TAKING IT PERSONALLY – THE OFFICE-HOLDER ON THE HOOK

DIFFERING CATEGORIES OF PERSONAL LIABILITY AND THEIR RELEVANCE

Stephen Davies QC, Neil Levy of Guildhall Chambers, February 2017

1. In these introductory notes we provide a broad outline of the circumstances in which insolvency office-holders, principally liquidators and administrators, can be made liable to pay damages, costs or other sums. The issue is not straight-forward due to the hybrid nature of their functions. This is concisely brought out in the following summary of a liquidator's role (which would be equally applicable to an administrator):

> *"…like a director, he is a distinct species of fiduciary whose office is an amalgam of statutory rules and agency and trust principles."*[1]

2. References to the "personal" liability of an insolvency office-holder can have different meanings in different contexts. At one end of the spectrum, he has no liability at all for an act or omission in question. At the other end, he is truly personally liable in the full economic sense because he is directly liable to meet the claim and has no recourse to or indemnity from the estate in respect of that liability.

3. Unlike a liquidator or administrator of a company, a trustee in bankruptcy is not an agent and is more than a mere custodian of assets. The assets of the bankrupt at the time of the commencement of the bankruptcy vest in him personally, and, for all intents and purposes, the bankrupt drops out of the picture because he has no further interest in them, see section 306 of the Insolvency Act 1986. The trustee's position differs in this respect from that of a liquidator/administrator, for although the latter are treated as trustees for the proper administration and distribution of the estate, the assets remain vested in the company as principal with the insolvency officer-holder displacing the board of directors as its agent. These fundamental differences must always be considered before applying the law and practice of corporate insolvency (in particular, as to the personal liability of liquidators and administrators) to trustees in bankruptcy. In what follows, it is mainly the personal liability of liquidators and administrators that is under consideration.

[1] Arden LJ, citing Palmer's Company Law in *In Re Stanford International* [2011] Ch 33, at 97B.

Personal claims and class claims

4. In company cases a distinction is drawn between claims which are brought by a claimant for the claimant's sole benefit ("personal claims"), and those claims which are of a class nature ("class claims"). As Professor Goode puts it[2]:

> *"The liquidator is not a trustee for individual creditors but rather an agent for the company in much the same position as a director and with statutory duties which may be enforced by application to the court. His duty is owed to the company and to the creditors as a class, but he does not in general owe any duty to an individual creditor. Accordingly, it is not normally open to an individual creditor to institute proceedings against a liquidator outside the winding up. His remedy for a breach of duty causing loss to the company is to institute misfeasance proceedings under s 212 of the Insolvency Act for an order compelling the liquidator to contribute to the company's assets. There are, however, exceptions to the rule that an individual creditor cannot pursue a remedy in his own right. The liquidator may incur a liability to an individual creditor for loss caused by fraud or other personal misconduct, such as breach of fiduciary duty or misfeasance, or for breach of contract, or for negligently distributing the company's assets without taking account of a debt which has been or should have been admitted to proof, but in this last case only where the company has been dissolved, and consequently is no longer in course of winding up, so that the creditor is deprived of his ordinary remedy of application to the court*."

5. In broad terms, a class claim focusses on the duties which an office-holder (as agent) owes to the company (as principal). Due to its insolvency, this equates to the interests of its creditors as a class. In contrast, a personal claim focusses on the liabilities owed by office-holder to the claimant directly.

(i) Class claims

6. The remedy sought in class claims is generally to make good loss to the company. It follows that personal claims cannot usually be brought in relation to matters which are properly the subject of class claims. As Lord Scott stated in *Hague v Nam Tai Electronics*:[3]

> *"13 … A culpable failure by a liquidator to collect in or preserve or take control of the assets of a company in liquidation may diminish the value of the fund available for distribution pro rata among the creditors but is not, in their Lordships' opinion, a breach of duty owed to each creditor as an individual.*

[2] Goode, *Principles of Corporate Insolvency* 4th ed (2011), para 5-03.
[3] [2008] UKPC 13.

