PERSONAL AND CORPORATE INSOLVENCY UPDATE

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CORPORATE INSOLVENCY

Whether funds paid out by third party constituted a transaction at an undervalue

***Hunt v Hoskings & Ors* [2013] EWHC 311 (Ch)**

Facts

Mr Hoskings had been the joint supervisor of CVAs in respect of CSM Group and CSM Sheet Feed. Ovenden Colbert Printers Limited ("the Company") had a claim against the CSM companies and it was agreed with the joint supervisors that the CSM companies would make payments to the Company in satisfaction of that liability. The Company then appointed accountants pursuant to two commission agreements, amongst other things, to manage the receipt of the payments from the CSM companies. The joint supervisors paid the sums due to the accountants following the provision of a letter from the Company authorising the accountants to receive the monies on the following bases: (i) they be held to the Company's order; (ii) authorising the accountants to take their commission as was due pursuant to the agreements; and (iii) the funds to be released only as instructed. Under the terms of the commission agreements, the accountants were paid a sum in excess of £750,000. Following payment from the CSM companies, the accountants took the commission due. The accountants in turn then made payments directly to Mr Hoskings. Mr Hoskings said that these sums were paid to him to discharge a total loan of £154,000 that he had made to Mr Temple, the accountant, in or around 1998/1999. Unfortunately, there was no longer a copy of the loan agreement available. Mr Temple had subsequently been adjudged bankrupt. Mr Hunt, the liquidator of the Company, issued proceedings against Mr Hoskings for the recovery of sums paid to Mr Hoskings by the Company's accountants from the client account as a transaction at an undervalue. Mr Hoskings in turn sought summary judgment / strike out on the application.

Decision

The judge set out the considerable and at times unpleasant background of allegations which had been made in the proceedings. He also noted that the Company was not seeking to rescind the commission agreements and had not as yet commenced any action for recovery against Mr Temple for misrepresentation.

The judge rejected an argument from the liquidator that because the letter of authority specified that the monies must be paid to Mr Temple's office account, which had not in fact occurred, that Mr Temple was not entitled to the monies. In that case, Mr Temple would have a set off for the same amount. The monies were not the Company's money by virtue of the fact that they had not passed through the identified account. At all times they were Mr Temple's money, unless and until those agreements were challenged.

To rely on section 238 of the Insolvency Act 1986 ("IA 86") the liquidator must show that the Company was a party to the transaction. It is insufficient simply to assert that there have been dealings on the account belonging to the Company. There must be a transaction which the liquidator seeks to avoid. Whatever mud Mr Hunt wished to throw at Mr Hoskings regarding his dealings, none of it was relevant to the application as there is no transaction to impeach.

In the context of this claim, the commission agreements were not being challenged and therefore the liquidator could not argue that the payments were unauthorised. If the payments were said to be unauthorised, then they are not a transaction entered into by the Company because of lack of mutuality: *Manson v Smith (Liquidator of Thomas Christy Limited)* [1997] 2 BCLC 161 applied. The judge accordingly gave judgment for Mr Hoskings.

Personal liability of administrator for costs

Wright Hassall LLP v Morris **(administrator of Marketbalance Ltd and another company) [2012] BPIR 1310 (Mummery, Patten and Treacy LJJ, 15 November 2012)**

Facts

The respondent, Mr Morris, was appointed administrator of Marketbalance Limited and Phoenix Insurance Management Limited (the "Companies"). Shortly after his appointment, he engaged Wright Hassall LLP, a firm of solicitors, to advise the Companies in relation to some litigation in which they were involved. The litigation was subsequently settled and Wright Hassall proceeded to raise invoices in respect of their work. Mr Morris disputed the liability of the Companies to pay the invoices on a number of grounds. Wright Hassall commenced court proceedings to recover their outstanding fees.

Wright Hassall initially brought their action against Mr Morris and his partner, trading as Redfern Partnership, but the particulars of claim were later amended to refer to Mr Morris as administrator of the Companies as the defendant. On 27 April 2010, the case came to trial before HHJ Simon Brown QC who gave judgment on liability in favour of Wright Hassall (directing an assessment and part payment on account) and also made a costs order in their favour. At the hearing, both parties appeared to present their arguments on the basis that what was being considered was the liability of the Companies; neither the question of whether Mr Morris was personally liable for the outstanding fees nor the identity of the defendant were debated.

The case was again brought to court when Mr Morris refused to make any payments under the judgement on the basis that Wright Hassall were an expense creditor ranking pari passu with other expense creditors and were therefore not entitled to be paid ahead of such other expense creditors. It was at this stage that HHJ Cooke identified the question of whether Mr Morris was personally liable; if he was, the request for directions as to whether Wright Hassall should be paid ahead of other expense creditors would fall away.

Judge Cooke's concluded that where litigation is commenced against an administrator arising out of contractual obligations said to have been entered into by him as administrator of a company, the cause of action will in general be one lying against the company and not the administrator, and that naming a defendant as an individual "as Administrator of X Limited" recognises that he is being sued as agent rather than in a personal capacity. Mr Morris was therefore not personally liable.

Wright Hassall appealed.

Decision

The CA unanimously agreed to allow the appeal.

