Neutral Citation Number: [2018] EWHC 2168 (Ch)

Case No: No 11 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15/08/2018

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

(1) Officeserve Technologies Limited (in Compulsory Liquidation) **(2) Paul David Wood and Simon Robert Haskew (as Joint Liquidators of Officeserve Technologies Limited)**	**Applicants**
- and -	
(1) Annabel's (Berkeley Square) Ltd **(2) Apple Retail UK Ltd** (3) Your PC Ltd t/a Aquilatec (4) British Business Influence Ltd (5) Prime Hotels (UK) Ltd t/a Bulgari Hotel **(6) BUPA Insurance Ltd** (7) Cartridge Save Ltd (8) China & Co (Props Hire) Ltd (9) Clapham Studios Ltd (10) Courier Express Refrigerated Transport Ltd **(11) COYA (Restaurant) Ltd** **(12) Dashle Ltd** (13) Database for Business Ltd t/a DBFB Communications (14) Digitek Resourcing Ltd **(15) Elleven Orthodontics Ltd** (16) Fasthosts Internet Ltd (17) FluidOne Ltd (18) Gemini Capital Consulting Ltd **(19) George (Mount Street) Ltd** (20) Global PA Associates Ltd **(21) Hat-trick Design Consultants (London) Ltd** **(22) Hedonism Drinks Ltd** (23) Inteam Ltd (24) Intellectual Property Office **(25) James Pimental Pinto**	**Respondents**

(26) Lawson Conner Services Ltd
(27) Lombard North Central Plc
(28) Luminescent Digital FZ LLE
(29) Martin Stockman
(30) Michele Ferriday t/a Michele Ferriday Flowers
(31) Monique Jayasuriya
(32) Telefonica UK Ltd t/a O2
(33) Park Chinois Ltd
(34) Please Hold (UK) Ltd
(35) Playtype Foundry APS
(36) Downtown Promotions Ltd t/a Project Club London
(37) Ring Central UK Ltd
(38) Salesforce.com EMEA Ltd
(39) SmartBear (Ireland) Ltd
(40) Subzero (2003) Ltd
(41) Dorchester Clubs Ltd t/a The PA Club
(42) Coney Island Ltd t/a Tramp
(43) Zurich Insurance Plc

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Simon Passfield (instructed by **Veale Wasbrough Vizards**) for the **Applicants**
The Respondents did not attend and were not represented

Hearing dates: 1, 5 June, 8 August 2018
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Judgment Approved

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application, made by notice dated 24 November 2017, by Officeserve Technologies Ltd ("the Company"), acting by its joint liquidators. The Company entered compulsory liquidation on 22 February 2017, on the basis of a petition presented on 26 October 2016. The 43 respondents are alleged to have received payments totalling £205,932.90 from the assets of the Company between those two dates, and it is therefore said that, in accordance with section 127 of the Insolvency Act 1986, those payments are void and must be returned to the Company.

2. Last year, I heard and disposed of certain preliminary issues in an application brought by the joint liquidators against Mr Cecil Anthony-Mike, the former executive chairman and director of the Company. I said this by way of introduction about the Company itself:

> "8. The Company was incorporated in 2011. The respondent became sole shareholder and director in 2013. It aspired "to disrupt and enter the £15.9 billion lunch at work market, using technology and a national delivery network". It grew rapidly, from a handful of employees at the outset to 200 employees and a market

value estimated at £40 million before it crashed. The respondent was originally the 100% shareholder. But between 2015 and 2016 outside investors were brought in, so that by the time of the crash the respondent held only 80% of the equity."

3. In the course of my judgment on those preliminary issues, I said this:

> "2. The application [against Mr Anthony-Mike] is made in the context of winding up proceedings against the Company. The petition to wind up the Company was first presented to the High Court, Chancery Division, Bristol District Registry, on 26 October 2016. It was based on a statutory demand that had been served on 3 October 2016. I interpose here to say that, before the petition could be dealt with, the respondent was ousted as a director and executive chairman of the Company, on 20 December 2016. On 23 December 2016 an agreement (called a 'settlement agreement') was entered into between the Company and the respondent, governing certain claims or potential claims by each against the other. I shall return to these events in more detail.
>
> 3. Returning to the proceedings concerning the Company, on 8 February 2017 HH Judge Purle QC, in the Birmingham District Registry of the Chancery Division, heard an application for an administration order in relation to this company. He dismissed that application, ordered that the petition to wind up the Company be transferred to Birmingham District Registry and also appointed Mr Haskew and Mr Wood (now the liquidators) as the joint provisional liquidators of the Company. On 22 February 2017 the judge made a winding up order.
>
> 4. There then followed proceedings within the winding up. First, a without notice freezing injunction was granted against the respondent, on 20 March 2017, by Mr Justice Newey. Then on 31 March 2017 an on-notice freezing injunction was granted, limited to assets to the value of £535,477.31. I varied that freezing injunction very slightly on 21 April 2017.
>
> 5. On 25 April 2017 I made an order by consent that certain preliminary issues should be determined in this application before the application itself was dealt with. The preliminary issues as set out in the order are as follows:
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> > "1. Whether section 127 of the Insolvency Act 1986 has rendered the entire settlement agreement dated 23 December 2016 void;
> >
> > 2. If and to the extent it is held that section 127 Insolvency Act 1986 has rendered the settlement agreement void, whether the settlement agreement should be validated by the court;
> >
> > 3. Whether all or any of the claims brought by the applicants against the respondent are barred pursuant to the terms of the settlement agreement;
> >
> > 4. If some, but not all the claims brought by the applicants against the respondent are so barred, which ones are so barred."
>
> 6. These issues arose out of the "settlement agreement" dated 23 December 2016 between the Company and the respondent, which might govern the claims made

> in the application. Put briefly, the respondent's case is that that agreement on its true construction bars all the claims. The Company says that it does not, but that in any event section 127 of the Insolvency Act 1986 renders the agreement void. The respondent says that in that case the court should validate the agreement as being in the interests of the Company's creditors…"

4. In my judgment, I held that, on its true construction, the claims brought by the Company against Mr Anthony Mike were not barred by the terms of the settlement agreement, but if they were, then the settlement agreement was avoided by the operation of section 127 of the Insolvency Act 1986, and that if it were it would not be right for the court to validate it under that section. My judgment was the subject of an appeal to the Court of Appeal, but before that appeal was heard the claim against Mr Anthony-Mike and the other directors of the Company was subject to a successful mediation, leading to a compromise of all claims by the Company against them. I will have to return to the effect of this later.

Procedure

5. This application was begun by an application notice issued on 24 November 2017 against the 43 separate respondents. It was supported by the third witness statement of Paul David Wood, dated 24 November 2017 (the first two witness statements having been made in support of the separate claim against Mr Anthony-Mike), the first, second and third witness statements of Nicholas Martindale, the first two dated 6 April 2018 and the third dated 29 May 2018 and the witness statement by Edward John Husband dated 4 June 2018. Very recently, I received the further witness statement of Mr Wood (his fourth), dated 27 July 2018, as described below.

6. The application was originally listed to be heard on 13 April 2018, but on 6 April 2018 the applicants applied for an adjournment of that hearing because of the successful mediation of the parallel dispute between the Company and Mr Anthony-Mike and other directors and senior employees of the Company. It was considered that this would be likely to lead to the resolution of a large number of the claims made in the present application. I acceded to the application for an adjournment, and the hearing was refixed for 1 June 2018.