14. Case law establishes that that is so. In Kyrris v Oldham [2004] 1 BCLC 305 Jonathan Parker LJ (with whose judgment Thorpe LJ and Dyson LJ agreed) held, at 329, that absent some special relationship an administrator of an insolvent partnership appointed under the Insolvency Act 1986 owed no common law duty of care to unsecured creditors in relation to his conduct of the administration. (See also Peskin v Anderson [2001] 1 BCLC 372)."

7. In liquidation, section 212 IA 1986 provides the procedural route for bringing a class claim. It enables the court to examine the conduct of a liquidator or administrative receiver who appears to have "misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of fiduciary or other duty in relation to the company" including in the case of a liquidator, misfeasance or breach of duty "in connection with the carrying out of his functions as liquidator." The application may be made by the official receiver, liquidator, a creditor or contributory. The court may compel the office-holder in default to repay, restore or account for the money or property with interest, or to contribute such sum to the company's assets as it thinks fit. The relief is therefore given in favour of the company rather than to an individual applicant. The section effectively re-enacts similar misfeasance provisions of successive Companies Acts. It creates no new liabilities but provides a procedural gateway enabling the applicant to seek to fix an office-holder with personal liability for misfeasance, for the benefit of the company in liquidation. The equivalent procedural gateway in administration is found in paragraph 75 of Schedule B1.

8. In *Kyrris v Oldham*[4] the claimants claimed to be secured creditors in the administration under equitable charges, and that the administrators had failed to account to them for monies secured by the charges. In addition, they claimed damages for breaches by the administrators of a common law duty of care owed to unsecured creditors, by having sold assets at an undervalue and wrongly compromised partnership claims. The alleged breaches of duty all related to the conduct of the partnership's affairs during the period of the administration. No special circumstances were relied upon. The damages claim was held to be unsustainable. Jonathan Parker LJ said:

"*77. Mr Royle does not claim to have suffered any damage which has not also been suffered by all other unsecured creditors. He does not assert that he is in any special position in this respect; he claims damages as a member of the class of unsecured creditors of the partnership. His claim, in effect, is that unsecured creditors have suffered loss by reason of the loss suffered by the partnership.*"

[4] [2004] 1 BCLC 305 (CA).

9. In *Peskin v Anderson*[5] the issue was whether directors of a company owed fiduciary duties to the shareholders. In the course of his judgment, with which Simon Brown and Latham LJJ agreed, Mummery LJ distinguished between on the one hand fiduciary duties owed by directors to the company by virtue of their legal relationship with the company, and on the other hand fiduciary duties owed by directors to shareholders, which did not arise from that legal relationship but which were dependant on establishing a special factual relationship between director and shareholder. Mummery said:

> *"33. The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by directors in that office, for the benefit of the shareholders, and not to prefer their own interests at the expense of the shareholders."*

10. In *Kyrris,* Jonathan Parker LJ accepted[6] that the position of an administrator appointed under the 1986 Act vis-à-vis creditors is directly analogous to that of a director vis-à-vis shareholders.

11. In *Lomax Leisure Ltd (in liquidation) v Miller*[7] dividend cheques issued by liquidators were stopped when the liquidators realised there was an appeal outstanding against the rejection of one creditor's proof. The claim was for non-payment of the cheques and damages for breach of duty owed to the creditors to pay the dividend once it had been declared. The claims were dismissed. The deputy judge held[8] that on the authority of *Kyrris*, unless the company had been dissolved, the claim for breach of duty would ordinarily only be capable of being brought as a misfeasance claim under s 212, with a view to recovering the moneys dissipated or paid away for the benefit of the liquidation and creditors as a whole. Here the liquidators owed no personal obligation to the relevant creditors to pay the dividend. He added that in any event, no loss had been suffered because the liquidators had retained the relevant funds. In those circumstances, the claim on the cheques also failed for lack of consideration (one of a limited number of established defences to a claim on a cheque).

---

[5] [2001] 1 BCLC 372 (CA).
[6] At [143].
[7] [2008] 1 BCLC 262 (Mark Cawson QC, sitting as a deputy High Court judge).
[8] At [34], sub-para (4).

(ii) Personal claims

12. The remedy sought in personal claims is generally to make good loss to the individual claimant caused by conduct on the part of the office-holder in disregard of the individual claimant's personal rights. Examples include the following.

