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At-a-glance cases provided by **Gatehouse Chambers**

Manolete Partners Plc v Dalal [2023] EWCA Civ 269

Facts`

The appellant (and claimant at trial) is a litigation funder. The defendant and respondent (the 'Director') was the director of a company in creditors' voluntary liquidation.

An HMRC investigation had concluded that there were undeclared sales of at least £7,123,644 over a ten-year period. This conclusion relied on extrapolating calculations regarding 2009 sales, and an admission that the directors' accounting had been 'far from perfect'. The liquidator assigned the company's claims to Manolete. Manolete then issued claims against the Director for the return of the undeclared profits, which were not in the company's bank. The claim relied exclusively on the HMRC investigation. The Director's defence was broad, denying the accuracy of HMRC's calculations. Manolete in turn relied on the principle in *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610, that directors cannot rely on their own failure to keep records to argue that a claim against them is not proved.

The trial judge calculated possible undeclared profits of around £3.7m. However, the judge found insufficient evidence of undeclared profit for 2009, the year used for HMRC's calculations. Furthermore, the judge accepted oral evidence that the Director was unaware of any undeclared withdrawals from the company. With HMRC's findings undermined, the claim was dismissed.

Manolete appealed. The principal grounds were: (1) the judge should have awarded Manolete the £3.7m in undeclared profits calculated by the judge; (2) the judge allowed the Director to rely on his own failure to keep records; and (3) the judge had thereby allowed the Director to rely on an unpleaded defence.

Held

The Court of Appeal dismissed Manolete's appeal, holding:

- Manolete's pleadings relied solely on HMRC's investigation, which extrapolated calculations for 2009. The judge found zero undeclared profits in 2009; extrapolation of zero was zero.
- The finding that there were no undeclared profits was based on evidence, not lack of records. The judge had decided the Director was honest, and the court noted that HMRC had in fact destroyed records after its investigation concluded.
- Manolete's pleadings contained no alternative basis on which the judge could find in Manolete's favour. The Director had challenged the accuracy of the HMRC calculations, and Manolete had failed to prove their accuracy.

Marwaha v Entertainment One Ltd [2023] EWHC 480 (Ch)

Facts

The creditor (C) commenced proceedings against its former employee (D) and others alleging conspiracy and bribery in connection with various foreign exchange transactions that D had caused C to enter. C settled with the other defendants and, in so doing, took an assignment of a loan agreement from one of them under which it had loaned £1.3m to D; C then agreed to discontinue its claim against D on a drop-hands basis. C then served a statutory demand on D under the assigned loan agreement. D applied to set aside the demand, alleging that the debt was disputed as the discontinuance had compromised the loan or/and that a bankruptcy petition would be an abuse of process on the *Henderson v Henderson* principle. The deputy district judge (DDJ) dismissed the application; D appealed.

Held

The correct test under the Insolvency Rules 2016, r 10.5(5)(b) is whether the debtor raised a triable issue. The DDJ had not expressly set out the test, but had applied it and found D had no reasonable prospects of success; on the facts, the DDJ was entitled to find that the discontinuance had not compromised the loan.

The wide ground under IR 2016, r 10.5(5)(d) should be applied where it would be unjust to allow the creditor to present a petition. *Henderson v Henderson* abuse arises where it would be oppressive for someone to have to defend successive proceedings on the same factual basis where they should have been brought at the same time. Whether there was such an abuse of process is not a matter of discretion but involved assessing and balancing various factors, with which an appeal court will be reluctant to interfere (*Stuart v Goldberg Linde (a firm)* [2008] EWCA Civ 2). Here the DDJ had considered the relevant facts and concluded that it did not amount to an abuse for C not to have included the debt claim in the initial proceedings. That was not plainly wrong; the DDJ was entitled to form that view and there was no error of law. Sarah Worthington KC, sitting as a Deputy High Court Judge, therefore dismissed the appeal.