Mummery, Patten and Treacy LJJ found that at no stage was any order of the court made whereby the Companies were joined (or replaced Mr Morris) as defendants to Wright Hassall's claim. Wright Hassall had not sued the Companies – to do so would have required the consent of the administrator or the permission of the court and no steps to obtain either of these had been taken. Instead Wright Hassall had sued Mr Morris and, despite the fact that Mr Morris had raised in his pleadings that the outstanding fees in dispute were the liability of the Companies and not his personal liability, Wright Hassall had succeeded in obtaining judgment against him. The fact that Mr Morris was sued as administrator of the Companies did not mean that he was not personally liable. There is no authority on what suing someone "as Administrator" means or to support the assertion made by Judge Cooke that doing so recognises that the person is being sued as agent rather than in a personal capacity. Mummery, Patten and Treacy LJJ also did not accept Judge Cooke's suggestion that a claimant must plead specifically that personal liability is alleged, if that is the case.

The task of the CA was to interpret the judgment given by Judge Brown, who could not have imposed liability on a party which was not before him. The only defendant in the action was, and had remained

at all times, Mr Morris and therefore the court held that Judge Brown's order was made against him personally and not against the Companies.

Powers of Provisional Liquidator to call for delivery up of documents

***Caldero Trading Limited v Beppler & Jacobson Limited & Ors* [2012] EWHC 4031 (Ch)**

Facts

In 2001 / 2002, a Mr Becirovic and a Mr Lazurenko were said to have entered into a joint venture agreement to own and operate a holiday business in Montenegro via BJUK ("the Company"). Mr Lazurenko is said to have provided very large sums to fund this. In 2010, there was a falling out, which ultimately appears to have led to the present petition to wind up the Company. There were agency agreements subsequently amended, said to have been entered into between 2002 and 2005, which purported to give effect to an arrangement whereby all the assets of the Company were owned by, and held for, third parties, such that the Company was in effect a shell company. In May 2012, a petition was presented by the petitioner Caldero, a shareholder in the Company which is itself wholly owned by Mr Becirovic, alleging a breakdown of trust and confidence between the joint venture partners; winding up of the Company on the ground of being just and equitable, alternatively for unfair prejudice relief under sections 994 & 996 of the Companies Act 2006. The petition alleged that the agency agreements were invalid and null and void. On 3 May 2012, the Court appointed the provisional liquidators without notice to the Respondents, who were shareholders in the Company, former directors or otherwise associated parties. The primary purpose of the provisional liquidators' appointment was to preserve the assets of the Company. By consent, on 16 July the Court wound up the Company on the grounds of just and equitable and unfairly prejudicial conduct, however, the possibility of liquidation remained and the appointment of the provisional liquidators was continued but the terms of their appointment were varied so that their power to investigate was effectively curtailed. Former directors and related parties of the Company applied to set aside an order requiring the delivery up of all books and records of the Company. Their primary contention was that the provisional liquidators were not entitled to such books and records, alternatively, they were entitled only to inspect such documents. The provisional liquidators made a cross application for delivery up of the same.

Decision

Substantial witness evidence was submitted by both sides, but the court held that its main function was to determine the ordinary and plain meaning of the July order being a refinement of the statutory powers conferred on provisional liquidators against the relevant factual matrix.

The provisional liquidators continued to be officers of the court, albeit under some constraints. The order anticipated that the provisional liquidators would continue to play a part and the existence of adequate security on the petition was irrelevant to the consideration of their powers. The outcome of the petition was still unknown and it was unclear whether it would result in a purchase or liquidation. In the circumstances, the role of the provisional liquidator continued. There had been no suggestions of impropriety made against the provisional liquidators.

The order in question related to a commercial bargain in the context of a statutory regime and the court construed the provisions in accordance with the well-known speech of Lord Hoffmann in the Investors Compensation Scheme case.

The Court had introduced qualifying words in the July order to limit the extent of the provisional liquidator's powers: "reasonably" and "necessary"; "solely", and; "... for protecting and preserving the assets of the respondent". The purpose of the power was plainly to be exercised with the intention of protecting and preserving the assets.

The conclusion might be surprising, bearing in mind that prima facie the provisional liquidators have a right to call for all the books in which the company has a proprietary interest, but that prima facie right had been deliberately cut down by the terms of the July order.

The provisional liquidators could not say that they exercised their judgment to call for the delivery up of the documents in any event. The starting point must be a determination of the extent of the power enjoyed by the provisional liquidator. Just because the provisional liquidators might have formed the view that that they were entitled to call for certain categories of documents (in this case all of them) did not lead to the conclusion that that was the proper construction of the power.

The need to identify the assets and liabilities of the Company did not, on the plain meaning of the order, entitle the provisional liquidators to go on a fishing expedition. Just because they do not know what the documents might be, cannot entitle them to say they want them all. Further, the court was not satisfied that the provisional liquidators had asked the right questions or focussed on the job in hand. However, they were entitled to make a request for specific documents falling within the categories covered by the power as construed. If those documents, once disclosed, show that there were further trains of enquiry, then further requests could be made.