7. The settlement of the dispute with Mr Anthony-Mike and others did indeed lead to a resolution of some of the disputes in the present claim. By the time of the skeleton argument prepared on 29 May 2018 for the hearing on 1 June 2018, the application was pursued only against 19 of the 43 respondents named in the original application notice. These were respondents nos 1, 2, 6, 11, 12, 15, 18, 19-22, 25, 26, 29, 31, 34, 36, 38, and 41. By the time of the hearing itself (at which no respondent was present or represented), a settlement had been reached with respondent no 20, and the applicants had discovered that respondents nos 18 and 36 were companies which had recently been dissolved, and therefore were no longer pursued.

8. At the hearing on 1 June 2018 I was concerned in particular with two matters which did not seem to me at that stage to have been sufficiently addressed. The first was the effect (if any) of the settlement of claims for breach of fiduciary duty against Mr Anthony-Mike and the other directors on the claims against the third party recipients who were respondents to the present application. The question was whether, if the Company has settled for value with those who caused the payments to be made, the

rule against double recovery, or any similar rule, reduced or even prevented a claim being made against the recipients of those payments. Secondly, in relation to respondent no 31, Monique Jayasuriya, who specifically raised the point (but indeed any other respondent to whom it might also apply), there was a question as to whether she was entitled to rely on the fact that she had already spent the money which she had received from the Company (in her case as salary for work done under a contract of employment with another company controlled by Mr Anthony-Mike) before she was made aware of the claim that the payments were in fact void under section 127. After hearing Mr Passfield on behalf of the applicants, who understandably was not fully prepared for these arguments, I decided to adjourn the hearing of the applications over a short period in order that I could be properly addressed on these points. The further hearing therefore took place on 5 June 2018.

9. At that adjourned hearing, Mr Passfield once more appeared on behalf of the applicants, and once again no respondent appeared or was represented. Mr Passfield addressed me on the two points which I had raised at the earlier hearing, and he drew a number of the relevant authorities to my attention. Given the importance of the points in principle, I reserved my judgment. But, after preparing most of my judgment, I realised that I needed more evidence and perhaps submissions on two points. These related to the exact terms of the settlement agreement between the liquidators and the directors, and to the purposes for which the payments to the respondents were made. As I have said, a further witness statement was prepared by Paul Wood, exhibiting various documents, and a further hearing held on 8 August 2018. Once more Mr Passfield appeared for the applicants, and once more none of the respondents appeared or was represented. Thereafter, I was able to complete my draft judgment within a relatively short time. Nevertheless, I am sorry for the delay in handing this down.

Positions of respondents

10. As I have said, a number of the respondents have settled with the applicants, and others are now no longer pursued, for various reasons. The claim however remains live against 16 respondents, nos 1, 2, 6, 11, 12, 15, 19, 21, 22, 25, 26, 29, 31, 34, 38, and 41. None of these attended any hearings, and none provided any written representations, except numbers 25 (Mr Pinto), 26 (Lawson Conner Ltd) and 31 (Ms Jayasuriya). I shall refer to their representations in due course.

Facts

11. The evidence in this claim establishes that, after the date of the presentation of the petition on 26 October 2016 and before the making of the winding up order on 22 February 2017, the Company made payments to third parties in the total sum of £1,722,608.38, including payments to the original 43 respondents to this application in the total sum of £205,932.90. The payments (forming part of that sum) that were made to the respondents still now pursued were as follows:

(1) Annabel's (Berkeley Square) Ltd	£1,000
(2) Apple Retail UK Ltd	£4,357.20
(6) BUPA Insurance Ltd	£1,389.04
(11) COYA (Restaurant) Ltd	£4,173.13
(12) Dashle Ltd	£12,500

(15) Elleven Orthodontics Ltd	£943
(19) George (Mount Street) Ltd	£2,672.61
(21) Hat-trick Design Consultants (London) Ltd	£9,750
(22) Hedonism Drinks Ltd	£2,850.80
(25) James Pimental Pinto	£10,000
(26) Lawson Conner Services Ltd	£1,890
(29) Martin Stockman	£1,000
(31) Monique Jayasuriya	£5,539.85
(34) Please Hold (UK) Ltd	£384
(38) Salesforce.com EMEA Ltd	£630.46
(41) Dorchester Clubs Ltd t/a The PA Club	£5,388

12. I interpolate here that no application has been made to the court for a validation order under section 127 of the Insolvency Act 1986 in respect of any of those payments. Accordingly, they are stated to be void under that section. I will return below to the nature of the claim that may be made by the Company against the recipients of payments avoided by section 127.

13. On 28 July 2017 I gave judgment on the preliminary issues raised in the claim brought by the Company against Mr Anthony-Mike. Mr Anthony-Mike subsequently sought and obtained permission to appeal against my decision, but in the meantime the effect of that decision was that he was exposed to the claims brought against him by the Company and its subsidiary ODL. That claim had 3 elements: (1) payments made for his personal benefit; (2) payments made to third parties before the petition was presented; and (3) payments made to third parties after the petition was presented. The claim against all directors (including Mr Anthony-Mike) over both companies exceeded £4 million. In relation to the Company alone, the claim against Mr Anthony-Mike was for about £1.9 million. Similar claims against the other directors related to the same loss, and did not increase the value of the claim. As I have said, the claims brought by both the Company and its subsidiary against Mr Anthony-Mike and the other directors were subject to a mediation, which was successful. I will come back to the terms of this settlement later, but for the present it is sufficient to say that, in nominal money terms, at least, the Company has not recouped the whole of its claimed losses by settling with Mr Anthony-Mike and the other directors.

14. The evidence available to the liquidators and to the court is limited. But, so far as it goes, it establishes the following facts about the transactions involving the respondents:

    i) The first respondent is a members' club in Mayfair, London. Mr Anthony-Mike used it to entertain business contacts. No receipt or invoice is available for the £1000 spent there on 5 December 2016.

    ii) The second respondent sells Apple technology equipment in the UK. There is an invoice to the Company for £789.60, dated 25 October 2016 and paid 2 December 2016, for a laptop computer. There are no invoices available for the payments of £2168.40, made on 28 October 2016 and £1399.20, made on 11 November 2016.

iii) The sixth respondent provides healthcare insurance. The 2 payments of £694.52 made on 2 November 2016 and 1 December 2016 were made by direct debit, suggesting that they were regular monthly payments, although there are no other documents to support this. The 31st respondent, Ms Jayasuriya, refers in her submissions to private health insurance being paid for her. She started her employment on 17 October 2016 and was not paid for December 2016. It is possible that these two payments to the 6th respondent were (in part, at least) in respect of her private health insurance.

iv) The 11th respondent is a members' club and Peruvian restaurant in Mayfair, London. The liquidators believe that this was a venue used by Mr Anthony-Mike when entertaining business clients. There are receipts for the sums of £1869.21 and £2303.92 in respect of the payments on 7th November and 28 November 2016. They relate to food and alcohol supplied.

v) The 12th respondent appears to be related to a Swedish company running a beauty business. The sum of £12,500 paid on 14 November 2016 appears to have been paid under the terms of a secured convertible loan note entered into by the Company with the 12th respondent on 9 September 2016.