13. In *Pulsford v Devenish*[9] the liquidator in a voluntary liquidation negligently omitted to inform the company's creditors of the liquidation, and distributed the company's assets to its contributories without regard to the creditors' claims. The company was later dissolved. Farwell J held[10] that the creditors had a claim against the liquidator. He concluded that the availability of the statutory remedy of a creditor under s 10 of the Companies Act 1890 (the predecessor of s 333 of the 1948 Act and hence of s 212 of the 1986 Act) and the statutory right of a creditor to apply in a voluntary liquidation conferred by s 138 of the 1890 Act ceased to exist when the company was dissolved.

14. In *James Smith & Sons (Norwood) Ltd v Goodman*[11] the company's liquidator distributed its assets without making provision for future rent due to the plaintiffs under certain leases owned by the company of which the plaintiffs were the lessors. No notice of the voluntary liquidation was given to creditors. The company was subsequently dissolved. The plaintiffs were unaware of the liquidation or of the subsequent dissolution. At first instance, Bennett J held that the liquidator was liable in damages to creditors for breach of statutory duty. His decision was affirmed on appeal.

15. In *Kyrris*, the Court of Appeal regarded the fact that the company had been dissolved in the above decisions as highly relevant.[12] In contrast, in *Re HIH Casualty and General Insurance Ltd*[13] David Richards J observed that:

> "*120 … claims in cases such as Pulsford v Devenish are personal to the creditor and relate to a breach of statutory duty as regards that particular creditor. The appropriate procedure for seeking redress may depend on whether the company has been dissolved, but the nature of the right as a personal right of the individual creditor to have his own claim treated in accordance with the statutory scheme remains the same.*"

[9] [1903] 2 Ch 625.
[10] At 632.
[11] [1936] Ch 216, [1935] All ER Rep 697.
[12] [160].
[13] [2005] EWHC 2125 (Ch) (reversed on other grounds).

16. In *IRC v Goldblatt,*[14] preferential creditors claimed damages against a receiver and debenture holder for breach of statutory duty under section 94 (1) of the Companies Act 1948 and as against the debenture holder alternatively for breach of duty as trustee for non-payment of the preferential debts. Goff J held that both were liable: the receiver for breach of a positive duty to pay the preferential creditors in priority to the debenture holder for having made payment which the receiver knew, or ought to have known, would result in payment to the debenture holder; the debenture holder for procuring a breach of statutory duty. In In *Re HIH Casualty and General Insurance Ltd,*[15] David Richards J referred (at [121]) to *Goldblatt* for the proposition that:

> *"Just as ordinary unsecured creditors have a right to have their claims treated in accordance with the statutory scheme, so also do unsecured creditors with a statutory priority. So a liquidator or other office holder who distributes assets without paying or providing for preferential claims is personally liable to those creditors for breach of statutory duty."*

17. In *A & J Fabrications Ltd v Grant Thornton,*[16] the plaintiffs, as majority creditors of a company in liquidation, alleged that they had agreed with Grant Thornton, the defendants, to support the appointment of one of the firm's partners or employees as liquidator of the company, with a view to investigating the conduct of the directors, and to pay Grant Thornton's fees up to an initial limit of £5,000. An insolvency practitioner from Grant Thornton was duly appointed liquidator (he was subsequently replaced by another of Grant Thornton's employees). The plaintiffs claimed damages against Grant Thornton for breach of contract, alleging that it acted negligently in the conduct of the liquidation. The statement of claim pleaded breach of a duty of care owed both in contract and in tort. Grant Thornton applied to strike out the action. Jacob J refused to strike out the claims. He held that there was nothing inconsistent between the pleaded contract and the employee having duties to the company. The contract simply confirmed that the employee/liquidator would do a proper job as liquidator. The existence of duties in contract with co-extensive duties in tort based on that special relationship, meant that the claims could be pursued as personal claims. To the extent that some comments made by Jacob J went further in suggesting the existence of a general duty of care owed to creditors, the Court of Appeal in *Kyrris* held[17] that *Peskin v Anderson* had decided that point.

[14] [1972] Ch 498.
[15] [2005] EWHC 2125 (Ch).
[16] [1998] 2 BCLC 227.
[17] [163].