Whether investors' funds were subject to Quistclose Trust

Raymond Bieber & Others v Teathers Limited **(in liquidation) [2013] 1 BCLC 248 (Arden, Sullivan, Patten LJJ, 14 November 2012)**

Facts

T Ltd promoted T3 as a series of proposed partnerships, with T Ltd as managing partner, formed to co-produce and exploit TV productions which it was hoped would attract identified tax and income benefits for those who became investing partners. Investors were invited to subscribe and become partners on the basis of an information memorandum and in accordance with various documents including a Subscription Agreement and a Deed of Partnership which they duly signed. Stage 1 of the arrangements involved the collection of investors' subscriptions by T Ltd which were banked in a client account with HSBC. At stage 2, after formation of the particular partnership and deduction of fees payable to T Ltd, the net aggregate subscriptions were transferred from the HSBC account to a partnership account with Barclays. At stage 3, once the partnership had decided to do so, the funds were transferred from the Barclays account and applied to fund a particular TV production. The investor claimants argued that: (1) T Ltd only had authority to invest their money if and to the extent that certain criteria found in the information memorandum and other related contemporaneous documents had been met; (2) T Ltd had no authority to incorporate partnerships if the purposes of T3 could not or would not be fulfilled and that it had been a breach of trust for T Ltd to have transferred investors' funds out of the HSBC account once it knew or ought to have known that the scheme being implemented was fundamentally different from T3 (i.e. as described in the information memorandum); (3) T Ltd had acted in breach of the FSA's client money rules when transferring funds at stage 2 from the HSBC account to a partnership account with Barclays.

Preliminary issues were framed in order to determine whether T Ltd had received subscriber funds subject to such restrictions as to create a Quistclose trust in favour of the subscribers in the event that their funds could not be invested in accordance with the criteria and purposes set out in the information memorandum.

The judge found against the claimants on the preliminary issues so framed ([2012] EWHC 190 (Ch); [2012] 2 BCLC 585).

The claimants appealed.

Decision

The Court of Appeal held that, although in the hands of T Ltd the investors' funds were undeniably trust moneys and that T Ltd had been obliged to invest the moneys in a T3 partnership, T Ltd had authority under the documentation signed by subscribers (including the Subscription Agreement) to execute a partnership deed on their behalf and to apply the funds in the HSBC account as that investor's contribution to the partnership capital. The critical question was whether the funds so invested remained trust moneys when transferred at stage 2 into a partnership bank account at Barclays. The judge had been correct to conclude that once the monies became partnership capital to be applied according to the Subscription Agreement, T Ltd's obligations were confined to using those

funds as partnership capital in accordance with the relevant partnership deed and that those contractual arrangements as between the investing partners were inconsistent with the imposition of a Quistclose trust. The partnership deed was the governing instrument which provided a complete code for the conduct of the partnership business such that each individual's beneficial ownership of his or her individual subscription ceased and was replaced with a right to participate in the profits of the partnership and its net assets on dissolution as stipulated in the deed. There was accordingly no room for the imposition of a Quistclose trust due to the express contractual arrangements of the parties.

As for the alleged breach of the FSA's client money rules, this claim was based on the false premise that the partnership account with Barclays was not an account of the "client". Along with the other partners, each investor was the joint legal owner of all the moneys standing to the credit of that account and there was nothing in the relevant rules of the FSA which required the receiving account to be in the sole name of the client.

It was acknowledged that the investors may have a cause of action against T Ltd for breach of fiduciary duty in their role as managing partner but this was not the subject of the preliminary issues ruling.

Correct method of valuation of contingent claims in MVL

***Ricoh Europe Holdings BV & Ors v Spratt & Anor* [2013] EWCA Civ 92**

Facts

Danka Business Systems plc ("the Company") was placed into members voluntary liquidation with an expected surplus of US$66 million. Ricoh's claims in the liquidation arose from various tax indemnities which were contained in a sale and purchase agreement (SPA) dated 12 October 2006. Under the SPA (which was completed on 31 January 2007) Ricoh acquired the issued share capital of various companies which were incorporated in a number of European countries and the Company agreed to indemnify Ricoh in respect of the pre-completion tax liabilities of the companies it acquired. As a consequence, at the commencement of the liquidation, Ricoh had both crystallised and contingent claims. In March 2009 the liquidators gave notice to the creditors pursuant to IR 4.182A that they proposed to make a final distribution and required them to prove their debts by 28 April 2009. Ricoh set out details of the tax liabilities included under the indemnities with an estimate of the maximum value of the contingent claims. The letter requested the liquidators deferred taking any further steps in the liquidation until all of the Ricoh claims could be quantified. Ricoh's position was that no definitive valuation of the contingent claims could be made until the audit process was completed and that the liquidators should ring fence a sufficiently large reserve prior to any distribution to other creditors and members out of which the contingent claims under the indemnities, once crystallised, could be paid. The liquidators' position was that it was unnecessary to wait until all of the tax liabilities became crystallised. They took the view that they were obliged to value any contingent claims under IR 4.86 and that the claims could be valued with a good degree of accuracy or, failing that, a realistic estimate made of the worst case outcome so as to enable an appropriate reserve to be set aside to meet the claims. The liquidators refused to defer any distribution or to make a reserve in the sums as requested as there was a significant disparity between the two parties on this issue. In April 2010 Ricoh issued an application seeking a direction under section 112 of the IA 86 regarding the amount of retention and period for which it should be held. At first instance the court ruled that once a contingent creditor had proved in the liquidation for its debts and they had been valued, there was no room in the statutory scheme to allow the liquidators to delay a distribution to members pending the crystallisation of the contingent liabilities. Ricoh appealed.