vi) The 15th respondent runs a dental practice in the Harley Street area of London. There are no receipts or invoices available in relation to the payments of £125 and £488 made on 11 November 2016 or the payment of £330 made on 18 November 2016. However, the applicant's solicitors were informed by an employee of the 15th respondent in March 2018 that those payments were linked to Mr Anthony-Mike and someone called "Julie". The latter person has not been identified.

vii) The 19th respondent runs a private members' club in Mayfair, London. Again, it appears that this was a venue used to entertain business contacts. Receipts, relating to food and drink supplied, are available in respect of the following payments: £69.58 (27 October 2016), £123.05 (7 November 2016), £63.25 (14 November 2016), £925.75 (15 November 2016), £280.60 (18 November 2016), £73.60 (21 November 2016), £115.58 (21 November 2016), £64.40 (21 November 2016), £123.05 (23 November 2016).

viii) The 21st respondent appears to be a design company founded in 2001 and based at London Bridge. However, no invoices are available and there is no further information as to what (if any) services were provided to the Company.

ix) The 22nd respondent is a company running an off-licence in Mayfair. The receipt for £2401.90, paid on 28 November 2016, shows the purchase of 6 bottles of wine or spirits.

x) The 25th respondent was a consultant retained by IDEASE LLP, but whose remuneration for his services was paid by the Company. It is that payment which is the subject of this claim. His position is considered in more detail later.

xi) The 26th respondent provides regulatory infrastructure and managed compliance services and software. They informed the liquidators that they had

invoiced and provided services in accordance with their service agreement dated 10 November 2016. That agreement has not been made available to the court. It is clear from a statement filed very recently that the services were provided to ValCap Ventures LLP, although paid for by the Company.

xii) The 29th respondent was employed by ValCap Ventures LLP as a consultant, although paid by the Company. The payment the subject of this claim appears to have been his fee for consultancy services in November 2016.

xiii) The 31st respondent was an employee of Valentina Capital Holdings UK Ltd, starting employment on 17 October 2016. But she was paid by the Company, and it is the payment of her remuneration which is the subject of this claim. I deal with her position in more detail later.

xiv) The 34th respondent provides "on hold" and voicemail telephone services. There are no invoices, contracts or receipts available in respect of the two payments of £192 made on 4 November and 2 December 2016. But they were paid by direct debit, suggesting that they were regular payments.

xv) The 38th respondent is a customer relationship management platform with applications for sales, services and marketing. No invoices or contract are available to explain the payment of £630.46 on 28 October 2016.

xvi) The 41st respondent trades as "the PA Club", offering services to senior PAs and EA's in London. The sums of £3594 and £1794 paid on 11th November and 2 December 2016, were, according to the invoices available, for a year's membership and for attendance at an event.

15. Letters before claim were sent to all respondents to this application. Where no response was received, and the letter was not returned, a chasing letter or email was sent. In a number of cases, there was no response at all. In three cases, detailed arguments were put forward. I deal with these later. In other cases, respondents have put forward a number of general arguments as defences to the claim made. In summary form, these include the following:

1. The goods or services in question were provided to the Company and the payments made were received in good faith;

2. The respondents were not aware of the petition at the time of supplying the goods or services or receiving the payments in question;

3. The respondents have changed their position since receipt of the payments and it would now be inequitable to require the recipients to repay;

4. The transactions concerned were in the best interests of, or for the benefit of, the creditors as a whole and would therefore be retrospectively validated by the court if any application were to be made.

16. An initial problem is that, with limited exceptions (with which I will deal below), the respondents have provided no sufficient details, let alone evidence, of the factual basis upon which any of these arguments may rest. In these circumstances, it is not possible

for the court to proceed on the basis that that factual basis is even arguably made good. When it comes to the final hearing of the substantive application, mere assertion in correspondence is simply not enough to prevent the law taking its course. The procedural rules are clear, and designed to achieve fairness between the parties. They are (for what it is worth) explained on a number of websites available via the internet. If respondents choose not to take the claims made against them seriously, to take legal advice on how best to deal with them, or even to take the trouble to come to court and explain themselves, I am afraid that they must accept the consequences. In principle, if someone makes a claim against you, and you bury your head in the sand, you have only yourself to blame if the claim goes against you. Of course, I accept that, in the case of some of the respondents, at least, the sums claimed are not large, and those respondents may have taken the view that, commercially speaking, it was not worth their while to spend time and trouble dealing with them. They may even have thought that the applicants might do the same. If so, that was a calculated risk.

17. At this stage, I can deal with the four generic defences forward by recipients quite shortly, and as follows:

1. The fact that goods or services were supplied in good faith does not affect the operation of section 127 in making the disposition of the Company's property void. There is no exception in the section for receipt in good faith. (I deal with this further below.)

2. The same applies to the fact of the absence of knowledge of the existence of the petition. The disposition is nevertheless void, because Parliament has said it is, and once again there is no exception for transacting without knowing of the petition. The legislature has chosen to make a policy decision that prefers the interests of the Company and its creditors to those of the innocent third parties who deal with it. The court has no power to ignore that policy decision. Indeed, so far as carried into execution by the words of the statute, it is its duty to enforce it.

3. Unless respondents provide admissible evidence of the change of position, the court is in no position to judge whether this can make any difference or not. As I say later, the burden is on the recipients to prove that they have a defence to the claim made against them. It is not for the applicants, having made out a prima facie case, to prove that they have not.

4. Whether the transaction would or would not be retrospectively validated by the court is irrelevant, if no application is ever made by the recipient for such validation. In the absence of such an application, the court must proceed on the basis that the disposition of the Company's property is void, as the statute says it is. In this connection, I accept the evidence filed on behalf of the applicants, that the recipients have been invited to make any applications which they wished for the validation of the payments they received, and yet none of them has done so.

Law

18. So far as material, section 127 currently provides as follows:

> **"127. Avoidance of property dispositions, etc.**
>
> (1) In a winding up by the court, any disposition of the Company's property, and any transfer of shares, or alteration in the status of the Company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.
>
> […]."

19. As has already been made clear, it is open to the recipient of a disposition falling within section 127 to apply to the court for a retrospective validation order. But, other than in exceptional circumstances, such an order should be made only if the disposition in question has been for the benefit of the general body of unsecured creditors, so that it is appropriate to disapply the usual *pari passu* principle: see *Express Electrical Distributors Limited v Beavis* [2016] 1 WLR 4783, [56]. In the present case, no such applications have been made by any respondent still pursued by the applicants, and there is no evidence before the court to show that there is any such exceptional circumstance as would justify the making of any validation orders.

Nature of claim against Respondents

20. I begin by considering the juridical nature of the claim which the Company makes against the respondents. In *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, the Court of Appeal (Peter Gibson, Mummery, Latham LJJ) said:

> "22. As Oliver J pointed out in *Re J Leslie Engineers Co Ltd* [1976] 1 WLR 292 at 298 the invalidating provisions (then to be found in section 227 of the Companies Act 1948) do not spell out the appropriate remedy of the Company when the disposition is avoided. The right of recovery of the Company's property which has been disposed of is determined by the general law. It is common ground in these proceedings that the right of recovery, whether invoked against the payees or against the Bank, is restitutionary. There is no claim against the Bank in these proceedings for damages either for breach of an alleged duty of care owed to the Company and to the general body of its creditors or for breach of an express or implied term of a contract between the Company and the Bank."

