Bankruptcy and Personal Insolvency Reports/2010/Phillips and Another v McGregor-Paterson - [2010] BPIR 239

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Phillips and Another v McGregor-Paterson

[2009] EWHC 2385 (Ch)

Chancery Division

Henderson J

2 October 2009

Liquidation – Insolvency proceedings – Preference – Misfeasance – Summary judgment – Insolvency Act 1986, ss 127, 212, 214, and 239–241 – Companies Act 1985, s 727 – Insolvency Rules 1986, Part 7

The claimants were the joint liquidators of Wilson Properties UK Ltd in respect of which a compulsory winding-up order was made on 18 July 2005. By a claim form issued in the Chancery Division of the High Court on 31 July 2006, the liquidators began proceedings against Mr **McGregor-Paterson** alleging that he had misapplied or otherwise became accountable for the money of the Company and was guilty of misfeasance and/or breach of fiduciary duty in his capacity as a director of the Company. The proceedings were stayed pending an appeal in respect of an application by another director, Mr Pierre Wilson, to rescind the winding-up order and an investigation into the affairs of the Company by the Public Interest Unit of the Insolvency Service. The appeal was dismissed and on 1 November 2007 the Public Interest Unit wrote to Mr **McGregor-Paterson** saying that no further action would be taken as a result of the investigation, but this did not affect the duties of the liquidator. The stay was lifted and on or about 17 January 2008 the liquidators served particulars of claim seeking three separate sums totalling approximately £54,700, £155,500 and £50,050, together with interest. Reliance was placed by the liquidators on one or more of ss 127, 212, 214 and 239–241 of the Insolvency Act 1986. On 3 March 2008 Mr **McGregor-Paterson** served a defence denying the allegations and emphasising that he had had little to do with the day-to-day running of the Company. On 8 May 2008 the liquidators issued an application to strike out the defence or for summary judgment. In response, Mr **McGregor-Paterson** relied on a witness statement to which was exhibited a bundle of documents, including the letter from the Public Interest Unit, as well as two statements from Angelo Antippa which had been served in the rescission proceedings. Mr Antippa was a chartered accountant who had been retained by the directors to deal with, amongst other things, the preparation of the Company's accounts. In general terms his evidence was directed towards establishing that the Company was not insolvent on the date of the winding-up order either on a balance sheet basis or on the basis of inability to pay debts as they fell due. The Master gave judgment for the claimants by way of summary judgment. Mr **McGregor-Paterson** filed an appellant's notice out of time seeking permission to appeal. He also applied for an extension of time. It was agreed that argument should be heard on all matters together, but the main thrust was on the merits of the appeal itself.

Held – granting permission to appeal out of time and allowing the appeal against summary judgment –

(1) The present proceedings were insolvency proceedings to which Part 7 of the Insolvency Rules 1986 applied, but the use of the wrong form was a 'formal defect' which was capable of being cured under r 7.55 as there was no substantial injustice to the parties.

(2) Whilst the claim form had understated the value of the claim that did not give rise to a jurisdictional issue as it exceeded £15,000 and any underpayment of the court fee could be dealt with by an undertaking from the liquidators' solicitors to ensure that the appropriate fee was paid.

(3) Section 127 of the Insolvency Act 1986 did not provide a cause of action against directors but rather made dispositions void so as to enable liquidators to

recover the same from recipients. Mr **McGregor-Paterson** was not a recipient. The Master proceeded on the footing that Mr **McGregor-Paterson** had not permitted or authorised the payments to be made but rather on the basis that Mr **McGregor-Paterson** had been guilty of misfeasance or breach of fiduciary duty in not taking effective steps to prevent payments being made which had caused loss to the Company. Such issue would have to go to trial, including the possible defence based on s 727 of the Companies Act 1985. The alternative claim based on wrongful trading would also need to be tried.

(4) In respect of the preference claim for payments to or for the benefit of Mr **McGregor-Paterson** and Mr Wilson, the issue whether the Company was insolvent when each of the payments were made could not be determined on a summary basis. The evidence before the Master was wholly insufficient to establish either an inability to pay debts as they fell due or balance sheet insolvency. Furthermore, whilst there was a presumption under s 239(6) of the Insolvency Act 1986 that the payments here were influenced by a desire to produce the effect set out in s 239(4), it was open to Mr **McGregor-Paterson** to show the contrary and, save in the clearest of cases, it would require a trial to determine whether the presumption had been rebutted. The alternative claim of misfeasance could only be determined after a trial.

(5) In respect of the final claim for which judgment was given, namely the repayment to Ms Hall and Mr Mooney of a loan where the loan agreement had been entered into personally by Mr Wilson but the moneys were allegedly borrowed for the benefit of the Company, the only properly pleaded claim was that this constituted a preference, but this again depended upon showing insolvency at the material time which for the reasons set out in (4) above could not be determined on a summary basis. Furthermore there was no reverse burden of proof applicable as Ms Hall and Mr Mooney were not on the available evidence connected with the Company. Even if there had been a properly pleaded case in misfeasance, Mr **McGregor-Paterson**'s explanation about the loan providing an indirect method of finance for the Company could only be dealt with at trial. There was also the possibility of relief under s 727 of the Companies Act 1985.

Per curiam: although the Master had stood over for further argument the allegation that the books and records of the Company had been so poorly maintained as to ground misfeasance, it was appropriate to comment that although such an allegation, if substantiated, might place a director in evidential difficulties and encourage the making of robust findings of fact, it was difficult to see how such failure could itself cause loss to the Company and thus ground a separate claim for misfeasance.

Statutory provisions considered

Solicitors Act 1974, s 61

Companies Act 1985, ss 459(1), 727(1)

Insolvency Act 1986, Part IV, ss 123(1), (2), 127, 212(1)(a), (3), 214, 238–241, 249

Companies Act 2006, ss 1157(1)–(3)

Civil Procedure Rules 1998 (SI 1998/3132), rr 3.4(2)(a), 3.10, Part 7, PD 7, r 24.2(a)(ii)

Insolvency Rules 1986 (SI 1986/1925), Part 7, rr 7.2(1), (2), 7.47(4), 7.55

Civil Proceedings Fees Order 2004 (SI 2004/3121)

Cases referred to in judgment

Cohen and Another v Selby and Another [2001] 1 BCLC 176, [2000] All ER (D) 1972, CA

Continental Assurance Co of London plc (In Liquidation) (No 2), Re [1998] 1 BCLC 583, ChD

Kirbys Coaches Ltd, Re [1991] BCLC 414, [1991] BCC 130, ChD

Osea Road Camp Sites Ltd, Re, sub nom Bamber v Eaton [2004] EWHC 2437 (Ch), [2005] 1 WLR 760, [2005] 1 All ER 820, ChD

Singlehurst v Tapscott Steamship Co Ltd [1899] WN 133, CA

James Couser for the joint liquidators, the claimants

*Jane Giret QC for Mr **McGregor**-Peterson, the defendant*

Cur adv vult

2 October 2009

HENDERSON J:

Introduction

[1] This is my judgment on two applications and an appeal by the defendant, Mr Neil **McGregor-Paterson**, which I heard on 18 and 26 June 2009. Mr **McGregor-Paterson** was a director of Wilson Properties UK Ltd (WP or the company) in respect of which a compulsory winding-up order was made in the Liverpool District Registry of the High Court on 18 July 2005. On 2 August 2005 the claimants, Mr **Phillips** and Mr Mehta, were appointed as joint liquidators of the company. By a claim form issued in the Chancery Division of the High Court on 31 July 2006 the liquidators began proceedings against Mr **McGregor-Paterson**, alleging that he had misapplied or otherwise become accountable for money of WP, and was guilty of misfeasance and/or breach of fiduciary duty in his capacity as a director of the company. The proceedings were then stayed by an order of Master Price made on 21 August 2006, pending the

outcome on appeal of an application by another director of WP, Mr Pierre Wilson, to rescind the winding-up order of 18 July 2005, and the outcome of an investigation into the affairs of WP by the Public Interest Unit of the Insolvency Service.

[2] Mr Wilson's application to rescind the winding-up order had been dismissed by District Judge Farquhar in the Peterborough County Court, and his appeal against that order, together with an application made directly to the High Court to remove the liquidators from office, was heard by Mann J on 17 and 18 January 2007. In a reserved judgment which he handed down on 1 February 2007, Mann J dismissed the appeal and also dismissed the application to remove the liquidators.

[3] On 1 November 2007 the Public Interest Unit wrote to Mr **McGregor-Paterson** confirming that no action would be taken as a result of the investigation into the company's affairs. The writer explained that, for this reason, no formal report would be produced. He then gave a brief account of the investigations which had been made, and the conclusions which had been reached. He concluded by saying:

> 'I trust that this is of assistance to you, however, I must emphasise that whilst my investigation may be satisfactorily concluded, this does not affect the duties of the Liquidator who will form his own views and proceed with the liquidation as he sees proper.'

[4] In the light of these developments, the stay on the present proceedings was lifted and on or about 17 January 2008 the liquidators served particulars of claim seeking payment by the defendant of three separate sums totalling approximately £54,700, £155,500 and £50,050 respectively, together with interest. Each claim was pleaded on various grounds which I will need to

examine later in this judgment, but in summary reliance was placed on one or more of the following provisions in the Insolvency Act 1986:

> (a) section 127 (which avoids dispositions of a company's property after the commencement of the winding up);
>
> (b) section 212 (which provides a summary remedy for misfeasance by directors which may be invoked in the course of the winding up of a company);
>
> (c) section 214 (which provides a remedy for wrongful trading before the commencement of the winding up); and
>
> (d) sections 239–241 (which enable the court to avoid, or grant appropriate relief in respect of, certain preferences given or transactions at an undervalue entered into in periods of up to 2 years before the onset of insolvency).

[5] Mr **McGregor-Paterson** was at this stage a litigant in person, and he remained one until shortly before the hearing of the present applications when he was able to secure the services of Mrs Jane Giret QC under the Public Access Scheme. On 3 March 2008 he served a defence, in which he denied the allegations against him and emphasised that he had had little to do with the day to day running of the company.

[6] On 8 May 2008 the liquidators issued an application asking for an order that the defence be struck out pursuant to CPR r 3.4(2)(a), or alternatively for summary judgment pursuant to CPR r 24.2(a)(ii). The application was supported by a witness statement dated 7 May 2008 of the second claimant, Mr Mehta, in which he explained why the liquidators took the view that the defence disclosed no reasonable grounds for defending the claim, and that there was no other compelling reason why the case should go to trial.

[7] Mr **McGregor-Paterson** responded with a witness statement dated 11 June 2008, which rather confusingly appears in the bundle in two versions, although there seems in fact to be very little difference between them. If it matters, the second version is the one upon which Mr **McGregor-Paterson** relies. He exhibited to his witness statement a bundle of documents, including the letter from the Public Interest Unit of the Insolvency Service dated 1 November 2007 to which I have already referred, and also two statements of a Mr Angelo Antippa dated 12 March and 7 May 2006. These statements were apparently served and relied upon by Mr Wilson in the rescission proceedings in the Peterborough County Court. Mr Antippa was a chartered accountant, and registered auditor, who practised as an independent accountant, and (according to his evidence) had been retained by the directors of WP to act for them in the preparation of the company's accounts and in ensuring compliance with the filing requirements of the relevant tax and company authorities. He said that he had also assisted the directors in the preparation of a business plan prior to the formation of the company. In general terms, his evidence was directed towards establishing that WP was not in fact insolvent, either on a balance sheet basis or on the basis of inability to pay debts as they fell due, on the date when the winding-up order was made, namely 18 July 2005.

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[8] The liquidators' application was heard by Deputy Master Farrington on 18 June 2008. The liquidators were represented, as they have been before me, by solicitors (Messrs Blake Lapthorn Tarlo Lyons) and counsel (Mr James Couser). Mr **McGregor-Paterson** appeared in person, and so far as I am aware had no Mackenzie friend to assist him. The Master reserved judgment, and on 14 August he handed down a written decision in which he held that summary judgment should be granted for each of the three sums claimed by the liquidators, and that there was no other compelling reason why the case should go to trial. In the light of these conclusions, it was unnecessary for him to deal with the liquidators' alternative claim that the defence should be struck out, and he did not do so. By his order of 14 August, entered on 19 August 2008, the Master made, or purported to make, appropriate declarations to reflect his written decision, and ordered the defendant to pay the three sums totalling £260,462.45, together with interest at the rate of 8% from 25 July 2005, within 14 days. He also ordered the defendant to pay the costs of the application on the standard basis, with an interim payment on account of such costs in the sum of £45,000 (inclusive of VAT) to be made within the same 14-day period.

[9] On or about 6 October 2008, Mr **McGregor-Paterson** filed an appellant's notice seeking permission to appeal against the whole of the order of Deputy Master Farrington. The grounds of appeal which he drafted alleged that the Master had made various errors of fact and law in his judgment, and also relied on a number of alleged procedural irregularities. The appellant's notice was filed well out of time (the usual 21-day period for appealing having expired on 4 September), so Mr **McGregor-Paterson** also applied for an extension of time, and in a witness statement dated 6 October 2008 he gave evidence of difficulties in his personal and medical circumstances since 14 August by way of explanation for the delay.

[10] The defendant's applications for permission to appeal and an extension of time were considered on paper by Kitchin J, who directed on 10 February 2009 that the applications should be listed for an oral hearing, with the appeal hearing to follow immediately if permission was granted. Thus it is that the two applications, and the appeal itself, came on for hearing before me in June. It was agreed at the outset that I should hear argument on all of the matters together, and in practice both sides devoted nearly all of their time to the merits of the appeal itself. I find it convenient to follow the same course in this judgment, and I will begin by considering the merits of the appeal on the assumption that permission to appeal, and the necessary extension of time, have been granted. To the extent that it is necessary to do so, I will then consider those two applications.