Held

It is clear from the wording of IR 4.86 itself that there must be a valuation of contingent claims in order for them to be admitted to proof. It is drafted on the assumption that any contingent claim is capable of valuation; this is in contrast to the previous provisions under former bankruptcy statutes which were not.

The valuation of contingent claims remains open to variation in the light of subsequent events right up to the completion of the liquidation in accordance with section 107 of the IA 86. However, the court expressed some doubt as to how a liquidator who has already valued the contingent claims and so admitted them comes under a legal duty to provide for the contingency in full by making a reserve against any distribution to members.

In this case, the contingency had a year remaining and as such, the liquidator was not under a legal duty to make the retention alleged. The liquidator was entitled to proceed to a distribution to members on the basis of the debts admitted to proof.

Any such valuation of a contingent liability must be based on a genuine and fair assessment of the chances of the liability occurring. The liquidator must therefore use his own expertise and that of any relevant advisors to make a realistic estimate. Where some material change in the relevant factual position occurs it must be taken into account. But the liquidator is not required simply to wait and see. That is the opposite of valuation.

There is nothing in IR 4.86 which requires the liquidator to guarantee a 100% by assuming a worst-case scenario as this would be unfair to the company and its other creditors and members. The valuation provisions must apply in the same form to both solvent and insolvent liquidations. The liquidators approach was upheld and the appeal dismissed.

<u>Can retrospective permission be given for the commencement of proceedings against companies in administration?</u>

***Bank of Ireland (UK) plc v Colliers International UK plc* [2012] EWHC 2942 (Ch)**

<u>Facts</u>

The applicant applied for retrospective permission to institute proceedings against Colliers International UK plc ("the Company") pursuant to paragraph 43(6) of Schedule B1 of the IA 86. The company was a firm of property valuation surveyors which was instructed by the applicant in 2006 to prepare valuations of care homes let to and operated by companies in the Southern Cross group, for the purpose of providing finance for the purchase of the care homes. In July 2011 companies in the Southern Cross Group went into administration. Valuations obtained by the applicants in 2011 indicated that the properties were in fact worth much less than indicated by the Company's 2006 valuations. The Company went into administration on 28 March 2012. Notification of potential claims was given by the applicant to the administrators on 23 May 2012. The parties thereafter entered into a series of standstill agreements but the present claims were issued on the expiry of the last of those standstill agreements. The question before the court was whether it had jurisdiction to accede to the application. In the event that it did, it was held that this was a clear case for the grant of permission, having regard to: (1) the position adopted by the administrators, (2) the circumstances in which it became necessary to issue the claim forms as a matter of urgency, (3) the subject matter of the claims (a Part 7 claim rather than the submission of a proof of debt) and (4) the existence of professional indemnity insurance in respect of the claims, to which the provisions of the Third Party (Rights against Insurers) Act 1930 apply.

<u>Held</u>

In *Re Saunders* [1997] Ch 60, the court held that two previous decisions which held that proceedings against a party in bankruptcy or compulsory liquidation were a nullity were wrong and that the court had jurisdiction to give retrospective permission for their commencement. Despite the decision of the High Court in *Re Taylor* [2006] EWHC 3029 (Ch) which held that Saunders had been incorrectly decided, first instance judges have since followed Re *Saunders*. It is clear from the judgments on this point that uncertainty persists.

It has been a legislative provision for many years that permission is required, although the consequence of the failure to obtain such permission prior to issue is not spelt out by the legislation. The provisions do not state whether the proceedings, commenced without such permission, are a nullity or whether the failure to obtain prior permission can be cured by a retrospective grant of permission.

The general approach to provisions requiring leave for the commencement of proceedings was restated by the Court of Appeal in *Adorian v Commissioner of Police of the Metropolis* [2009] EWCA Civ 18 which identified a number of reasons why a failure to obtain prior permission under section 329 of the Criminal Justice Act 2003, did not involve the drastic step of nullifying proceedings including the effect on limitation periods and the procedural consequences, which were both equally applicable to claims against bankrupts or companies in compulsory liquidation or administration. The general approach to provisions requiring permission for the commencement of proceedings and the factors relied on in *Adorian* were also applicable to the relevant provisions in the Insolvency Act and strongly support the decision in *Re Saunders.*

The court must look beyond the language of the particular section to the entire context of the provision, its purpose, and the consequences of a decision as to its effect, with a general pre-disposition that the lack of prior permission should not render the proceedings a nullity. There is little to support a conclusion that proceedings brought without the permission required by various provisions of the Insolvency Act are a nullity and much to support the contrary conclusion.

In addition to the consequences of holding that proceedings are a nullity, it is clearly relevant to have regard to the purpose of the provisions in the context of insolvency. It is important to note that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court; it does not apply to a company in creditors' voluntary winding-up. This suggests that the real purpose of these provisions is not so much the protection of creditors as to the court's control of the task of supervising the collection and distribution of the company's assets.

There is, in the case of administration, the additional consideration that consent may be granted by the administrator. There is no convincing reason why an administrator should not be permitted to grant retrospective consent.

Accordingly, retrospective permission was granted.