18. In the *Lomax Leisure* case (above), the deputy judge commented[18] that:

> "*It may well be that so long as it is not alleged that the liquidator has done or failed to do something that might have harmed creditors as a whole, there is scope for the imposition of a duty of care to individual secured or preferential creditors not to misapply distributions so as to provide a remedy for creditors whose interests are damaged by a misapplied distribution, cf IRC v Goldblatt … and the claims that were not struck out in Kyrris …*"

19. The analysis in the *Lomax Leisure* case does not seem precisely to mirror that of David Richards J in *HIH* (to which the deputy judge did not refer), but to the extent that there is any difference of approach between them, we believe the analysis in *HIH* is the more accurate.

The office-holder as agent of the company

20. In cases involving personal claims against liquidators, it is also necessary to consider whether the conduct of which complaint is made was undertaken by the liquidator acting as principal in his capacity as office-holder or as agent for the company of which he is liquidator.

21. David Richards J discussed the distinction in *In re Southern Pacific Personal Loans Ltd*.[19] He held that in exercising any rights in respect of certain personal data within the meaning of the Data Protection Act 1998, which had been processed by the company prior to its liquidation, liquidators would be acting as agents of the company. In those circumstances, the liquidators could not be personally responsible for compliance with provisions of the DPA in respect of the data processed by the company, including but not limited to responding to data subject access requests made under section 7.

22. As to when a liquidator may be acting as principal, David Richards J stated:

> "*17 … Some of the duties of a liquidator are undertaken by him as principal in that capacity and not on behalf of the company of which he is the liquidator. For example, where he receives and adjudicates on proofs of debts submitted by those claiming to be creditors of the company, he does so as the liquidator and not as an agent of the company …*
>
> *23 The different capacities in which a liquidator may act are illustrated by legal proceedings which may be brought. A company in liquidation may commence or defend legal proceedings in its own name. If it does so it is the company which is the party and not the liquidator. In instructing lawyers to act on behalf of the company in such proceedings, the liquidator acts as the agent of the company. It is for that reason that security for costs may be ordered against a company in liquidation which brings proceedings. This may be*

[18] At [34], sub-para (5).
[19] *Oakley Smith v Information Commissioner* [2014] Ch 426.

contrasted with those proceedings brought by the liquidator in his own name, as provided by various provisions of the Insolvency Act 1986, such as sections 212-214 and 238-239. In those cases it is the liquidator himself who is the party and ordinarily security for costs will not be ordered against him."

23. The judge referred to several authorities dealing with situations in which a liquidator acts as agent with no personal liability. For example, it has been held that a solicitor appointed by a liquidator to act on behalf of the company has no claim against the liquidator personally for fees due to the solicitor.[20] Similarly, it has been held that an assignment of a company's lease by a liquidator on behalf of the company would be an assignment by the company itself and could therefore cause the company to be in breach of covenant for not having obtained consent of the lessor.[21] A liquidator who caused a company to adopt a contract of sale had no personal liability to the sellers.[22] And a liquidator who caused a company in liquidation to continue to occupy premises was not liable for rent and rates (albeit that they may be payable as expenses of the liquidation).[23] He concluded that the authorities establish that in exercising his powers and fulfilling his duties in respect of the property of the company, the liquidator acts as agent for the company.

24. Similar considerations will apply in claims against administrators. Paragraph 69 of Schedule B1 to the Insolvency Act 1986 provides that, in the exercise of his functions, an administrator acts as the company's agent. When he enters into a contract as administrator it will be a matter of construction of the contract whether the insolvent company is liable under the contract or he is liable personally or they are both liable. In *Stewart v Engel* [2000] BCC 741 (relating to the status of liquidators but the principles are the same) HHJ Raymond Jack QC (as he then was) summarised the authorities (at 744D) as follows:

"So the general position is that a liquidator contracts as the agent of the company and does not incur personal liability. He may, however, as may any agent, contract on terms which show that he is undertaking a personal liability. The contract in question must be examined to see whether that is so."