In *Rose v AIB Group (UK) plc* [2003] 1 WLR 2791, [30], Mr Nicholas Warren QC (as he then was), and in *Clark v Meerson* [2018] BPIR 661, [45]-[46], Mr Deputy Registrar Mullen accepted this characterisation of the claim as "restitutionary", though in each case there was no real dispute between the parties on this point.

21. In parenthesis at this point, I add that, as explained by Millett LJ in *Trustee of the property of FC Jones and Sons v Jones* [1997] Ch 159, 164H-166H (a personal bankruptcy case), it is clear that the reference to a disposition being "avoided" by the insolvency statute is not a reference to the ideas conveyed by the use of the terms "void" and "voidable", as generally understood elsewhere in the law. Those terms refer respectively (1) to something that is and was void from the beginning, and (2) to something which was valid at the beginning but was subsequently avoided retrospectively. The latter case leaves open a window of opportunity for a transfer to a third party for value and in good faith, which on general equitable principles may bar

rescission thereafter. But, in the context of s 127 (as also in the case of personal bankruptcy), the legal consequence of the transaction *at the time it was carried out* depends on what happens *subsequently*. If the winding-up order is eventually made, the disposition is and always was void from the beginning, although the court has the power to validate it in an appropriate case. If however the winding-up order is not made, the disposition is and always was valid.

22. In my judgment, however, the characterisation of the claim as "restitutionary" does not mean that the claim made by the Company against the recipient must necessarily be a claim in what used to be called restitution, and is now called unjust enrichment. It is perhaps better seen as a claim for the 'restitution' (in the old-fashioned sense of 'return') of the property the subject of the disposition which by virtue of section 127 is void in law. So, if the void disposition was one relating to a property right, then the property right has not been transferred to the recipient of the physical asset the subject of that property right, and a claim will lie on behalf of the Company for the return of that asset. For example, if the Company had handed over possession and purported to transfer the ownership of a motorcar to a third party, but the disposition was avoided by section 127, the Company's claim would be for the physical return of the motorcar under the general law of tort, that is, interference with goods.

23. In the recent bankruptcy case of *Ahmed v Ingram* [2018] EWCA Civ 519, transfers of company shares had been made by the bankrupt after the presentation of the petition but before the bankruptcy order was made. The trustees in bankruptcy sought, as against the transferees, a declaration that the transfers were void, and orders to compensate the estate for the reduction in value of the shares since they were transferred. By the time of the trial, the transferees no longer contested the declaration sought, and had retransferred the shares to the trustees. The litigation continued in relation to the question of compensation.

24. Gloster LJ (with whom Patten and David Richards LJJ agreed) said:

> "29. In the respondent's notice, the respondents submitted that the judge ought to have concluded that s 284 of the Insolvency Act 1986 provides a free-standing right to recover the compensation ordered by the judge. I disagree. In my judgment s 284 only operates to *avoid* relevant dispositions. The section is silent as to the remedy available to the bankruptcy estate when a disposition has been avoided, and the appropriate remedy is, accordingly, governed by the general law. This is a point which was decided by this court in *Hollicourt (Contracts) Ltd*…
>
> […]
>
> 33. *Hollicourt* clearly shows that the right to recovery is 'restitutionary'. Here the appellants (correctly) accepted that, as well as having a right to the return of the shares, the trustees in bankruptcy were, in addition, entitled to claim equitable compensation in respect of any loss that the estate had suffered as a result of the wrongful retention. At trial there was some argument as to the meaning of that term in the context of s 284. Again, it is somewhat unclear what the judge precisely decided on this point, but it appears that Proudman J accepted Mr Moraes' submission that 'restitutionary' simply meant that

> 'the bankrupt's estate is entitled to be restored to the position it would have been in had the [first appellant] not retained the Shares, as if the trustees in bankruptcy had only had them they would have realised them in accordance with their duties.'

34. But I cannot agree that that is the right approach. The word 'restitutionary' as used in the authorities is used in the sense of restoring trust property *actually lost as a result of a breach of trust.* The trustees in bankruptcy have chosen to make a case for compensation based on breach of trust. The cases clearly establish that compensatory relief, in addition to the restoration of trust property, is available where the claimant beneficiary can establish a loss to the estate caused by the trustee's breach of trust. Such relief may be awarded in appropriate cases in addition to the restoration of property and is compensatory in nature. That was made clear by Lord Toulson in his judgment in *AIB* at [64]-[66]…"

25. Gloster LJ considered the effect of various provisions of the Insolvency Act 1986 on the transfers of company shares, as well as other authorities, and concluded:

> "45. In my judgment, the effect of sections 278, 283, 284 and 306 of the Insolvency Act 1986 was that, in the present case, as from the transfer date, the first appellant held the legal title to the shares on the following trusts:
>
> i) contingently for the bankrupt, in the event that a bankruptcy order was indeed made against him; and
>
> ii) subject thereto (i.e. in the event that no such order was made), for himself as absolute owner of both the legal and beneficial title.
>
> As from the date when the bankruptcy order was made on 21 April 2009, the first appellant and/or the sisters (if they had had some of the shares transferred to them by this date, as to which see below) held the legal title on trust for the bankrupt and title to them was vested in Mr Hosking, on the latter's appointment as trustee in bankruptcy on 22 July 2009. An alternative analysis would be that the first appellant and/or the sisters held a defeasible or voidable title from the transfer date until the bankruptcy order and thereafter no title to the shares at all, since the transfer was, retrospectively, void. However, the claim for equitable compensation was premised on the trust analysis and I see no reason to depart from it as it makes little difference to the ultimate outcome."

26. But, here, the claims are in respect of payments of sums of money from the Company's bank account to third parties. Money is different from chattels, company shares or land. For example, if B pays A's money in currency to C without authority, A has no claim against C in conversion: see the cases cited in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 559E. However, A can recover from C in a personal action in what used to be known as money had and received, and now as unjust enrichment, at least unless C has acted in good faith and given a valuable consideration: *ibid*, 560A-B, 572B-E.

27. But that is not quite this case. This case is one where payment of money is made by A directly to C, but it amounts to a disposition of A's property which is made void by

the statute on A's insolvency. Does the same principle apply? There are two authorities which bear on this question. The first is *Re J Leslie Engineers Ltd* [1976] 1 WLR 292, a decision of Oliver J. In that case, the director of a company between presentation of a petition to wind up and the making of the order paid over £1050 to a creditor for work done. Of this sum, £800 was paid by way of a cheque drawn on the personal account of the director and his wife, which was in fact overdrawn at the time. The director caused the Company to pay £800 into the joint account to reimburse them for the sum paid to the creditor. Oliver J held that the payment of £800 from the Company to the joint account *was* a disposition of the Company's property and accordingly void, but the payment out of the joint account to the creditor was *not* a disposition of the Company's property and therefore was not void. The creditor therefore was not liable in respect of that sum to the Company. The remaining part of the £1050 was drawn out in cash from the Company's bank account by the director, who bought post office money orders in the total sum of £250 and sent them to the creditor, who cashed them. Oliver J held that this was a disposition of the Company's property, and therefore void. The judge made a declaration that the payment of £250 was void and an order for its recovery from the creditor. In relation to the sum of £800, it seems clear that the form of the claim for repayment of the money was an action in money had and received: see at 299B-C. Although it is not expressly stated by the judge, it would appear that in his view that was also the nature of the claim made in respect of the £250.