<u>Consultation requirements under TULCRA</u>

***AEI Cables Limited v GMB & Ors* [2013] UKEAT/0375/12/LA**

<u>Facts</u>

From approximately February 2011, it was clear that AEI Cables Limited ("the Company") was in trouble and would have to undergo some form of restructuring and redundancies. General discussions with trade unions began in early 2011. The ET at first instance found that between 17 and 20 May 2011, the Company had taken insolvency advice and was told that unless it restructured, it risked trading insolvent. On 25 May 2011, the Company's bank declined to extend credit. It was found that the directors decided on that day, following that meeting, that the Company's plant should be closed and 124 employees be made redundant, but 189 employees were to be retained in the domestic division. The Company's accountants advised that it should be placed into a Company Voluntary Arrangement. On 26 May 2011, the Company's HR manager spoke to Unite and notified them that there would be immediate redundancies. On 27 May 2011, a letter was sent to the 124 employees in the cable division making them redundant with immediate effect. On 24 June 2011, the CVA was ratified and the Company has thereafter remained in business. The ET found that there had been a breach of the duty under section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") to consult with the trade unions and employees about the impending redundancies. There were no special circumstances upon which the Company could raise to excuse non-compliance. The ET concluded that it was appropriate in the circumstances to make a protected award of 90 days wages having regard to the seriousness of the Company's default in relation to its failure under section 188. The Company appealed against the length of the protective award.

<u>Decision</u>

The basis upon which the ET should exercise its discretion in making an award should take into account the following: (1) the purpose of the award is to provide a sanction for breach by the employer of the obligations in section 188, it is not to compensate the employees for loss which they

have suffered in consequence of the breach; (2) the ET has a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default; (3) the default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult; (4) the deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under section 188; (5) how the ET assesses the length of protected period is a matter for the ET, but a proper approach in a case where there has been consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the Tribunal consider appropriate: *Susie Radin v GMB* [2004] ICR 893 applied.

It was properly and correctly conceded that if the consultation period had begun between 17 and 20 May and been completed by 26 May, it could not have lasted for more than 9 days. It was also conceded that the ET's finding that there should have been a 90 day consultation period was also wrong on the facts.

The purpose of making a protective award is penal, it is not compensatory. It is penal in the sense that it is designed to encourage employers to comply with their obligations under sections 188 and 189. The starting point in considering the length of a protective award is 90 days. However, ETs are bound to take account of mitigating factors and are bound to ask the important question why did the Company act as it did. Had the ET asked this question it could not possibly have ignored the fact and the conclusion that the Company simply was unable to trade lawfully after the advice it had received on 25 May. In those circumstances, it was clearly wrong for the ET to anticipate that a 90 day consultation period could have started.

In the EAT's view, a good employer who is unable to consult or provide information within a meaningful period would have 'pulled out all the stops' to do what it could to consult as best it could and to provide information as best it could. The ET found that in this case the Company's failure was complete as there was no consultation and no real provision of information. However, the EAT found that the ET failed to have sufficient regard to the insolvency and the consequences of trading and that a consultation period of 90 was simply not possible, the award of 90 days could not stand.

The court held that the appropriate course was to reduce the award to 60 days.

PERSONAL INSOLVENCY

Effect of a suspension of creditors' approval of IVA

***Davis and another v Price and another* [2013] BPIR 200 (Mr Justice David Richards 21 February 2013)**

Facts

Mr and Mrs Price had provided funds to the debtors, Mr and Mrs Davies ("the debtors"), for the purpose of investment in their company, which later failed. They subsequently had grounds to believe the funds had not been so invested and commenced proceedings to recover the balance. The claim was disputed. The debtors obtained interim orders on 28 April 2010 and proposed IVAs which were considered at a creditors' meeting on 8 June 2010. The return to creditors under the proposal was calculated on the basis that Mr and Mrs Price's claim was not established. The chairman at the meeting treated Mr and Mrs Price's claim as contingent and valued it at £1. On that basis, the proposals were approved by a majority of 83.7% in value of creditors voting at the meetings. If Mr and Mrs Price's claims had been admitted in full or for a substantial sum, the proposals would not have been approved. On 1 July 2010, Mr and Mrs Price issued an application under s262 challenging the value of £1 attributed to their claim. The application was successful and the District Judge made an order that their claim should have been admitted to voting in the sum of £35,388.54, the approval of the IVA be suspended and a new meeting convened to consider the varied proposals ("the Order").

The Order also provided that the debtors pay Mr and Mrs Price's costs of their s262 application in the sum of £7,010.52 ("the costs"). The revised proposals were put to a creditors meeting and approved. Mr and Mrs Price voted but only on the basis of their claim and not the costs. On 16 September 2011, they served statutory demands for the costs. Following a hearing on 23 April 2012, the statutory demands were set aside and Mr and Mrs Price were ordered to pay the debtors costs of £10,000. Mr and Mrs Price appealed that order arguing that where a creditors' approval is suspended (rather than revoked) the IVA proposal will only apply to those creditors covered by the original proposal, such that they had been free to pursue their subsequent costs order outside of and free from the IVA.