25. Professor Goode summarises the position (at paragraph 11-99) as follows: [24]

"Liabilities arising under new contracts constitute expenses of the liquidation and as such are payable, not provable. In considering liabilities arising under new contracts, it is necessary to distinguish contracts entered into by the administrator personally from those

[20] *In re Anglo-Moravian Hungarian Junction Railway; Ex p Watkin* (1875) 1 Ch D 130 (CA).
[21] *In re Farrow's Bank Ltd* [1921] 2 Ch 164 (CA).
[22] *Stead Hazel & Co v Cooper* [1933] 1 KB 840 (Lawrence J).
[23] *In re Toshoku Finance UK plc* [2002] 1 WLR 671, [31]-[34].
[24] *Principles of Corporate Insolvency Law* 4th Ed., (2011) at paragraph 11-99, under the sub-heading "The administrator's liability."

entered into by the company through the administrator. If for the benefit of the administration the administrator enters into a contract in his own name – which could happen because that is the only basis upon which the other party is willing to deal – he is personally liable on the contract but has a right to be indemnified by the company. The administrator incurs no personal liability on new contracts into which he enters as agent for the company except where he agrees to assume such liability. Accordingly, it is only the company which incurs a liability on such contracts. In this respect, the administrator is much less vulnerable than the administrative receiver, who is personally liable on contracts entered into by him, whether in his own name or in the company's name."

26. As observed in Fletcher, Higham & Trower *Corporate Administrations and Rescue Procedures:*[25] "*Administrators are invariably insistent upon excluding all potential personal liability, however remote*" (and see para 10.16 on the difficulties of excluding personal liability). Such an express negative declaration of personal non-liability can take various forms. Professor Goode refers to the recognised method of avoiding such personal liability - by the contract making it clear that the administrator contracts only as agent for the company.

27. It follows that an administrator/liquidator is not personally liable on contracts which he concludes on behalf of the company unless the contract otherwise expressly provides. So, for example, if goods are held by the company under a hire-purchase agreement, he will not incur liability if the equipment is retained and used for the proper purpose of the administration. But it has been said that:

"… administrators remain exposed to a claim so long as they have not been released, whether they committed the tort of conversion or not. That is because the administrators are officers of the court and at all times subject to the court's direction. If they wish to make use of another party's property for the purposes of the administration and cannot agree terms, they can seek the directions of the court. If administrators wrongly retain goods otherwise than for the proper purposes of the administration, for example, to use them as a bargaining counter, the owner can apply to the court to direct the administrators to hand over the goods without the need for action, and to pay compensation for having retained them in the meantime … the administrators, until their release, remain liable at the direction of the court to pay not only for the use of the goods of another, but also for compensation for having wrongfully refused leave to the owner to retake the goods."[26]

[25] 2nd Ed., (2004), para 10.12.
[26] *Barclays Mercantile Business Finance Ltd v Sibec* [1992] 1 WLR 1253, 1259D (Millett J).

28. It is fair to say that, whilst personal liability in such circumstances would not be in doubt, there does not appear to be a reported example of the use of the procedure envisaged by Millett J in this passage.

Liability for fraud

29. An office-holder who engages in misconduct which amounts to the tort of fraud or deceit, incurs personal liability applying ordinary common law principles. Such cases generally require proof of conduct undertaken with a dishonest intention to cause, and which did in fact cause, loss to the claimant. It is no answer the office-holder was acting in a representative capacity or as agent for another. "No one can escape liability for his fraud by saying: 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable."[27] It is well established that claims for damages for fraud and bad faith can be brought by an individual claimant against an office-holder by way of personal claim outside of the collective insolvency regime.[28]

Liability for other torts

30. An insolvency office-holder who commits a tort while acting as administrator is personally liable for it and if he intends, procures and shares a common design for the commission of a tort by the company, he could be made liable as a joint tortfeasor.[29] An insolvency officer-holder is personally liable in the tort of conversion if he deals with third party assets, subject to statutory defences.[30]

31. The so-called rule in *Said v Butt*[31] is that an agent cannot be sued for interfering with contractual relationships between his principal and the other contracting party. The rule has been relied on to suggest that insolvency office-holders cannot be sued in tort whether for inducing breach of contract or in conspiracy, in respect of any acts on their part which they undertake in good faith in their capacity as agents of the company.