28. The other authority is the decision of the Court of Appeal, already cited, in *Trustee of the property of FC Jones and Sons v Jones* [1997] Ch 159. This was a case of personal bankruptcy of the members of a partnership, rather than the winding up of a company. The facts of this case occurred before the coming into force of the Insolvency Act 1986, and thus the relevant legislation was contained in the Bankruptcy Act 1914. The partners in a firm committed an act of bankruptcy, a bankruptcy petition was presented, a receiving order was made, and thereafter the partners were adjudicated bankrupt. Under section 37 of the 1914 Act, the title of the trustee in bankruptcy to the assets of the bankrupts related back to the date of the act of bankruptcy. After that date, but before the bankruptcy adjudication, two of the partners gave cheques drawn on their bank account to the wife of one of them, who paid it into an account she had opened with a firm of commodity brokers. The wife then made profits from commodity speculation (in potato futures), and paid all the money thereafter into a call deposit account with a bank. The trustee in bankruptcy sought to recover this money from the bank, which interpleaded, and left the matter to be fought out between the trustee in bankruptcy and the wife.

29. Millett LJ (with whom Nourse and Beldam LJJ agreed) declined to

> "accept the main submission of counsel that the only action at law which was available to the trustee was an action against the defendant for money had and received" (at 164G-H).

He held that, in the events that had happened, the trustee in bankruptcy had a statutory legal title to the debt owed by the bank to its customer, as represented by the call deposit account (at 166H-167B, 170F-G). Thus the trustee in bankruptcy, rather than the wife, was the real creditor of the bank, even at law. He could therefore sue *in debt*, rather than money had and received. (He also held that the trustee in bankruptcy had title to the profits made, by means of tracing at common law. I am not concerned with

this part of the decision, since there is no question in the present case of any claim to profits being made with the money that was paid to the respondents.)

30. However, it is clear that the position for bankrupts under the 1914 Act was different to that for companies under the 1986 Act. Instead of dispositions of the Company's property being made void, so that ownership never left the Company, title to the bankrupt's estate vested directly in the trustee. For my purposes, the important point is that the Court of Appeal did not suggest that a claim for money had and received would not lie (subject to usual defences, including limitation). Instead, the court held that in that case there was a superior alternative, not subject to possible defences to money had and received, namely a claim in debt.

31. A claim for money had and received was also treated as the form of claim where a money payment was avoided by supervening insolvency in both *Pettit v Novakovic* [2007] BPIR 1643, [16], and *Re D'Eye* [2016] BPIR 883, [46], [49] (both cases of personal bankruptcy arising under the 1986 Act).

32. In the present case, I am in no doubt that the modern equivalent of the old claim for money had and received, namely the claim in unjust enrichment, is *in principle* the appropriate form of claim to be made by a company where a disposition of its property retrospectively avoided takes the form of the payment of money. However, given that the circumstances in which the claim applies, namely the statutory avoidance of dispositions on an insolvency, it does not follow that such a claim must necessarily have all the characteristics to be found in cases not involving insolvency. The policy surrounding the law's treatment of insolvency may require that the claim be modified, particularly when it comes to defences. As Chief Registrar Baister said in *Re D'Eye* [2016] BPIR 883,

> "49. I tentatively conclude from the foregoing that Mr Curl is probably right in saying that we are not in Goff and Jones territory because we are not dealing with unjust enrichment generally but a particular statutory regime which gives rise to an obligation to account for money had and received to which there are limited defences."

The burden of proof

33. Before I consider the question of defences generally, I mention the question of the burden of proof. The general rule in civil litigation is that the party who asserts must prove: *Robins v National Trust Company Ltd* [1927] AC 515, 520, per Viscount Dunedin. In *Abrath v North East Railway Company* (1883) 11 QBD 440 (affirmed (1886) 11 App Cas 247), Bowen LJ said (at 456):

> "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a prima facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof … is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner."

34. In a claim in unjust enrichment, as modified for insolvency situations, the cause of action is constituted by certain elements. The claimant must prove that these elements exist in the particular case. If nothing more is proved, in particular by the defendant, the claimant will succeed. If the defendant then proves the elements of a defence, and there is nothing more, the claimant will fail. It is not for the claimant however to prove the *absence* of a defence for the defendant: *cf Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827d.

Defences

Good faith for value

35. Now I turn more generally to the question of defences to the Company's claim in respect of a void payment. In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, a case of money had and received in a non-insolvency context, it was held that the recipient would have a defence if he was in good faith and gave valuable consideration for the payment. Lord Goff of Chieveley said (at 572B-D):

> "[H]ere the money had been paid to the respondents by a third party, Cass; and in such a case the appellant has to establish a basis on which he is entitled to the money. This (at least, as a general rule) he does by showing that the money is his legal property... If he can do so, he may be entitled to succeed in a claim against the third party for money had and received to his use, though not if the third party has received the money in good faith and for a valuable consideration."

36. But such a defence can hardly apply in the context of payments made void in the insolvency context. The purpose of making such payments void is to protect creditors, by requiring the *pari passu* principle to be followed. As Chief Registrar Baister also said in *Re D'Eye* [2016] BPIR 883,

> "54. It seems plain to me that it would be wholly unjust to allow any of the parties who has been paid by the bankrupt or on his behalf out of his estate to retain the sums they have received to the detriment of other creditors. To do so would be to prefer those persons over the creditors in the bankruptcy (or other creditors in the bankruptcy) and would defeat the statutory purposes to which I have alluded."

On the contrary, what the insolvency policy requires is that payments made which are avoided by the statute should be repaid to the estate as soon as possible. As one would expect, this is a defence: *Pettit v Novakovic* [2007] BPIR 1643, [16].

Change of position

37. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 is also the case in which it was definitively held that change of position in good faith in reliance on a payment made was a good defence to a claim in money had and received. The question is how far that defence applies in the insolvency context. In *Rose v AIB Group (UK) plc* [2003] 1 WLR 2791, the argument was made that change of position as a defence was "simply unavailable in the context of claims to recover monies the payment of which, as a result of section 127, [was] rendered void" ([39]).

38. The deputy judge, Nicholas Warren QC (as he then was), said this:

> "41. Attractively as the argument was presented by Mr Prentis, I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator. It seems to me that the question of validation of a disposition is distinct from the question of actual recovery if the disposition is not validated. I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition. After all, in other cases where payments can be treated as void or ultra vires, it is commonplace that restitution is available subject to restitutionary defences. The purpose behind the discretion conferred on the court to validate a disposition is not the same as the purpose of the change of position defence, albeit that both are based on an overarching concept of fairness. The former is directed principally at achieving a pari passu distribution of assets whilst permitting transactions which are, or are likely to be, of benefit to the Company to take place; the latter is an inherent qualification to the right of restitution and which, in its very nature, will be detrimental to the Company and distort the pari passu distribution of assets.
>
> 42. I do not consider that the comparison with sections 238 and 239 improves the argument that section 127 excludes a change of position defence in all cases. Those sections provide express remedies to which the liquidator is entitled if certain conditions are satisfied; in the case of section 127, in contrast, no remedy at all is provided for recovery (where a validation order is not made) and the matter is left to the general law. The result is not incongruous because a liquidator must establish something more under sections 238 and 239 if he wishes to take advantage of the express statutory remedies.
>
> 43. However, whether the change of position defence succeeds will then depend on the individual facts. It is clear, for instance, that a payee cannot rely on a change of position defence if he knows, when he changes his position, that the payment to him was invalid. It might be said that this is because he is not acting in 'good faith' or not acting on 'the faith of the receipt'."