The background facts

[11] WP was incorporated on 24 July 2003 as a property development company, its principal business being the purchase of barns and their conversion to residential dwellings for onward sale. The managing director and prime mover of the business was Mr Wilson. He appears to have been the sole original shareholder, but following the death of his wife their four adult children also became directors and minority shareholders. By this date, too, Mr **McGregor-Paterson** had made a substantial investment in the company, and he had been offered, and accepted, the opportunity to become a director

and 15% shareholder. According to Mr Antippa, Mr **McGregor-Paterson** contributed business development and marketing skills, having gained experience over several years working in senior roles in the public relations industry, both in the UK and the USA. As at 31 July 2004 the issued share capital of the company consisted of 200 ordinary 'A' shares of £1 each, and 200 redeemable ordinary 'B' shares of £1 each. Mr Wilson held 120 (60%) of each class of share, and Mr **McGregor-Paterson** held 30 (15%). The remaining 25% was held by the Wilsons' four children.

[12] During its first year of activity the company acquired land at two sites in Cambridgeshire and began development work. However, there was a defect in the title to one of the sites, as a result of which the company sued the solicitors who had acted for it in the purchase transaction. These proceedings eventually bore fruit in a settlement agreement in March 2005 under which the company accepted £325,000 inclusive of costs.

[13] The company prepared its first accounts for the period from its incorporation to 31 July 2004. The directors' report was signed by Mr **McGregor-Paterson** on 1 April 2005, and the balance sheet was signed by Mr Wilson on the same date, in each case signifying approval on behalf of the board. The report recorded that the directors were satisfied that the business of the company was 'a going concern'. The balance sheet showed net liabilities of £162,937, but this was on the footing that work in progress was valued at the lower of cost and net realisable value, and it also included as amounts falling due to creditors after more than one year the sum of £359,249 in respect of directors' loans. The other loans falling due after more than one year, amounting to £713,989, were secured on the Company's assets and were repayable over 10 years. The secured lender was the Lancashire Mortgage Corporation Ltd (the LMC), with whom (according to Mr Antippa) Mr Wilson had a long-term relationship. There is no suggestion anywhere in the evidence that the LMC was ever concerned about its security or the financial health of the company. The profit and loss account as at 31 July 2004 revealed a nil turnover and a retained loss carried forward of £163,337, comprising administrative expenses of £49,929 and interest payable (to the LMC) of £113,408.

[14] On 8 April 2005 £190,000 of the settlement moneys arising from the litigation with the company's former solicitors was paid into the company's bank account, which was at that date overdrawn in a sum of just under £8,000. On 19 May 2005 £50,050 was paid out of the account, in repayment of a loan which had initially been made by a Ms Hall and a Mr Mooney to Mr Wilson on 25 August 2004, and the terms of which had subsequently been varied in February 2005. This repayment is one of the transactions attacked by the liquidators in the present proceedings.

[15] On 25 May 2005 a winding-up petition was presented against the company by a firm of solicitors who had briefly acted for it, The Specter Partnership. To avoid confusion, I should make it clear that The Specter Partnership was not the firm which the company had sued and with which the settlement agreement had been reached. In his witness statement Mr **McGregor-Paterson** explains that he had initially introduced The Specter Partnership to the company as a result of a good relationship which he had built up with the firm's senior partner, Mr Ken Specter, and his conveyancing

team between May and December 2004, when Mr **McGregor-Paterson** was managing a London-based estate agency of which he was a co-owner.

[16] In his judgment of 1 February 2007, Mann J described the background to the petition in the following terms:

> '[WP] owned various properties. From time to time it required the assistance of solicitors in conveyancing and in litigation. In 2004 it was engaged in litigation with one of its former solicitors. It engaged Specter to act for it. On 24 September 2004 it signed a form entitled "Commercial Litigation" on one line and "Terms of Engagement" on the next … Specter acted for a few months and the matter came to an end.
>
> The judgment appealed from [*ie the judgment of District Judge Farquhar*] refers to a detailed bill of costs having been dated 15 March, which was apparently the subject of some discussion between the parties, followed by a threat to serve a formal bill. Such a bill was served under cover of a letter dated 6 April. The amount claimed was £51,115.73. On or about 19 April 2005 Specter served a statutory demand in the sum of £42,656.16, giving credit for sums paid by [WP]. That amount was not paid. On 25 May 2005 Specter presented a petition to wind up on the basis of that demand. At the end of June … [WP] served a form of defence document in opposition to the petition taking a number of points in opposition to the petition, including the inflation of the bill, invoicing for non-existent work and breach of duty. Specter responded with a witness statement from one of its consultants, pointing out (among other things) that it was not the case that the whole of the debt was disputed. [WP] did not attend the hearing of the petition on 18 July 2005. Apparently the directors were on holiday at the time. I am told that there was some argument at the hearing (in the sense that the matter was not treated as automatic) and the winding-up order was made.'

[17] As appears from that summary, the company did not accept that the petition debt was properly due and owing to The Specter Partnership, but although a written document was served setting out some of the company's grounds of opposition no steps were taken to appear, or to arrange for the company to be represented, at the hearing of the petition on 18 July 2005. In those circumstances it is not surprising that a winding-up order was made. Nor were any prompt steps taken to apply for rescission of the winding-up order. The application which eventually came before District Judge Farquhar was not made until January 2006, and it was only as amended by a further application notice dated 22 March 2006 that it explicitly sought relief on the principal ground canvassed before the district judge and Mann J, namely that the winding-up order was invalid and made without jurisdiction because it was in substance an action based on a contentious business agreement contrary to s 61 of the Solicitors Act 1974. That contention was rejected by the district judge, and was also rejected, although for somewhat different reasons, by Mann J on appeal. The district judge went on to hold that, if he was wrong on the first point, he would in any event have refused permission for the rescission application to be brought out of time. By virtue of r 7.47(4)

of the Insolvency Rules 1986, any such application must be made within 7 days of the making of the winding-up order. He said that he could see no justification for the delay of some 7 months before any appropriate legal steps were taken. Mann J agreed, and said that not only was the district judge entitled to reach that conclusion, but it was a decision that was entirely correct and one that he (Mann J) would have reached himself: see para [23] of the judgment.

[18] In view of these conclusions, it was unnecessary for Mann J to express any view on the question

whether the company might have succeeded in its opposition to the petition if it had galvanised itself sufficiently to take the necessary steps at the appropriate time. As he said in para [20] of his judgment, having referred to some of the matters relied on by the company as showing that the debt was disputed:

> 'It is not necessary for me to consider all these matters in detail. Some of them are misplaced. Others are, at most, matters which might have been deployed to demonstrate that the petition debt was said to have been disputed. For the reasons appearing below [*ie the reasons relating to delay*], it is now too late to take those points so far as there is anything in them.'