32. *Lictor Anstalt (a company registered in Liechtenstein) v MIR Steel UK Limited*[32] concerned two applications in an action relating to the allegedly unlawful sale of steel-making equipment by a company in administration. Lictor Anstalt (the claimant) supplied equipment to A under the

[27] *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 & 4)* [2003] 1 AC 959 (HL), Lord Hoffmann at [22]; see also Lord Rodger at [40]. The case concerned the personal liability of a company director, not an office-holder, but the principle is one of general application.
[28] In the context of liquidation, see for example *Knowles v Scott* [1891] Ch 717 (Romer J) at 723 (… "the liquidator is not liable to an action for damages for delay in performing his duty [to make a distribution] when that delay was not wilful or fraudulent and in no way arose from *mala fides* on his part").
[29] Lightman & Moss: The Law of Administrators and Receivers of Companies, 5th Ed. (2011) at para 12-051.
[30] *Hachette UK Ltd v Borders (UK) Ltd* [2009] EWHC 3487 (Ch).
[31] [1920] 3 KB 497 (QBD).
[32] [2014] EWHC 3316 (Ch).

terms of an agreement. Following the making of the administration order over A, its joint administrators marketed and then negotiated the sale of the equipment, together with the bulk of the other assets of the business, to L. A, acting by its administrators, and L agreed that the sale should be effected by means of a hive down of the assets and business to a company formed by the administrators called MIR, followed by a sale of MIR to L. The claimant alleged that it retained title to the equipment at the time of the sale and that the sale constituted a conversion of its property. In the alternative, it alleged that A had acted in breach of the agreement by selling the equipment to MIR and that MIR and L were liable for the tort of inducing a breach of contract by A. The claimant also alleged that the same facts gave rise to a claim for an unlawful means conspiracy involving A, MIR and L. In the first application, MIR sought summary judgment to dismiss the allegations by the claimant. In the second application, MIR sought to join A and its administrators as Part 20 defendants. The court held that MIR was unable to make out any claims against the administrators and A which had any real prospect of success.

33. The judge recorded[33] that it was common ground between the parties before him that the rule in *Said v Butt* applied such that the administrators could not be sued in tort whether for inducing breach of contract or in conspiracy in respect of any acts on their part which they undertook in good faith in their capacity as agents of A. Later in his judgment,[34] the judge expressed the view that the application of the rule to administrators was plainly correct.

34. However, in the earlier decision in *SCI Games Ltd v Argonaut Software*[35] the applicability of the rule in *Said v Butt* to administrators was held to be inappropriate for summary determination. It is not clear whether that decision was cited in *Lictor Anstalt*. Moreover, the applicability of the rule to administrators is doubted by Lightman & Moss in *The Law of Administrators and Receivers of Companies*[36] who conclude that:

> *"There is accordingly no reason in principle why an administrator should not be exposed to liability for unlawfully interfering with the contracts of a company in administration. However, any unlawfulness would have to be judged in the light of the purpose of administration and the administrator's statutory powers. So, for example, there may be circumstances where it is in the interests of creditors as a whole that the administrator caused the company in administration to breach a contract with one particular creditor. In such circumstances, it is difficult to see how an action could lie against the administrator, even assuming that he is not protected by the rule in Said v Butt."*

[33] At [38].
[34] At [54].
[35] [2005] EWHC 1403 (Ch).
[36] 5th Ed., (2011), para 12-052.

35. The concession by MIR that the rule applied was fatal to its application to join the administrators as parties to any claim for a contribution, whether for procuring a breach of contract or unlawful means conspiracy. Thereafter, the interest in this decision is MIR's argument in favour of dismissing the claim against it based on the doctrine of justification. This argument had been run by the administrators as part of their successful resistance of the application to join them as parties. They contended that, in addition to their defence based on the rule in *Said v Butt*, they had a complete defence of justification to the claim in tort for inducing a breach of contract by reference to the need to carry out their statutory functions and the need to give good title to purchasers. MIR's case was that, if the administrators could rely on justification, MIR was also entitled to do so as purchaser from the administrators. The court acknowledged there was "considerable force" in MIR's submissions that the defence of justification should be extended to circumstances where administrators sold assets in breach of contract in pursuit of their statutory functions and purposes. However, as a purely personal contractual right of the claimant was under consideration in this case (as opposed to proprietary rights and restrictions currently respected in the administration process), this was not a decision to be taken for the first time in the absence of full argument after trial, based on findings of fact. The court therefore considered it inappropriate to dismiss the claim against MIR on an application for summary judgment.