Dolfin Asset Services Ltd v Stephens & Anor (Re Dolfin Financial (UK) Ltd) [2023] EWHC 123 (Ch)

Facts

Dolfin Financial (UK) Ltd ('Dolfin UK') traded as an investment firm. On 30 June 2021 it was placed into special administration on

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the application of its directors pursuant to the Investment Bank Special Administration Rules 2011 (the 'Rules').

Dolfin Asset Services Ltd ('DASL') was a purported creditor of Dolfin UK and submitted two claims in the special administration.

The joint special administrators ('JSAs') circulated progress reports to creditors, including DASL, on 28 January 2022 and 27 July 2022. The first progress report identified that, during the period from 30 June 2021 to 29 December 2021, the JSAs had incurred time costs of £1,756,446.98. The second progress report stated that, during the period from 30 December 2021 to 29 June 2022, the JSAs incurred total time costs of £1,068,112.00.

DASL expressed concern about these fees, and demanded a line-by-line breakdown of post-appointment costs, under threat of an application under r 201 of the Rules. Rule 201 empowers creditors to request further information from a special administrator for further information about remuneration and, if the information is not forthcoming, to apply to the court accordingly.

The JSAs declined to provide the information sought: the request was disproportionate, and would time-consuming, costly and contrary to the interests of the insolvency estate as a whole to produce. Further, the JSAs had not yet sought to fix the basis of their remuneration; they had not sought to draw any remuneration; and DASL, as a potential bidding party for the business of Dolfin UK, would have had an unfair advantage in the sales process if the information was provided.

DASL applied to court for the provision of fee information, and sought an extension of time in which to bring their applications (being similar applications in relation to each progress report).

Held

Chief ICC Judge Briggs dismissed the applications.

He concluded that r 201 only applies in respect of a remuneration statement issued in compliance with r 122(1)(f). But r 122(1)(f), which requires a special administrator to include certain fees information in a progress report, only applies 'if the basis of remuneration has been fixed'. Here, since the JSAs' had not sought to fix their remuneration, there was no jurisdiction to order them to provide the information DASL demanded.

The judge found that, in any event, the JSAs' other reasons for refusing to provide the fee information sought by DASL were well-founded.

In Re Fastfit Station Ltd [2023] EWHC 496 (Ch)

Facts

This was an application by the liquidators of Fastfit Station Ltd (the 'Company') for an order under s 238 of the Insolvency Act 1986, seeking restoration of payments made pursuant to transactions at an undervalue.

The Company was entering financial difficulty in around September 2013. A new company (Fastfit Station MK Ltd) was incorporated on 3 March 2014. Towards the end of March 2014, and faced with the threat of winding up, one of the directors (Mr Barker) sought advice from an insolvency practitioner (Mr Dickinson) as to issuing a notice of intention to appoint administrators, and how to deal with the likely consequence of the bank freezing the Company's accounts. Mr Dickinson advised that Mr Barker could 'push [takings] into the new company' then account for the payments in a sale agreement by which Fastfit MK would purchase the Company's business.

Mr Barker duly set up terminals in the Company's offices that directed customer payments to Fastfit MK's bank account. The Company's business was sold to Fastfit MK; however, the diverted payments were not accounted for in the sale and purchase agreement. Upon liquidation of the Company, the liquidators sought to recover the diverted payments, arguing that they amounted to transactions at an undervalue.

Held

ICC Judge Mullen granted the application. He found that:

(1) The payments were transactions 'entered into by the Company' in that it had directed its customers to pay sums due to Fastfit MK.
(2) They were entered into at an undervalue, in that they were made gratuitously to Fastfit MK with no consideration in return.
(3) The payments could not reasonably be regarded as for the purpose of carrying on the Company's business, since the money had demonstrably not been used for the Company's benefit, but that of the ongoing business (eg payment of wages and salaries).
(4) Mr Barker, although he had acted honestly, was in breach of his s 172 Companies Act 2006 (CA 2006) duty to the Company.
(5) Mr Barker would not be granted relief under s 1157 CA 2006, despite the advice from Mr Dickinson. That advice was given at an early stage, was relatively informal, and contemplated that any payments would need to be accounted for through the sale agreement. ■