39. As it happened, the claim to a change of position defence in that case failed on the facts:

> "55. … In my judgment, the change of position in releasing the charge was not made in reliance upon the initial validity of the credits to the overdrawn accounts, but was made in reliance on an assumption that no claim would be made to assert that initial invalidity. Without reliance on the initial validity, there is no change of position defence to the restitutionary claim."

40. Nevertheless, the deputy judge's view that, in principle, change of position was a defence to a restitutionary claim in respect of payments made void by section 127, was endorsed (albeit *obiter*) in *Clark v Meerson* [2018] BPIR 661, [47], and also cited with apparent approval in *Re D'Eye* [2016] BPIR 883, [55].

41. However, in the present case, Mr Passfield, for the applicants, argued that the claim in respect of payments made void under section 127 should not be regarded as a restitutionary claim in the sense of one based on the principle of unjust enrichment. Accordingly, the defence of change of position was not relevant in this context. Certainly, when dealing with purported transfers of property rights, there is much to

be said for this. But in the context of payments of money, where the appropriate claim outside the insolvency context was the old claim in money had and received, and now in unjust enrichment, and this kind of claim is ordinarily subject to the defence of change position (as shown by *Lipkin Gorman*), in my judgment there would have to be some good policy reason why that defence should not apply to the claim for money paid even in the insolvency context. The reasoning of Mr Nicholas Warren QC in *Rose* is compelling, even if in that case the defence failed on the facts. I therefore conclude that in principle it would be open to any of the respondents in the present case to defend the claim brought against them by showing a change of position in good faith in reliance on the payment. However, and as I have said, the burden of doing so lies on them: *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827d.

42. In this context, 'reliance' includes 'anticipatory reliance'. In other words, it can include action taken before the payment as well as after, as long as the recipient was relying on what was anticipated to happen: see the opinion of the Judicial Committee of the Privy Council in *Dextra Bank and Trust Co Ltd v Bank of Jamaica* (2001) 59 WIR 432, [38]. But either way there is a need for a causal link between the receipt of the payment and the change of position which makes it inequitable for the recipient to be required to make restitution; purely coincidental misfortune suffered is not enough: *Scottish Equitable plc v Derby* [2001] 3 All ER 818. Moreover,

> "the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things": see Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580F-G.

43. Even if there is a causal connection between the payment and the change of position, the recipient may be no worse off in substance. So for example it is not generally sufficient to use the money paid to pay off an existing debt which would have had to be paid sooner or later: *Scottish Equitable plc v Derby* [2001] 3 All ER 818, [35]; see also *Wards Solicitors v Hendawi* [2018] EWHC 1907 (Ch), [28]-[31]. Finally, the concept of "relative fault" has no role to play in the defence of change of position, as the defence may be invoked by anyone in good faith: see *Dextra Bank and Trust Co Ltd v Bank of Jamaica* (2001) 59 WIR 432, [45].

Estoppel

44. Assuming that I am right about the availability in principle of the defence of change of position, the question then arises whether there could also or alternatively be a defence by way of estoppel. In *Avon County Council v Howlett* [1983] 1 WLR 605, the defendant was a teacher employed by the plaintiff. After an accident at his school, he was unable to work. Under his contract of employment, he was entitled to certain sick pay. By mistake, the plaintiff over a period of months overpaid him by £1007. When he enquired whether the payments being made were correct, he was told that they were. He bought a suit for himself and a second hand car at a total cost of £460.50, and did not claim social security benefit of £86.11 which he would have claimed had he not received the payments from the plaintiff. When the mistake was discovered, the plaintiff sought to recover the overpayment as money paid by mistake. The defendant pleaded that in reliance on the plaintiff's representations he had suffered a detriment amounting to £546.61, although the evidence in fact showed that

he had spent all of the overpayment, and (beyond the two specific items referred to) in ordinary living expenses, and would not have the money to satisfy any judgment that might be given against him. The defendant declined however to amend his defence to claim a detriment in the whole of the overpayment.

45. At first instance, Sheldon J held that the plaintiff was estopped from claiming £546.61 of the overpayment by reason of the detriment suffered by the defendant in that sum and pleaded by him in his defence. Having noted that the defendant had spent all the money and was not in a position to repay any, but in the light of the refusal of the defendant to amend his defence, and on being told by the plaintiff that the claim was in the nature of a test case (because there were other cases of overpayment by the same employer being considered), he gave judgment for the plaintiff for the balance of £460.39, not to be enforced without the leave of the court. The defendant appealed on the basis that, if the estoppel were established at all, it operated to bar the whole claim and not merely the first £546.61 of it.

46. The Court of Appeal was unhappy with the course adopted by the judge, who had been persuaded by the parties in effect to try a hypothetical case. Nonetheless, the appeal was allowed. The majority of that court allowed the appeal on the basis, as Slade LJ put it (at 622D, G-H), that

> "a party who, as a result of being able to rely on an estoppel, succeeds on a cause of action on which, without being able to rely on it, he would necessarily have failed, may be able to recover more than the actual damage suffered by him as a result of the representation which gave rise to it. Thus if a bank's customer is estopped from asserting that a cheque with which he has been debited is a forgery, because of his failure to inform the bank in due time, so that it could have had recourse to the forger, the debit will stand for the whole amount and not merely that which could have been recovered from the forger…
>
> So far as they go, the authorities suggest that in cases where estoppel by representation is available as a defence to a claim for money had and received, the courts similarly do not treat the operation of the estoppel as being restricted to the precise amount of the detriment which the representee proves he has suffered in reliance on the representation." (See also Eveleigh LJ at 611C-D. Cumming-Bruce LJ allowed the appeal by way of a pleading point: see at 609E-G.)

47. But Slade LJ also went on to say (at 624-5):

> "I recognise that in some circumstances the doctrine of estoppel could be said to give rise to injustice if it operated so as to defeat in its entirety an action which would otherwise lie for money had not received. This might be the case for example where the sums sought to be recovered was so large as to bear no relation to any detriment which the recipient could possibly have suffered" (see also Eveleigh LJ at 611-2, and Cumming-Bruce LJ at 608G-H).

The example given in the last sentence of this extract is usually referred to in subsequent authorities as the "exception" to the estoppel principle recognised in that case. I will return to this later.