Decision

The appeal was dismissed. The Judge found that if an IVA was suspended it did not continue to bind creditors. During the period of suspension, there was no "approved arrangement" within the meaning of s260(2) IA 1986. For that reason, the court has express powers under s262(6) to renew an interim order pending the further creditors' meeting. Neither the Act nor the Rules distinguishes between the original meeting at which the IVA was first considered and subsequent meetings. The only rule providing for entitlement to vote is r5.21 which entitles any creditor who has notice of the meeting to vote at it, with the calculation of their vote being undertaken in accordance with r5.21(2). Therefore the liability for the costs was a debt subject to the terms of the IVA approved at the further meeting and Mr and Mrs Price were not entitled to serve statutory demands.

Payment of trustee's costs where bankruptcy appealed and trustee unaware

***Appleyard v Wewelwala* [2012] EWHC 3302 (Ch)**

Facts

Mrs Wewelwala ("CMW") was made bankrupt by on 20 April 2011, on the petition of Davenham Trust Limited, in respect of a statutory demand based upon a judgment debt of some £18,000 odd, the existence of which was not in dispute. CMW resisted the bankruptcy proceedings on the ground that Davenham had unreasonably refused to accept her offer to make payment of the debt by instalments. CMW initially sought to appeal the bankruptcy order by a written application for permission to appeal.

The OR deferred appointing a trustee pending the outcome of the application. On 8 July, CMW's application was refused on paper. Mr Appleyard ("the Trustee") was appointed on 15 July, with effect from 20 July. Thereafter the Trustee began to discharge his duties as regards CMW's bankruptcy

estate. CMW renewed her appeal and was granted an oral application for permission listed on 20 October. She notified the Trustee and otherwise fully cooperated. The Trustee was not required to, and did not attend at that hearing. The hearing on 20 October was adjourned and relisted for 14 December. Davenham was directed to attend. The order made no other directions and did not state that CMW was required to notify the Trustee of the relisting. She did not do so. At the adjourned hearing, the appeal was allowed. The order simply recorded that the bankruptcy order be set aside and removed from the Bankruptcy Register, that the hearing of the bankruptcy petition be adjourned for twelve months on CMW's undertaking to make instalment payments to Davenham at the rate of £500 per month for six months, with the balance being paid by 14 December 2012, and gave permission to restore the bankruptcy petition in the event of non-payment. The Trustee was only informed of the relisted hearing and outcome in January 2012. The order made no provision for his release from office, or for payment of his expenses.

Decision

It was common ground that the Trustee be released from office.

The first issue to resolve was the question of the court's jurisdiction in this matter. The present situation was not a review of the order of 14 December as the court had simply not dealt with the issue of the Trustee's costs at all. The court was satisfied it had inherent jurisdiction in dealing with the issue rather as a *consequence* of the order. The jurisdiction conferred a discretion on the court as to the twin questions: (1) whether the Trustee should have his expenses paid; and (2) by whom, or out of what fund. That discretion is to be exercised having regard to all relevant matters, but in accordance with such principles as are to be gleaned from available authority.

There was no reason why the jurisdiction for costs post annulment should not extend to cases where the bankruptcy order is set aside on appeal, in particular because one ground for annulment, under section 282(1)(a) of the IA 86, is that the bankruptcy order ought not to have been made in the first place. That is a ground for annulment closely analogous to grounds of appeal; both processes have the effect of divesting the trustee of the property of the estate which vested in him upon his appointment and which would otherwise be available to him for the purpose of discharging his proper expenses.

A trustee who acts properly and innocently of any wrongdoing can expect to obtain payment of his reasonable expenses and is not to be expected to act gratuitously, or to discharge expenses out of his own pocket. It is clear that the trustee's remedy is not limited to the exercise of a lien or equitable charge over assets in his name or under his control: *Mellor v Mellor* [1992] 1WLR 517 and *Thornhill v Atherton* [2004] EWCA Civ 1858 applied.

The combined effect of the authorities is that the Trustee's right to recover his expenses, having acted entirely properly and innocently at least until January 2012, must prevail over CMW's right to enjoy to the full her estate upon its re-vesting in her. This is so even if, as between her and Davenham, it may be Davenham which was largely to blame for the circumstances leading to those expenses being innocently incurred.

The court directed that her property, that is her beneficial interest in the land and her half interest in the bank accounts, stand charged with payment of the Trustee's reasonable expenses down to January 2012, leaving him to obtain execution as he saw fit, absent agreement.

However, as to the additional expenses incurred after being notified of the setting aside of the bankruptcy order, whatever may be the formal position, the Trustee should not have incurred further expense without first applying to the court for directions.

By way of a postscript, it was noted that a trustee in bankruptcy's expenses are as important a matter to be dealt with on an appeal against a bankruptcy order heard after his appointment, as they are in any application for rescission or for annulment and litigants and their legal advisers should bear this in mind.