[19] At the date of presentation of the petition, 25 May 2005, the amount standing to the credit to the company's bank account was £51,162.37. Between the presentation of the petition and the making of the winding-up order on 18 July, payments and withdrawals from the account were made totalling £46,116.13. Further payments and withdrawals continued to be made between 19 and 25 July, amounting to £8,553.36. As at 25 July, the company's bank account was overdrawn by £3,298.51. At no stage was a validation order for any of these payments or withdrawals sought by the company pursuant to s 127(1) of the Insolvency Act 1986. These are the transactions which are the subject matter of the first of the liquidators' three claims.

Two technical points

[20] I must first deal with two technical points taken by Mrs Giret on behalf of the defendant.

[21] The first, and potentially more significant, point is that the liquidators have brought their claim by way of a standard claim form in the Chancery Division of the High Court pursuant to Part 7 of the CPR, and not by way of an ordinary application under Part 7 of the Insolvency Rules 1986. Mrs Giret submits that the liquidators' claims against Mr **McGregor-Paterson** are clearly claims under the Insolvency Act 1986, and are therefore insolvency proceedings to which the procedural code in Part 7 of the Insolvency Rules applies. Chapter 1 of Part 7 applies to any application made to the court under the 1986 Act or under the Insolvency Rules themselves, subject to three immaterial exceptions. Rule 7.2(1) defines, for the purposes of Chapter 1, and except insofar as the context otherwise requires, 'originating application' as meaning an application to the court which is not an application in pending proceedings before the court, and 'ordinary application' as meaning any other application to the court. By virtue of r 7.2(2), '[e]very application shall be in the form appropriate to the application concerned'. In the present case there

are pending proceedings before the court, namely the winding-up proceedings, so the liquidators' application should have been made by an ordinary application in those proceedings.

[22] Mrs Giret goes on to submit that the present proceedings are fatally and irremediably flawed, because of the liquidators' failure to use the form of application prescribed by Parliament for insolvency proceedings. She prays in aid by way of analogy the decision of Pumfrey J in *Re Osea Road Camp Sites Ltd, sub nom Bamber v Eaton* [2004] EWHC 2437 (Ch), [2005] 1 WLR 760, [2005] 1 All ER 820, where he held that the requirement in s 459(1) of the Companies Act 1985 that a member of a company 'may apply to the court by petition' where he seeks to establish unfair prejudice in the conduct of the company's affairs was a mandatory requirement that any such proceedings be commenced by way of petition, and accordingly where such relief was sought by a claim form and particulars of claim the proceedings were in the wrong form and had to be struck out. In reaching this conclusion Pumfrey J considered, and rejected, a submission that the use of the wrong form was merely an error of procedure which could be cured by CPR r 3.10, which provided then (as it still does now):

> 'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.'

[23] Pumfrey J held that, as a matter of construction, the words 'error of procedure' in CPR r 3.10 relate only to errors in the procedure established by the Civil Procedure Rules themselves, and are not apt to relate to requirements imposed by some other statute. As he said in para [15] of his judgment:

'Failure to use the prescribed route to commence proceedings in relation to unfair prejudice does not seem to me to be merely an error of procedure. It seems to me to be a failure to use the mechanism provided for the purpose.'

[24] By way of contrast, Mrs Giret also referred me to the decision of Evans-Lombe J in *Re Continental Assurance Co of London plc (In Liquidation) (No 2)* [1998] 1 BCLC 583. In that case the company had been placed in creditors' voluntary liquidation, and the liquidators issued an application against the directors seeking various orders under the Insolvency Act 1986. They made their application in the form of an ordinary application, rather than as an originating application, and the directors applied for the application to be struck out for procedural irregularity. The judge held that the proceedings should have been started by originating application, because in a creditors' voluntary winding up, unlike a compulsory winding up, there was no existing insolvency proceeding within r 7 in which the application could be made: see his judgment at 586g–587b. However, he went on to hold that the irregularity could, and on the facts of the case before him should, be cured pursuant to r 7.55 of the Insolvency Rules, which is headed 'Formal defects' and provides as follows:

'No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or the irregularity, and that the injustice cannot be remedied by any order of the court.'

[25] Mrs Giret sought to distinguish the decision in *Re Continental Assurance* on the basis that the liquidators had used a form of application provided for by the Insolvency Rules, and their only mistake had been to proceed by way of ordinary application instead of originating application. In the present case, she submitted, the liquidators have used a form of originating process that falls entirely outside the scope of the Insolvency Rules, with the consequence that there are no 'insolvency proceedings' before the court which could be validated by application of r 7.55. I was for a time attracted by this submission, but on reflection I am unable to accept it. I agree with the submission of Mr Couser for the liquidators that the present proceedings are plainly insolvency proceedings, a term which is nowhere defined in the Insolvency Rules, by virtue of the fact that they are brought under various provisions of the Insolvency Act 1986. Accordingly, they are proceedings to which Part 7 of the Insolvency Rules applies, and the use of the wrong form of application is in my judgment a 'formal defect' which is capable of being cured under r 7.55. If that is right, the effect of r 7.55 is that the present proceedings are not to be invalidated by the formal defect unless the court considers that substantial injustice has been caused by it, and that the injustice cannot be remedied by any order of the court. In my view no substantial injustice has been caused in the present case, and the only practical difference which Mrs Giret was able to point to is that the liquidators' application for summary judgment was heard by a master rather than a registrar. Furthermore, the objection is not one that has been taken by the defendant at any earlier stage, nor is it included in his grounds of appeal. While it is no doubt desirable that applications of the present type should be heard by a registrar with specialised knowledge of insolvency proceedings, I cannot regard the fact that the application was heard by a deputy master as in itself having

caused any injustice to Mr **McGregor-Paterson**. An appeal against the master's decision lies, with permission, to the High Court, in exactly the same way as it would from a decision of the registrar; and insolvency law is in any event part of the general diet of the Chancery Division, with which masters as well as registrars frequently have to deal in one context or another.

[26] For these reasons Mrs Giret's first technical point must in my judgment be rejected.

[27] Her second point, which is foreshadowed in the grounds of appeal, is that the value of the claim was stated on the claim form issued on 31 July 2006 to be £50,000, whereas the amounts claimed in the particulars of claim are in excess of £260,000 plus interest. In my judgment, this point gives rise to no question of jurisdiction, as proceedings may properly be started in the High Court where the value of the claim is more than £15,000: see para 2.1 of the Practice Direction supplemental to CPR Part 7. The only relevance of the point is that the liquidators may have paid court fees on issue of the claim at a rate lower than that prescribed in the Civil Proceedings Fees Order 2004.

[2010] BPIR 239 at 249

If that is the case, the position needs to be remedied, and I did not understand Mr Couser to contend the contrary. Accordingly, if the position has not been remedied by the time when this judgment is handed down, I will require an undertaking from the liquidators' solicitors to ensure that the appropriate fee is paid. Subject to that, the point has no relevance to the questions which I have to decide and I need say no more about it.