48. I have already referred to the decision of the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, establishing beyond any doubt the defence of change of position to claim in money had received. Professor Gerard McMeel has argued (*The Modern Law of Restitution*, 428-29) that this decision has in effect overruled the decision in *Avon County Council v Howlett*:

> "It is submitted that the better view is that the decision in *Lipkin Gorman* effectively excludes the operation of estoppel in this context. Therefore estoppel no longer has any role to play here. There are a number of reasons for this. First, to allow estoppel completely to exclude a claim in restitution where the expenditure in reliance is less, even considerably less, than the total claim would operate an injustice at the expense of the transferor. The availability of the more proportionate defence means that the court must necessarily disregard the earlier primitive defence. Accordingly, *Lipkin Gorman* can be seen as having impliedly overruled the decision of the Court of Appeal in *Avon County Council v Howlett* [1983] 1 WLR 604. Secondly, support for this position can be garnered from the speech of Lord Goff, where his Lordship commented (at 579) 'that, in many cases, estoppel is not an appropriate concept to deal with the problem'. In Newfoundland the courts have rejected estoppel completely in this context (*RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (fourth) 230, at 237). The case law on estoppel is preserved, for the avoidance of doubt, by Goff and Jones, 828-33. Even if estoppel does survive, it is submitted that it will have only limited operation, in circumstances where there is an *express* representation by the transferor that the transferee is entitled to the money, and where it would be difficult for the transferee to quantify his expenditure in reliance."

49. Goff and Jones, *The Law of Unjust Enrichment*, 9th edition by Charles Mitchell, Paul Mitchell and Stephen Watterson, take a different view. They say (at [30-16]):

> "In our view, however, the two defences are different and estoppel has a role to play that is not performed by change of position. Change of position is about the fair allocation of loss where the value transferred from the claimant to the defendant has been dissipated through no fault of the defendants, while estoppel is about holding the claimant to his undertakings where these have been detrimentally relied upon by the defendant. Before brushing the estoppel defence to one side on the basis that it always produces the same outcome as the change of position defence, one would need to be certain that it would never be appropriate to fulfil the defendant's expectations rather than merely reversing his detriment, or to achieve some combination of the two. There is an unspoken assumption in recent judicial discussions of the estoppel defence that this would never be appropriate, but no explanation has been offered of why this should be so. Furthermore, if a court were to take the view that the point of estoppel was to prevent the claimant from leading evidence to establish that the defendant's enrichment was unjust, then that would suggest that the argument does not work as a 'defence' at all, but rather as a denial that the claimant has established all the necessary ingredients of his cause of action."

50. There is some judicial support for the view expressed by Professor McMeel. In *Philip Collins Ltd v Davis* [2000] 3 All ER 808, the claimant sought repayment of monies paid by mistake, and the defendants relied on the defences of change of position and estoppel by representation. Jonathan Parker J held that the change of position defence

extended to one half of the overpayments. In relation to the argument based on estoppel by representation, he held that no representation had been made by the claimant and there was no evidence that the defendants had acted to their detriment in respect of any specific payment. So that part of the claim failed. But he also said (at 826 a-b):

> "In any event, as I read the relevant authorities, the law has now developed to the point where a defence of estoppel by representation is no longer apt in restitutionary claims where the most flexible defence of change of position is in principle available…"

51. On the other hand, in *Scottish Equitable plc v Derby* [2001] 3 All ER 818, where a life assurance company overpaid the amount due under a pension policy, and sought to recover it, the defendant sought to rely on the defence of change of position. That defence succeeded at first instance only as to a small part of the overpayment. An appeal to the Court of Appeal was dismissed. Robert Walker LJ (with whom Simon Brown and Keene LJJ agreed) considered the decision in *Avon County Council v Howlett*, and said:

> "44. I would be content to follow the judge in refraining from attempting any general statement of principle and treating this case as comfortably within the exception recognised by all three members of this court in the *Avon County Council* case. We cannot overrule that case but we can note that it was not seen, even by the court which decided it, as a wholly satisfactory authority, because of its fictional element."

52. The correctness of *Avon County Council v Howlett* was again considered by the Court of Appeal in *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286. The defendant was expecting a payment of a certain size into its account from a third party. By mistake the bank paid a sum of that size into the defendant's account which had been intended for the account of another of its customers. The defendant dispatched goods to the third party, but of much less value than the mistaken payment. The bank later sought repayment from the defendant. At first instance, the judge found that the money had been paid by mistake, that the bank had represented that the money was due to the defendant, and that the defendant had acted on that representation to its detriment by dispatching the goods. However, the judge held that the defendant was entitled to rely on the estoppel only to the extent of the detrimental reliance. The defendant appealed, but the appeal was dismissed.

53. The court considered in particular the decision in *Avon County Council v Howlett*, and the relationship between the defences of change of position and estoppel by representation. It was argued for the bank that the defence of estoppel was no longer available in a case such as the present, where the defence of change of position was available to the defendant. Potter LJ concluded (at [46]) that

> "the two defences will remain distinct, unless or until the House of Lords rules otherwise."

Peter Gibson LJ (at [66]) called the decision in *Avon County Council v Howlett* a "procedural oddity". He went on in the same paragraph to say that

> "It was decided at a time when the defence of change of position was not recognised. But it was not expressly overruled by the House of Lords in the *Lipkin Gorman* case. … I doubt if this court is free to treat the *Howlett* case as overruled."

The court held that this case fell within the "exception" in *Avon County Council v Howlett*, where the payment sought to be recovered was so large as to bear no relation to any detriment incurred, so that it was unconscionable for the recipient to retain the balance, and that therefore the estoppel defence extended only to the value of the goods shipped.

54. It is therefore clear that, under the general law, and despite academic criticism, the defences of change of position and estoppel by representation continue to exist separately, even if the enlargement of the so-called "exception" to the *Avon* principle draws the two defences closer together. In the context of insolvency, the position appears to be the same. In the case of *Rose v AIB Group (UK) plc* [2003] 1 WLR 2791, to which I have already referred, the deputy judge (at [57]) accepted that it was open to the recipient of a payment of money avoided by section 127 to prove the elements of an estoppel by way of defence to the claim for repayment. In my judgment, I must proceed on the basis that estoppel by representation and change of position are in principle both available to respondents to the present application. Obviously, whether they can avail themselves of either defence depends on the particular facts of each respondent's case.

55. I have already mentioned the elements of the defence of change of position. An estoppel by representation requires (1) representation, for example that the money paid was actually owed, (2) some action taken in reliance on the representation which would be (3) to the recipient's detriment if the representor were not held to the representation. However, it is established that payment of money in ordinary circumstances does not amount in itself to a representation that the money was actually owed: see *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670. More recent authority makes the same point in relation to *tender* of payment: *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 825j.

The impact of the settlement with the directors

Background

56. But there is one other matter of law with which I must deal before considering the application of the law to the facts. This is the question of the impact (if any) on the claims against these respondents of the compromise by the liquidators of the Company's claims against Mr Anthony-Mike and the other directors. In the applicants' skeleton argument, the relevant background is set out as follows:

> "21. On 23 March 2017, the Liquidators issued a claim against Mr Anthony-Mike for equitable compensation for the losses suffered by the Company as a result of his breaches of fiduciary duty. These breaches included causing or permitting the Company to make payments after the presentation of the Petition. The Liquidators asserted that Mr Anthony-Mike was liable to compensate the Company to the extent that the Company was unable to recover monies from the recipients of the void payments.

22. On 27 April 2017, the Liquidators reached a global settlement with Mr Anthony-Mike and the other *de jure* directors of the Company (against whom claims had been threatened in relation to both the Company and Officeserve Direct Ltd) on confidential terms.