Purpose of the power to suspend a bankruptcy discharge

***Bramston v Haut* [2012] BPIR 672 (Rix, Arden, Kitchen LJJ 14 December 2012)**

Facts

The TiB appealed against a decision of Arnold J ([2012] BPIR 672) dismissing his application to set aside an order suspending the bankrupt's discharge and ordering the TiB personally to pay the bankrupt's costs. The bankrupt had made a proposal for an IVA shortly before the automatic discharge of his bankruptcy which was supported by the majority of the bankrupt's creditors. However, the TiB did not support it as he believed the Bankrupt had failed to co-operate, concealed assets and hidden the true state of his financial affairs. On that basis he refused to apply for an ordered suspending the discharge, the effect of which would be to stop the bankrupt's assets vesting in the TiB. The Judge concluded it was in the creditors' best interests for the discharge to be suspended for the purpose of putting forward IVA proposals. The TiB applied to set that order aside. Arnold J refused the application and found that the TiB's refusal to make the application to suspend constituted *Wednesbury* unreasonableness and ordered him to personally pay the bankrupt's costs. The TiB appealed arguing that: (1) ss279 and 303 did not provide a proper jurisdictional basis for an order suspending the bankrupt's discharge for the purpose of allowing a bankrupt further time to make proposals for an IVA; (2) the Judge had erred in concluding that the TiB had acted unreasonably; (3) the Judge had erred in exercising his discretion as to costs.

Decision

Allowing the TiB's appeal, Kitchen LJ (with whom Rix LJ and Arden LJ agreed) held as follows:

(1) The purpose of a suspension under s279(3) was plainly connected to a failure by a bankrupt to comply with his obligations under Part IX of IA 1986. The subsection contemplates an application being made by the TiB or the official receiver, not by the bankrupt. R.6.215 of IR 1986 sets out a clear framework for such an application. Further, and importantly, s279(4) expressly provides the court may not make an order unless it is satisfied that the bankrupt has failed or is failing to comply with an obligation under Part IX.

(2) A purpose of the power conferred by s279 was to extend the period of the bankruptcy and to ensure that the bankrupt continued to suffer the disabilities arising from his undischarged bankruptcy until he complied with his obligations under IA 1986. In this sense the power was intended to be penal and used for purposes connected with the functions of the TiB to realise and distribute the bankrupt's estate.

(3) It was clear that the order made in the present case was not linked to the bankrupt's failure to comply with his obligations, but was made to give him time to put an IVA proposal before the creditors, and thereafter secure the annulment of his bankruptcy order. That was impermissible and outside the scope of the jurisdiction conferred by s279(3).

(4) The proper gateway for the bankrupt to have made an application for the suspension of his bankruptcy lay in ss 252 to 256. S252 confers jurisdiction upon the court to make an interim order which has the effect that, during the period for which it is in force, no bankruptcy petition relating to the debtor may be proceeded with. The orders which the court may make include (by s255(4)) a provision staying proceedings in the bankruptcy or modifying any provision in the Second Group of Parts (dealing with the insolvency of individuals and bankruptcy) and any provision of the rules in their application to the debtor's bankruptcy. Such a modification could therefore include a modification of s278(b) which provides that the bankruptcy of an individual against whom a bankruptcy order has been made continues until the individual is discharged. Thus in an appropriate case the court can make an order under s252 suspending the automatic discharge of the bankrupt for a specified period. The legislation does, however, incorporate important limitations to this jurisdiction and safeguards in relation to its exercise. In particular: (i) notice is required to be given to the official receiver and the TiB (by s253(4)); (ii) the court is given the opportunity of considering the IVA proposal at a hearing which the TiB and the official receiver are entitled to attend (by s255); and (iii) if the court makes an interim order, it can require the nominee to file a report for consideration by the court (by

s256(1)). In the particular circumstances of this case, if the bankrupt had made an application for an interim order under s253 IA1986 it would inevitably have foundered.

(5) The Judge had fallen into error in concluding that TiB actions were unreasonable because: (i) he had adopted the *Wednesbury* unreasonableness test when he ought to have asked himself whether the TiB had acted perversely; (ii) it was wholly impossible to say that the TiB had acted perversely in refusing to allow the bankrupt to make an application on his behalf under s279(3) to put the IVA before the creditors when that subsection provided no jurisdictional basis for such an application; and (iii) it was not the duty of a TiB to respond affirmatively to a bankrupt's request that he co-operate in the promotion of an IVA proposal. The TiB had believed that the bankrupt was in continuing default of his obligations and that the proposed IVA was defective and prejudicial to the interests of the creditors with whom he had no personal connection. In those circumstances, the TiB had not acted perversely or as no other reasonable TiB would have acted. Accordingly, the Judge's order for costs could not stand.

Application to release bankrupt from lump sum payment obligations

***McRoberts v McRoberts* [2013] BPIR 77 (Mr Justice Hildyard 1 November 2012)**

Facts

Pursuant to a consent order dated 1 April 2003, the Applicant (A) was required to pay to the Respondent a lump sum of £450,000 starting on the making of the Order. The sum would be paid in full by 31 March 2009 with interest. In default of any instalment, the full amount became due. The Order also provided for A to transfer his interest in the matrimonial home and the Respondent to transfer shares in A's company to A. Upon those actions taking place and the decree absolute being made, the claims for financial provision would be dismissed and no further claims made. A did not keep up the instalment payments. On 18 September 2006, A was declared bankrupt. The Respondent entered a proof of debt for the outstanding £244,966. There was no return to creditors and the outstanding sum due to the Respondent at the time of discharge was £350,000. A applied under s 281(5) for that debt to be released.