The first claim: payments out of the company's bank account following the presentation of the winding-up petition

[28] Paragraph 5.1 of the particulars of claim sets out the history of payments and withdrawals from the company's bank account between 25 May 2005 (the date of presentation of the winding-up petition) and 25 July 2005 (one week after the date when the winding-up order was made). I have already summarised that history in para [19] above. The relevant sheets from the company's bank statements are appended to the particulars of claim, and I do not understand the defendant to dispute that the payments and withdrawals were in fact made on the dates and in the amounts shown.

[29] Paragraph 5.2 of the particulars of claim then alleges:

> (a) that, although the defendant had indicated in correspondence that he regarded these payments as having been made in the ordinary course of business and for the benefit of the company, he had declined to seek validation orders from the court, despite having been invited to do so by the liquidators;
>
> (b) that the payments enabled the company to continue to trade during this period; and
>
> (c) that this was personally beneficial to the defendant and detrimental to the company's general body of creditors.

The explanation for allegation (c) is then given as follows:

> 'This is because the defendant had personally guaranteed certain of the company's debts and so stood to reduce his liability under those personal guarantees if it was possible to reduce the company's shortfall by continuing to renovate and convert properties owned by it. By contrast, the Company concluded no sales during this period, such that it made a net trading loss during

the post petition period.'

[30] On the basis of the allegations in paras 5.1 and 5.2, it is then pleaded, without further elaboration:

> (a) in para 15, under the heading 'Particulars of void dispositions', that the defendant caused or permitted the company to make payments out of its bank account totalling £54,669.49 following the presentation of the winding-up petition;
>
> (b) in para 18, under the heading 'Particulars of misfeasance and/or breach of fiduciary and/or other duty', that the defendant, being an officer of the company, caused or permitted post petition dispositions of that amount out of the company's bank account; and

> (c) in para 22, under the heading 'Particulars of wrongful trading', that as a consequence of the matters set out in the particulars of claim, and the presentation of the petition in particular, the defendant knew or ought to have concluded by 25 May 2005 that there was no reasonable prospect that the company would avoid going into insolvent liquidation, despite which he caused or permitted the company to continue trading without having taken every step with a view to minimising the potential loss to the company's creditors.

[31] The Deputy Master dealt with this part of the claim in paras [8]–[11] of his judgment. After reciting the history of the payments, he said in para [8]:

> 'The defendant denied that he had been asked to obtain validation orders. He did not deny the withdrawals from the Bank Account. However, he said that there was no evidence that he permitted or caused any of the payments to be made, and disputed that he had been invited to seek the validation orders. As a general submission (which applies to all amounts claimed against him), the defendant said that the Company was solvent and that it was not failing: he went through the evidence and drew the court's attention to certain transactions which he said would produce positive revenue for the Company.'

[32] In para [9], the Master said he would assume in the defendant's favour that, as he alleged, there was no evidence of his having permitted or caused the payments from the bank account, and that he was not personally invited to seek the validation orders. He then found as a fact that payments and withdrawals were made from the bank account in the pleaded amounts, and that no validation orders had been made in respect of any part of the total sum of £54,669.49.

[33] The Master then recited the relevant provisions of s 127 and s 212 of the 1986 Act, as follows:

> Section 127(1)
>
> 'In a winding up by the court, any disposition of the company's property … made after the commencement of the winding up is, unless the court otherwise orders, void.'
>
> Section 212

'(1) This section applies if in the course of the winding up of a company it appears that a person who—

(a) is or has been an officer of the company …

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

…

(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

[2010] BPIR 239 at 251

(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.'

[34] The Master then stated his conclusions in para [11]:

'It is clear from section 127(1) that any disposition of property after the commencement of the winding-up (which for this purpose is 25 May 2005) is void. The defendant at that time was an officer of the Company, which is now in liquidation. The requirements of section 212(1)(a) are thereby satisfied. Despite the assumption in favour of the defendant recorded in paragraph 9 above, the fact remains that he was aware of the winding-up petition. He should have taken immediate steps to ascertain his obligations as a Director (and, in particular, whether the winding-up petition changed his obligations) and acted appropriately. On the evidence, he failed to do so, and permitted (albeit unwittingly) the balance of the Bank Account to be reduced. He was thereby in breach of the duty owed by him as a Director to the Company, and he is accountable for the sum withdrawn. Accordingly, the circumstances fall within section 212(3). I find that the defendant has no real prospect of successfully defending the claim and there is no compelling reason for a trial. The defendant will therefore pay to the claimants £54,669.49.'

[35] As the Master implicitly recognised, s 127(1) does not in itself provide the liquidators with any cause of action against the directors of a company which has been wound up. The effect of the section, in the absence of a validation order, is rather to make the relevant dispositions void, and thus to enable the liquidators to take steps to recover the relevant property from the recipients, or to avoid the burden of any obligations to which the company would be subject if the dispositions were valid. Accordingly, the effect of s 127(1) was, at best, of only peripheral relevance to the liquidators' claim against Mr **McGregor-Paterson**, although it did have the result (not dealt with anywhere in the evidence filed by the liquidators) that credit should have been allowed in the claim against the defendant for any recoveries from third parties made by the liquidators pursuant to s 127(1). It is further relevant to note that the defendant was not himself the

recipient of any of the avoided payments or withdrawals from the bank account, and the Master expressly proceeded on the footing that there was no evidence of his having permitted or caused the relevant payments to be made. It was clearly appropriate for this assumption to be made in the defendant's favour, on a summary judgment application, in view of the evidence in his witness statement that his involvement in the day to day running of the business was minimal, his practical involvement with the company amounted to less than a few hours a month on average and focussed mainly on the marketing and human resources aspects of the business, that he lived and worked in central London whilst the company operated in and around Peterborough, and (importantly) he was not a cheque signatory and had no access to the company's bank account.

[2010] BPIR 239 at 252

Although Mr Couser was able to point the Deputy Master to various matters in the documentary record which appear to cast doubt on at least some of those assertions by the defendant, it seems clear to me that their truth or otherwise could only be fairly established at trial after full disclosure of documents and after oral evidence had been given.

[36] In these circumstances, the case against the defendant under this head had to depend on establishing, to a summary judgment standard of proof, that he had been guilty of misfeasance or breach of fiduciary duty in not taking effective steps to prevent the payments being made, and that loss had thereby been caused to the company. It is important to note in this connection that s 212 of the 1986 Act is of a procedural nature only, and it does not, of itself, create any new rights or obligations: see for example *Cohen and Another v Selby and Another* [2001] 1 BCLC 176 at 183 per Chadwick LJ (with whose judgment Sir Andrew Morritt V-C and Rix LJ agreed). Furthermore, even if those conditions were satisfied, the further question would arise whether the court should exercise its power to grant relief under s 727 of the Companies Act 1985 (due to be replaced, from October 2009, by similar provisions in s 1157(1)–(3) of the Companies Act 2006). Section 727(1) provides as follows:

> 'If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company … it appears to the court hearing the case that that officer … is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as it thinks fit.'