Office-holder liability for litigation costs

32. Liability for litigation costs is in a special category and the subject of a series of judge-made rules. The rules of thumb are as follows.

33. **First**, if the office-holder is the named claimant/applicant, costs orders will be against him personally, subject to his indemnity out of the estate. In *Re Wilson Lovatt & Sons Ltd,*[37] Oliver J explained that an office-holder is not in a special position relating to costs when he institutes court proceedings in his own name:

> *"I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who initiates proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator ..."*

[37] [1977] 1 All ER 274, at 285.

34. In *BPE Solictors v Gabriel,*[38]Lord Sumption stated in respect of the liability for litigation costs of a trustee in bankruptcy:

> *"4. The ordinary rule is that a trustee in bankruptcy is treated as party to any legal proceedings which he commences or adopts, and is personally liable for any costs which may be awarded to the other side, subject to a right of indemnity against the insolvent estate to the full extent of the assets ...*
> *10. … But it is well established that he will be treated as the party if he has in fact adopted the proceedings by conducting the litigation, even if there has been no formal substitution: Trustee of the Property of Vickery (a bankrupt) v Modern Security Systems Ltd [1998] 1 BCLC 428. It follows that an order for costs in favour of the other side is made against the trustee personally in the same way as it would be made against any other unsuccessful litigant. The cost of satisfying the order is treated as an expense of performing his office, for which he assumes personal liability just as he does for any other expenses and liabilities incurred in the administration and distribution of the estate, but subject to a right of indemnity against the assets if the expenses and liabilities were properly incurred."*

35. **Secondly**, as indicated in the last sentence of the above passage, the office-holder will look to the estate to recoup an adverse costs liability. Whether there should be recoupment is a question which arises as a matter of the administration of the insolvent estate. The court which decides that question of administration of the estate is not necessarily the same court as the court in which the office-holder made his application in which he failed (though, as here, it often will be). In deciding whether the office-holder ought to be entitled to recover the costs which he has been ordered to pay from the assets of the company, the court dealing with the administration is exercising its supervisory jurisdiction over its officers. In *Re Wheal Vyvyan Mining Co, Wescomb's Case,*[39] the Court of Appeal in Chancery refused to make an order for the payment of the liquidator's costs out of the assets but left him to apply to the court having conduct of the winding up.

36. In *In re MC Bacon Ltd*,[40] Millett J stated that "A liquidator's right to recoup out of the assets of the company expenditure properly incurred by him, including costs of unsuccessful proceedings properly brought by him, has been recognised for over 100 years: see *In re Silver Valley Mines* (1882) 21 Ch D 381; *In re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274." He decided that there was no automatic right to such recoupment (see also *Mond v Hammond Suddards* [1999] 3 WLR 697).

[38] [2015] UKSC 39, [2015] BPIR 779, [2015] AC 1663.
[39] (1874) 9 Ch App 553.
[40] [1991] Ch 127, at 140.

37. In *Lewis v IRC,*[41] the Court of Appeal stated (para 41) that the legal source of the power exercised for over 100 years referred to by Millett J in *Re MC Bacon* was unclear. The Court of Appeal was unable to find any statutory basis for it in the statutory code and commented that it was surprising to find that, as was suggested, the source was in the inherent jurisdiction of the court. The right of recoupment or indemnity will not be lost unless the office-holder has been unreasonable or negligent or otherwise acted improperly. It follows that the circumstances in which the court makes an order for costs against an office-holder, the economic effect of which is to visit him with personal liability, are many and varied, for recent examples, see e.g. *Coyne v DRC Distribution Limited,*[42] *Howard v Savage,*[43] *Smurthwaite v Simpson-Smith,*[44] and *Re Capitol Films Ltd (In Administration).*[45]

38. **Thirdly**, if the office-holder should cause the litigation to be commenced or continued not in his own name but in the name of the company, it will be a rare case in which he is visited with an order for costs personally. The principles remain as stated in *Metalloy Supplies Ltd v MA (UK) Ltd*[46]where Millett LJ said (in relation to the liability of a director but the point has greater force vis-a-vis an insolvency office-holder):