Decision

Considering *Hayes v Hayes* [2012] EWHC 1240 (Ch) (which was decided by HHJ Pelling QC, sitting as a High Court judge), Hildyard J agreed that the following were factors which ought to be taken into account when judging such an application:

1) any lapse of time between the date when the discharge occurred and the date of any application for release, and the reasons for any delay;

2) the future earning capacity of the applicant, the possibility of some future income or capital receipt or windfall, the prospect accordingly of the obligation being fulfilled in whole or in part if not released, and in the round whether there is any good reason for maintaining the obligation;

3) the risk of the respondent to the application using the fact of the obligation (if not released) to harass the applicant, for example by seeking to diminish the applicant in the eyes of the community, or his future prospects, by reference to the stigma still relating to bankruptcy, or by bringing new and abusive bankruptcy proceedings calculated to restrict the applicant in building a new life;

4) the duration of time that has elapsed since the relevant obligation arose.

He concluded that the purpose of the section was to enable the court, in order better to achieve the objectives of discharging a bankrupt, to release an obligation if persuaded that the likelihood of its being satisfied is not such that its continuance is likely to be of benefit to the obligee, and that, conversely, its release is necessary in order to assist the obligor in building a viable financial future.

On the facts of this case, it appeared to the court that A did have means that he was not being wholly transparent about which could be used to reduce the sum and he did not put forward any future enterprise which would be blighted by these payments. Further, the court was persuaded by the submission that in fact R had fulfilled her side of the bargain by transferring her shares and to release A seemed unfair when it appeared he did have means to pay some if not all of her side.

Transaction defrauding creditors-whether statutory purpose made out

***Williams (Trustee in Bankruptcy of Taylor) v (1) Taylor* (2) Raines [2013] BPIR 133**

Facts

Mr Taylor (T) married Dr Raines (R) in September 2001. They each had children and properties from previous marriages. T had recently retired as a director and employee of the family company, in relation to which he was also a guarantor. Thereafter, he had spent time renovating his solely owned property ("the Property") which R had demanded that he do before she and her children would move into it. In mid-2002, R invested £120,000 in the family company. On 3 April 2003 it went into creditors' voluntary liquidation. On 23 April, T transferred the Property into the joint names of himself and R to be held as tenants in common in equal shares. The transfer expressed no consideration. They later made a declaration of trust that recited that R had paid £120,000 towards improvement works to the property, £120,000 as a loan to his company, that T was able to pay his debts, and that a mortgage on the property, which had been obtained to discharge T's prior liabilities, was to be discharged first from his interest in the property. The Property was sold in 2007, and a second property bought in R's sole name. The Property was sold for a gross sum of £900,000, a net sum of just over £890,000, providing half shares of just over £445,000 each. The redemption of the mortgage and the National Westminster Bank's second charge absorbed all of T's half share and £8,500 of R's half share. The second property cost £350,000 plus costs. R lent T £42,000 out of the balance, and received the rest of just over £31,500. A bankruptcy order was made against T on his own petition on 6 April 2009. By a claim brought under s 423 of the Insolvency Act 1986, W, T's trustee in bankruptcy, sought to set aside the transfer and the declaration of trust, thereby effectively seeking to recover for the benefit of the creditors of T the second property plus the £31,500. On 2 November 2011 HHJ Hodge QC (sitting as a High Court Judge) dismissed the application on the basis that W had failed to prove the statutory purpose under s423(3).

The Trustee appealed.

Decision

The Court of Appeal dismissed the appeal on the following basis:

(1) The court could only make an order under s 423 of the Act in relation to a transaction entered into by a person for the purpose (a) of putting assets beyond the reach of a person who was making, or might at some time make, a claim against him or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he was making or might make. That purpose did not have to be shown to be the sole or dominant purpose, but it had to be a real, substantial purpose of the transaction. *Hashmi v The Commissioners for Inland Revenue* [2002] EWCA Civ 981 applied.

(2) The declaration of trust was intended to give effect to the arrangements already made between the parties, and the process which led to the trust being declared was initiated before the creditors' voluntary liquidation of the family company. The Judge held that no part of T's purpose in entering into the transfer and the deed of trust was to escape his liabilities. W's appeal was fairly and squarely a challenge to the Judge's findings of fact, founded on contentions that the Judge's conclusions of fact as to the absence of the statutory purpose, as an intention on the part of T, could not stand in the face of a number of objective indicators.

(3) The objective factors did shift the evidential burden, in the sense that if there had been no evidence in answer to that of W based on the documents and the objective contemporary circumstances, it would have been a legitimate inference that the statutory purpose was at least a substantial purpose of T in entering into the transaction. But there was evidence adduced on

(4) the other side, and the question was therefore not to be analysed in the absence of such evidence. It came down to a question of the Judge's treatment and assessment of that evidence in that context. The substantial proposition that the judge came to was untenable, or at least unreasoned, conclusions of fact in considering the evidence of the witnesses could not be accepted.

(5) It could not be said that the judge failed to understand the primary points in the case, or that he had no regard to them in coming to the conclusions that he reached as to the acceptance of T's and R's evidence of the prior agreements and otherwise. The evidential process was not easy or straightforward, and it might be that a different judge would have come to a different conclusion as to the credibility and reliability of the witnesses.

(6) Ultimately, the appeal came down to saying that the objective factors were so powerful that the Judge could not properly have believed the respondents as to either the existence of the prior agreements or the absence of the statutory purpose from T's motivation in 2003. It was for the Judge to consider whether he did believe them, having heard the evidence. He did so. His conclusion could not be successfully challenged.

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Guildhall Chambers
June 2013

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