The existing authorities indicate (although they predate the CPR, and may be ripe for reappraisal) that it is not necessary for a party to plead reliance upon s 727, and the defence can be raised for the first time at trial: see *Singlehurst v Tapscott Steamship Co Ltd* [1899] WN 133 and the decision of Hoffmann J in *Re Kirbys Coaches Ltd* [1991] BCLC 414, [1991] BCC 130.

[37] In my judgment, the relevant legal principles have only to be stated for it to be obvious that the liquidators' claim against the defendant under this head could not be disposed of by an application for summary judgment and would have to go to trial. The questions whether the defendant was in breach of his common law or fiduciary duties as a director, and if so whether and to what extent he should be excused for those breaches, are questions which can only be determined after a full examination of all the evidence, both oral and documentary, at trial. The defendant's case, in a nutshell, is that the payments in question were made without his personal knowledge or involvement, that his role in the company did not make it incumbent on him to prevent the payments being made, that the underlying financial position of the company was sound (for the reasons given by Mr Antippa in his evidence), that no creditors apart from The Specter Partnership were placing pressure upon the company, and that the petition debt was disputed in good faith and on substantial grounds. With respect to the Deputy Master, it was in my judgment

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quite impossible for him to conclude that this case had no real prospect of success at trial. Furthermore, the issue of relief under s 727 was not raised before him, no doubt because Mr **McGregor-Paterson**, as a litigant in person, was unaware of it. I think it is a little unfortunate that the possible existence of a s 727 defence was not drawn to the Master's attention by counsel for the liquidators, although I see the force of Mr Couser's point that the scope for the defence may be limited, if not non-existent, in the light of the defendant's primary case that the payments were nothing to do with him. That may be so, if the defendant's primary case is rejected; but for the reasons which I have given I do not think that it can be rejected out of hand at this stage.

[38] The Master did not deal in his judgment with the alternative claim of wrongful trading under this head, and in my judgment it is clear, for essentially the same reasons, that this claim too must go to trial. In the absence of any consideration of the question by the Master, the inclusion in his order of a declaration that the defendant's actions in causing or permitting the relevant dispositions to be made constituted wrongful trading was, on any view of the matter, inappropriate and cannot stand.

The second claim: the alleged preferences in favour of the defendant and Mr Wilson totalling £155,472.96

[39] The pleading of this claim in the particulars of claim is very basic. Paragraph 5.3 alleges that between 11 December 2003 and 22 July 2005 the 'Directors' loan account' was reduced by payments made from the company's bank account to or for the benefit of the defendant and Mr Wilson. The total amount of the payments was £155,472.96, comprising £98,121.90 paid to or for the benefit of the defendant and £57,351.06 paid to or for the benefit of Mr Wilson. A schedule of the payments is appended, giving brief particulars of the payments and making it clear (where it is not obvious) which of the two directors is alleged to have benefited from them. The schedule also has a column headed 'Questionnaire Reference', which I was told cross-refers to payments which were investigated by the Public Interest Unit. Paragraph 5.3 then continues:

> 'These reductions in the directors' loan account were without any corresponding benefit to the company. In particular, but without limitation to the generality of that assertion, the Schedule includes sums paid by the Company to credit card providers and loan finance companies which had advanced moneys to the defendant and Mr Wilson in their personal capacities, rather than on behalf of the Company.'

[40] Paragraph 5.4 then alleges that the directors failed to keep, or cause to be kept, proper accounting records in accordance with the then prevailing requirements of the Companies Act 1985, and that despite numerous requests to them to do so 'the directors have never delivered up properly written up bank and petty cash books, purchase day books, or payroll records, and have not conducted regular bank, cash and ledger reconciliations'.

[41] It is then pleaded:

(a) in para 16, under the heading 'Particulars of preferences', that

the defendant caused or permitted the reduction of the directors' loan account by the payment of £155,472.96 to or on behalf of himself and Mr Wilson; and

(b) in para 19, under the heading 'Particulars of misfeasance [etc]', that in his capacity as an

officer of the company the defendant caused or permitted the directors' loan account to be reduced by the same sums.

Paragraphs 20 and 21 contain further particulars under the latter heading, namely:

(c) that the defendant permitted Mr Wilson to make payments to or on behalf of himself in the sum of £57,351.06 to the detriment of the company; and

(d) that the defendant failed to keep, or cause to be kept, proper accounting records in accordance with the requirements of the Companies Act 1985.

[42] The relevant statutory provisions relating to preferences are contained in ss 238–240 of the 1986 Act, from which it will be sufficient to cite the following extracts:

'238(1) This section applies in the case of a company where—

…

(b) the company goes into liquidation;

and “the office-holder” means the … liquidator …

239(1) This section applies as does section 238.

(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(4) For the purposes of this section and section 241, a company gives a preference to a person if—

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

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

(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by

a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).

240(1) Subject to the next subsection, the time at which a company … gives a preference is a relevant time if the … preference [is] given—

(a) in the case … of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

…

(2) Where a company … gives a preference at a time mentioned in subsection (1)(a) …, that time is not a relevant time for the purposes of section 238 or 239 unless the company—

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the … preference; …

(3) For the purposes of subsection (1), the onset of insolvency is—

…

(e) in a case where section 238 or 239 applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up.'

As directors of the company, both the defendant and Mr Wilson were connected with it: see s 249.

[43] It is worth observing at this point that a preference given by a company to a connected person (such as a director) is vulnerable if the preference was given in the period of 2 years before the commencement of the winding up, but (by virtue of s 240(2)) only if the company was at that time unable to pay its debts within the meaning of s 123, or if it became unable to do so as a consequence of the preference. Section 123(1) provides that a company is deemed unable to pay its debts in various circumstances, of which the only relevant one is:

'(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.'

By virtue of s 123(2), a company is also deemed unable to pay its debts

> 'if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.'

Returning to s 240(2), the requirements of the subsection are presumed to be satisfied, in the absence of proof to the contrary, in relation to any transaction

at an undervalue which is entered into by a company with a connected person, but there is no similar provision presuming the requirements of the subsection to be satisfied where a preference is given to a connected person. Thus in the present case it would be for the liquidators to establish that the company was unable to pay its debts within the meaning of s 123 at the time when any alleged preference was given to the defendant or Mr Wilson. In the absence of such proof of insolvency, the time at which the preference was given could not be a relevant time, and the conditions in s 239(2) which entitle the court to intervene could not be satisfied.

