directions to a liquidator, which the court proposed to appoint, with a view to a proper examination and determination of the issue as to the money in question. The covert and unlawful removal of AA as director and signatory, the seizure of control of Fi Call Seychelles and the appropriation of the moneys in the company's account all amounted to further support the need for a winding-up order. The unjustified and unlawful misappropriation of the money due to Global Torch under the 2011 SPA was another factor weighing in favour of a just and equitable winding-up order being made. In all the circumstances, Global Torch had fully demonstrated the need for the winding up of Fi Call Ltd on the just and equitable ground (see [55], [108], [137], [149], [158] of the judgment).

Fi Call Ltd would be ordered to be wound up. The Apex parties had to make restitution, alternatively, pay damages, in the sum of $6.7m plus interest, being the amount due and owing to Global Torch by Apex under the Al Shehri 2001 SPA. Further orders were made (see [182] of the judgment).

*Rica Gold Washing Co, Re* [1874–80] All ER Rep Ext 1570 applied; *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 applied; *Hawkes v Cuddy*; *Neath Rugby Ltd, Re* [2009] All ER (D) 42 (Apr) applied; *McKillen v Misland (Cyprus) Investments Ltd*; *McKillen v Barclay* [2013] 2 BCLC 583 considered.

***Matthew Collings QC and Oliver Phillips (instructed by HCLS LLP in the petition and set aside application only) for the claimants.***

***Justin Fenwick QC, Daniel Saoul and Michael Ryan (instructed by Mishcon de Reya) for the defendants.***

# LEGISLATION

## (1) Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2015

SI 2015/1977: The application fee to be recognised as a professional insolvency body is increased from 31 December 2015. The new fee will be £12,000 and the annual fee, based on the number of practitioners a professional body has, will also increase.

The application and annual fees for professional registration are currently set in the Insolvency Practitioners and Insolvency Service Account (Fees) Order 2003, SI 2003/3363.

The new fees are payable from 1 January 2016 and are amended as follows:

- £4,500 for the application fee to £12,000; and
- £300 as the multiplier for the annual fee to £360.

The annual fee is multiplied by the total number of people that body has authorised to act as insolvency practitioners. It will apply to those authorised by the professional insolvency body on 1 January each year from 2016.

## (2) 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)