> *"[A costs order against a non-party] may be made in a wide variety of circumstances, where the third party is considered to be the real party interested in the outcome of the suit. It may also be made when a third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith … the doctrine of the separate liability of the company would be eroded and the principle that such order should be exceptional would be nullified."*

[41] [2001] 3 All ER 499; [2001] 2 BCLC 392.
[42] [2008] EWCA Civ 488; [2008] BCC 612; esp para 2 of the judgment of Rimer LJ.
[43] [2006] EWHC 3693 (Ch); [2007] BPIR 1097, esp paras [22] and [23] of the judgment of Lewison J.
[44] [2006] EWCA Civ. 1183; [2006] BPIR 1504, esp para [25] of the judgment of Chadwick LJ.
[45] [2010] EWHC 3223 (Ch); [2011] 2 BCLC 359.
[46] [1997] 1 WLR 1613.

39. **Fourthly** (and a sting in the tale), a successful litigant in proceedings either with the liquidator, or with the company through its liquidators, or with the company after liquidation has begun, is prima facie entitled to be paid *immediately* the costs which are ordered to be paid to him, and to be paid in full. The onus is on the liquidator to show that immediate payment cannot be made, or that other persons have claims in priority or ranking pari passu.[47] The court has jurisdiction to order that the costs of litigation which has been continued by the liquidator be paid as an expense of the winding up in priority to the general costs of the winding up: *Re Movitex Ltd.*[48] When adverse costs have to be met prior to any of the costs and expenses of the liquidation, this means that the successful litigant is entitled to look not only to be paid out the costs in hand but also to the repayment of any funds spent (e.g. in paying remuneration to the office-holders). So, in *Re Pacific Coast Syndicate Ltd,*[49] there had been a balance at bank of £500 when judgment was entered against the company. The liquidator then paid £375 to his solicitors on account of his own litigation costs and the balance to his successful adversary who obtained an order that the liquidator should pay him the balance out of his own pocket. Although the liquidator was held to have a right of recoupment out of the estate, this was of no practical benefit to him unless and until any further assets should come into his hands. In a real, economic sense, the liquidator was made personally liable in respect of the costs which the company had been ordered to pay.

40. **Fifthly**, rule 7.39 of the Insolvency Rules 1986 directly protects an IP against litigation costs when he is made party to proceedings in that capacity.[50] It is headed: "*Award of costs against official receiver or responsible insolvency practitioner"* and provides**:**

> *"Without prejudice to any provision of the Act or Rules by virtue of which the official receiver is not in any event to be liable for costs and expenses, where the official receiver or a responsible insolvency practitioner is made a party to any proceedings on the application of another party to the proceedings, he shall not be personally liable for costs unless the court otherwise directs".*

This provision applies equally to an application brought by another party to which the trustee is joined as a necessary party, see *Re Mordant*, where Sir Donald Nicholls V-C indicated the approach of the court to r.7.39 as follows:

---

[47] *Re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26*; Re London Metallurgical Co* [1895] 1 Ch 758, and see *Smith v UIC Insurance Co Ltd* [2001] BCC 11 (the principle in the cases cited is applicable in the context of provisional liquidation). The fact that costs orders are payable immediately and in full might lead the court to dismiss an application for security for costs made against the company in liquidation or provisional liquidation: *Smith v UIC Insurance Co Ltd* above.
[48] [1990] BCLC 785.
[49] [1913] 2 Ch 26.
[50] But not otherwise, see *Wright Hassall LLP v Morris* [2012] BPIR 1310, [2013] BCC 192 (CA).

"I do not think these factors lead to the conclusion that it would be right to depart from what r.7.39 indicated is to be the starting point regarding costs orders against respondent trustees in bankruptcy, namely, there is no personal liability unless, in effect, there is good reason to direct otherwise. In my view this is not a case for me to direct otherwise."

Rule 7.39 is without prejudice to the other provisions in the Act or Rules by which the Official Receiver or trustee are not liable for costs in any event, e.g. rr 6.105(6), 6.132(4), 6.142(5), and 6.177(2).

Stephen Davies QC
Neil Levy