[44] In para [21] of his judgment the Master recorded the defendant's argument that the company was not insolvent during the period from December 2003 to July 2005. In para [23] the Master discussed the financial position of the company:

> 'It is clear from the evidence that during the relevant period the Company was facing difficult times financially. By July 2004 it was already in arrears to the Lancashire Mortgage Company with the payment of mortgage interest, which continued to accrue on the compound basis. In March 2005 the Company instructed agents to market all its properties in an unfinished state. The agents' valuations for the purpose of the sale were less than the outstanding amount due to the mortgagee which the claimants said remained a creditor in the liquidation. It is true that the negligence claim against the former solicitors caused problems; before the receipt of the £190,000 on 8 April 2005 that Bank Account was generally overdrawn, but thereafter was substantially in credit. No explanation was offered by the defendant for the repayment of £137,641.96 before that date, and at a time when the Company probably needed to retain funds.'

The Master then referred to the company's report and accounts for the period ended 31 July 2004, and the retained loss of £163,337 shown therein.

[45] In para [24] the Master commented that there was a degree of tension between the defendant's argument that the company was not insolvent and what had actually occurred, and he said that the removal of substantial sums from the company's bank account before the receipt of the £190,000 on 8 April 2005 'does not make sense commercially in the context of the Company's interests'. He observed that there was a pattern whereby the defendant and/or Mr Wilson made personal borrowings from third parties, and then advanced sums to the company which were reflected in corresponding increases in their loan accounts.

[46] After setting out the relevant provisions of ss 238–240, the Master then stated his conclusions on this part of the case as follows:

> '26 The repayments of £155,742.96 all occurred within the period of two years ending with the date of the commencement of the winding up: see section 240(1)(a). It is a reasonable

> conclusion from the evidence that at the relevant times the Company was unable to pay its debts. The Company is in insolvent liquidation: see the definition in the Insolvency Rules 1986. Further, as the defendant conceded in his written evidence, he was a creditor of the Company and had given personal guarantees for
>
> *[2010] BPIR 239 at 257*
>
> certain of its debts. The same could be said about Mr Wilson. They stood, therefore, to benefit directly and indirectly from the repayments. It is not necessary for the claimants to show, as the defendant alleged, that other creditors were pressing in order to show that the Company gave a preference to the defendant and/or Mr Wilson although, of course, if other creditors were pressing that would assist the claimants' argument.
>
> 27 The only reasonable conclusion is that by effecting the payments at the time they were made and in the name of the Company the defendant and/or Mr Wilson were placing themselves in a better position than they would otherwise have enjoyed. That better position was their receiving at an earlier time the amount repaid in full, as opposed to a dividend which might have been paid at a later date in consequence of the liquidation. On the evidence the defendant has not been able to overcome the presumption in section 239(6). I find, therefore, that the payments totalling £155,742.96 were preferential payments by the Company within section 239(4). To make such payments or to have knowledge of such payments as a director is misfeasance within section 212. On the evidence the defendant has no real prospect of successfully defending the claim and there is no compelling reason for a trial. The defendant should make restoration of that amount to the Company under section 239(3) and/or section 212(3).'

[47] In my respectful opinion the Master's reasoning in these paragraphs falls well short of what would be needed to justify a summary judgment against the defendant. To begin with the preference issue, it seems clear to me that the question whether the company was unable to pay its debts within the meaning of s 123 at the time when each of the disputed payments was made is a question that cannot possibly be determined on a summary basis. The evidence before the Master was wholly insufficient to establish conclusively that the company was unable to pay its debts as they fell due, either before or after the receipt of the £190,000 in April 2005, while the alternative definition of inability to pay debts in s 123(2) would have required a full investigation of the value of the company's assets, and could not safely be deduced from the historic cost figures shown in the July 2004 accounts. The evidence of Mr Antippa, to which the Master nowhere refers in his judgment, is in my judgment clearly sufficient to show that there is at the very lowest a triable issue on this point. Furthermore, I do not understand how the Master felt able, without a trial, to conclude that the defendant had been unable to overcome the presumption in s 239(6). The subsection reverses the burden of proof with regard to intention when the beneficiary of the preference is a person connected with the company, but that is not to say the burden can never be discharged. Save in the clearest of cases, it will only be possible after a trial to determine whether or not the statutory presumption has been rebutted.

[48] For similar reasons, I consider that the alternative claim of misfeasance under this head can only be determined following a trial. Furthermore, it cannot be ignored in this connection that the Public Interest Unit decided to take no action against Mr **McGregor-Paterson** after conducting a lengthy investigation, and that many of the transactions now impugned by the liquidators were apparently among those investigated.

[2010] BPIR 239 at 258

The defendant says in his witness statement that the investigation included his attendance for a full day at the office of the Public Interest Unit. It is of course true, as the letter to the defendant of 1 November 2007 made clear, that the conclusions reached by the investigator were in no sense binding on the liquidators, and also that only a sample of unexplained cheque payments had been examined. Nevertheless, the fact that Mr

McGregor-Paterson was given a clean bill of health by the Public Interest Unit should surely cause a court to think long and hard before concluding, on a summary judgment application, that the case of misfeasance pleaded against him is so strong that he has no realistic prospect of successfully defending it. I am also fortified in reaching this conclusion by the fact that this part of the case is pleaded against the defendant in such a scanty fashion, and without any clear allegation of loss sustained by the company.

[49] For completeness, I should also mention that the Master reached no decision on the allegation that the books and records of the company had been so poorly maintained as to ground an allegation of misfeasance. As he records in para [22] of his judgment, he stood over this aspect of the matter for further argument if necessary. I would only comment that, whilst a failure to maintain proper books and records may well place a defendant director in evidential difficulties, and encourage the court to make robust findings of fact against him, it is difficult to see how such failure could in itself cause loss to the company and thus ground a separate claim for misfeasance.

The third claim: the repayment of the Hall/Mooney loan

[50] This claim relates to a loan, originally in the sum of £45,000, which was made by Ms Fiona Anne Hall and Mr Raymond Gary Mooney to Mr Wilson, and secured on a property owned by Mr Wilson called the Grocer's Barn. The terms of the loan were set out in a written loan agreement dated 25 August 2004, which was signed by Mr Wilson and witnessed by the defendant. The agreement acknowledged receipt by Mr Wilson of the loan, and undertook to repay it in full, with interest (if appropriate) as specified in a deed of legal charge of even date, plus a further sum of £5,000, within 16 weeks of the date of the agreement. It was further provided that, if the borrower failed to pay the full amount on the due date, interest should be charged by the lender at the rate of 10% pa upon the amount owed until it had been repaid.

[51] Repayment of the loan was not effected by the due date, and on 10 February 2005 the parties entered into a written variation of the loan agreement. This document recited the earlier loan agreement, describing the additional sum of £5,000 payable thereunder as being 'in respect of accrued interest', and provided that the loan 'with the sum of £5,000 and accrued interest' should be repaid by Mr Wilson to the lenders on or before 30 March 2005, together with interest at the rate specified in the loan agreement (ie 10%) upon the amount of the loan (ie £45,000) from 15 December 2004 until repayment. In all other respects, the loan agreement and the legal charge securing it were to remain as drawn and continue to have full effect.

[52] Repayment of the loan was eventually effected by a cheque for £50,000 drawn on the company's bank account on 19 May 2005 in favour of Ms Hall and Mr Mooney. The amount actually debited to the account was £50,050, the additional £50 representing the bank's charges for a special

cheque. If any further sum was paid in respect of the interest due under the varied agreement, it does not appear to have been paid from the company's account. There had been two previous abortive attempts to pay the £50,000 from the company's account, but for present purposes nothing turns on that.

[53] The debit to the company's bank account was made 6 days before the presentation of the winding-up petition, so the transaction was not avoided by s 127 of the 1986 Act.

[54] The particulars of claim allege that the loan was a personal arrangement between Mr Wilson and the lenders, and seek to link it with two credit entries of £35,000 and £15,000 shown on the company's bank statements on 22 July and 26 August 2004 respectively. In paras 6–11 of the particulars of claim, reference is made to correspondence between the liquidators and the defendant in October and November 2005, in

which the defendant responded to the allegation that the repayment of the loan was a preference within the meaning of s 239 of the 1986 Act. In the course of that correspondence the defendant explained, among other matters, that the £50,050 was paid in repayment of the loan made by Ms Hall and Mr Mooney, that for 'personal reasons' he chose to deduct that sum from the money owing to him on his director's loan account with the company, that Ms Hall and Mr Mooney had no connection with the company and were personal friends of his, and that 'the loan was a business transaction'. It was then pleaded, in para 17, that the payment of the £50,050 (although the figure was erroneously given as £50,500) constituted a preference under s 239. There was no specific plea that the payment also constituted misfeasance or a breach of fiduciary duty, although the relief claimed in the prayer at the end of the particulars includes a declaration to that effect.

[55] The defendant dealt with this loan in paras 47 and 48 of his witness statement. His evidence was to the following effect. The £45,000 was raised by Mr Wilson from Ms Hall and Mr Mooney when the company's business became under-funded following the problem which arose about the title to the first properties acquired by the company. This caused a delay in operations, and the money was needed to help manage cash flow. The company had no assets of its own which could be used to secure the loan, because all the properties it owned were already charged to the LMC. It was for this reason that the loan agreement was entered into with Mr Wilson, and a first legal charge was granted over the Grocer's Barn, a property that was owned by Mr Wilson. On the basis of information provided by Ms Hall and Mr Mooney, and confirmed by their bank, the loan moneys of £45,000 were advanced as follows:

> (a) £11,588 was paid into the client account of Belmont Hansford, who were solicitors acting for the company, and the money was used to pay an outstanding invoice;
>
> (b) £15,000 was paid direct to the company (this being the second of the credits referred to in the particulars of claim); and
>
> (c) £18,358 was paid to a company called Value Property Shops Ltd and related to the £35,000 credited to the company on 22 July 2004. I interpose that Value Property Shops Ltd is apparently a company controlled by the defendant, and the £35,000 credit

> received by the company is shown on the bank statement as having been paid in by the defendant.

The repayment of the loan to Ms Hall and Mr Mooney on 19 May 2005 was arranged by Mr Wilson, and was treated as an outstanding liability of the company 'as the money was borrowed for the benefit of the Company and the money was used for the benefit of the Company'. At the time of the repayment, the company was not in financial difficulties and 'there were no other payments due'.

[56] As I have already pointed out, the repayment of the loan was made after the sum of £190,000 had been paid into the company's bank account on 8 April 2005, and the same was true of the two earlier abortive attempts to make the payment. On the date when the payment was finally made, 19 May, the amount standing to the credit of the account was in excess of £108,000, and the credit balance at the end of the following day was still in excess of £53,000.

[57] In the light of this evidence, it is in my view obvious that the liquidators' claim under this head must go to trial. The only properly pleaded claim is that the payment of the £50,000 constituted a preference, but that depends, among other things, on establishing that the company was unable to pay its debts on 19 May 2005.

For the reasons which I have already given, that is not an issue which can be determined on a summary basis. Furthermore, Ms Hall and Mr Mooney were not (on the available evidence) connected with the company, so the reversed burden of proof in s 239(6) would not apply. There is no properly pleaded claim in misfeasance, but even if there were the defendant has provided a plausible explanation to the effect that the loan was an indirect means of providing finance to the company, and the proceeds were used for the benefit of the company and not for the personal benefit of Mr Wilson. The truth of that explanation can only be established at trial. Finally, even on the assumption that there was a breach of duty by the defendant in relation to this payment, there would still be the possibility of relief under s 727 of the Companies Act 1985 to consider.

[58] The Master dealt with the matter in paras [18] and [19] of his judgment, after setting out the background facts and referring very briefly to some of the defendant's evidence. He took the view that a construction of the documents led to 'the inescapable conclusion' that the £45,000 was borrowed personally by Mr Wilson, and even though it 'may well have been the case' that he gave instructions for the £45,000 to be disbursed for the company's purposes, the repayment from the company's bank account had been used to repay a personal liability of his. The payment was a misapplication of the company's assets, because it represented the use of company funds to finance a director's personal obligations to third parties, and to secure the release of a legal charge over property which the company did not own. The defendant was not only aware of the arrangements, but also actively participated in making them. He had therefore permitted company money to be misapplied, in breach of the duty owed by him to the company as a director.

[59] In my respectful opinion this reasoning again fails to justify the conclusion which the Master reached. It is, of course, true that as between Mr Wilson and the lenders the loan was a personal obligation, and they could not have sued the company for repayment. However, that does not meet the

point that, if the defendant's evidence is correct, the money was in fact used as an indirect source of finance for the company, and was expended for its benefit. If that is right, the fact that repayment was made directly by the company to the lenders does not necessarily entail any impropriety, but simply the use of a convenient short cut (rather than the company first paying Mr Wilson, who would then repay the lenders). Furthermore, according to the explanation which the defendant gave the liquidators in correspondence in October 2005, a corresponding reduction was made in his (rather than Mr Wilson's) loan account, so the company's overall indebtedness remained unchanged. Why the defendant should have chosen to debit his loan account rather than Mr Wilson's is something of a mystery, but on the face of it concerns him and Mr Wilson alone. There is, as I understand it, a close personal as well as business relationship between them, and they live together at the same address.

[60] In the circumstances, the Master's conclusion that the payment to the lenders was a misapplication of the company's assets is in my view not one that it was open to him to reach on a summary basis.

Permission to appeal and extension of time

[61] In my judgment, this is plainly a case in which permission to appeal should be granted, as I consider that the Master reached the wrong conclusion and the whole of this claim should go to trial. I also have no hesitation in granting the defendant the necessary extension of time for the filing of his appellant's notice, having regard to his position as a litigant in person and the matters set out in his statement of 6 October 2008. While not conceding the point, Mr Couser wisely did not take up time trying to persuade me otherwise.

Conclusion

[62] For the reasons which I have given, this appeal will be allowed. I will deal with questions of costs and

further directions when this judgment is handed down, but in the meantime I would ask counsel to do their best to agree suitable directions for the future conduct of the case.