23. The court has expressed concerns as to whether the settlement precludes the Liquidators from recovering any sums from the respondents. This would only be the case if by the settlement the Company's losses were recouped in full, such that the principle of full satisfaction would operate to prevent double recovery.

24. The Liquidators are prevented by the confidentiality provisions of the settlement from disclosing its terms without the consent of the other parties or a court order. However, as part of that settlement, the other parties permitted the Liquidators to report to creditors on the broad terms of the settlement. Accordingly, in their report to creditors dated 20 April 2018 pursuant to Insolvency Rule 18.8 and filed at Companies House on 3 May 2018, the Liquidators reported:

> "Settlement Agreement
>
> At a mediation meeting on 28 March 2018 we settled all claims against the directors of the Company. Whilst we have signed a confidentiality agreement over the detailed terms of the agreement we can confirm the following: –
>
> – the insurers have agreed to pay £1.55 million within 28 days of the signing of the agreement
>
> – this will be split between both OTL (£1.1 million) and ODL (£450,000) when received by our lawyers
>
> – all claims against the directors and from the directors are extinguished
>
> – the sum of £34,107 currently held by can be used to cover legal fees as ordered by the court".

25. It is therefore clear from this report that the Liquidators have not recouped the whole of the Company's losses, such that the rule against double recovery is not engaged.

26. The Liquidators will ensure that a copy of the settlement agreement is available at court in the event that the court considers it appropriate to order them to disclose its contents to the court. Further submissions will be made at the hearing as to the terms on which any such disclosure should be ordered."

57. In fact, the question of disclosing the settlement agreement during the earlier hearings was not raised, either by the applicants or by me, and therefore I did not discuss any terms on which it might be disclosed to me. At that stage I thought I did not need to see precisely what those terms were. However, subsequently, in preparing this judgment, I considered that I probably did need to see them after all, and accordingly convened a further hearing to discuss the matter, on 8 August 2018. At that hearing,

after discussion with Mr Passfield, on behalf of the applicants, I directed that the agreement be disclosed to me, and it was. In order not unnecessarily to compromise the confidentiality of the agreement as far as possible, I shall not set out in this judgment significant passages from the agreement. But I can summarise the important parts for my purposes as follows.

58. Clause 3.1 provides for the directors of the Company to be liable to pay the total sum of £1,550,000

> "in consideration of the terms of this Deed and in particular the Applicants [meaning the Company, its subsidiary ODL and the applicants in this proceeding] complying with and/or procuring the performance of the obligations and undertakings contained in this Deed and in particular clause 4".

59. Clause 4.1 provides that the agreement

> "is in full and final settlement of, and each Party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set offs, whether in this jurisdiction or any other, whether or not presently known to the Parties or to the law, and whether in law or equity, that they or any of them ever had, may have or hereafter can, shall or may have against any other Party arising out of or connected with or which relate in any manner to [the dispute between the Parties and various other matters connected with that dispute] and/or … any other matter arising out of or connected with the relationship between any of the Parties".

I add that none of the present respondents is within the definition of "Party" for the purposes of the agreement.

60. Clause 5.1 provides that the then existing proceedings against Mr Anthony-Mike would be dismissed and the various documents needed to achieve that would be executed. It will of course be borne in mind that at that date there were no proceedings on foot against any other director, so there was no need for any provision to deal with such other proceedings.

61. Clause 5.2 specifically deals with this application (which had been commenced on 24 November 2017). It provided for the present applicants to write to the present respondents to advise them of terms upon which the Company and the applicants were willing not to pursue that application against them, but expressly provided that the applicants were entitled to continue with the application and enforce any subsequent order made any against any of the respondents who did not agree to those terms.

62. As I have said, earlier in this judgment, the claims against the directors of the Company and its subsidiary exceeded £4 million, and those against Mr Anthony-Mike and his fellow directors of the Company £1.9 million. The amount recovered under the settlement totals £1.55 million, but of that only £1.1 million is attributed to the Company, with the rest being attributed to ODL. It is therefore clear that, in nominal terms, the Company has not made a full recovery on the claims against its directors. Nevertheless, it is clear from the material before me that:

(1) The claims against the directors of the Company arose from alleged breaches of duty which included causing or permitting the Company to make payments after the presentation of the petition.

(2) As part of the global settlement agreement *all* claims against the directors and from the directors are extinguished.

On the face of it, that logically means that all claims against the directors in respect of *causing or permitting the Company to make payments after presentation of the petition* have now been extinguished.

63. On the other hand, the amount which the directors have paid for the extinguishment of all those claims was not as much as was actually claimed. In other words, the price of satisfaction of the claims against the directors, including those in respect of payments made void by section 127, is less than the face value of those claims. This of course is a common phenomenon in litigation. A claimant making a claim takes account of the risks inherent in litigation, and also the cost of that litigation in money, time and stress, and may settle for less than he or she claims. A defendant defending a claim does the same thing, but in reverse, and may settle by paying more than he or she claims to owe, in order to "buy off" the claim.

The authorities

64. The applicants cited to me the decision of Deputy Registrar Mullen in *Clark v Meerson* [2018] BPIR 661. That was a case where the facts were in part strikingly similar to those in the present case. A company in liquidation made a claim against the director for breaches of fiduciary and other duties in permitting certain payments to be made by the Company, including payments to the director's wife (who was the Company secretary) which were void under section 127. The Company also made a claim against the wife as the recipient of the payments. An issue arose as to whether the Company's claim had been compromised in correspondence. The deputy registrar held that it had. But he also held that this compromise had no effect on the claim against the director's wife. I will first consider some of the authorities put before the deputy registrar, and will return to this case thereafter.

65. In his judgment, the deputy registrar referred to the decisions of the House of Lords in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455, and of the Court of Appeal in *David Yablon Minton v Kenburgh Investments (Northern) Ltd (in Liquidation)* [2001] BCC 648. In the former case the deceased had in his lifetime settled a claim against his former employer for negligence in causing him to be exposed to asbestos at a power plant owned by the defendant. The asbestos exposure had led him to develop malignant mesothelioma, from which he died. Just before his death, he had settled for about two-thirds of the value which the claim would have had if wholly successful. After his death, his personal representatives sued the defendant as owner and occupier of the power plant. The House of Lords, taking the opposite view from the courts below, held that the claim was barred because the deceased had accepted a sum in settlement and satisfaction of his entire cause of action.

66. Lord Hope of Craighead (with whom Lord Browne-Wilkinson and Lord Hoffmann agreed) said (at 474E-H):

> "The agreed sum is a liquidated amount which replaces the claim for an illiquid sum. The effect of the compromise is to fix the amount of his claim in just the same way as if the case had gone to trial and he had obtained judgment. Once the agreed sum has been paid, his claim against the defendant will have been satisfied. Satisfaction discharges the tort and is a bar to any further action in respect of it… I think that it follows that, if the claim was for the whole amount of the loss for which the defendant as one of the concurrent tortfeasors is liable to him in damages, satisfaction of the claim against him will have the effect of extinguishing the claim against the other concurrent tortfeasors.
>
> There may be cases where the terms of the settlement, or the extent of the claim made against the tortfeasor with whom the plaintiff has entered into the settlement, will show the parties have not treated the settlement as satisfaction for the full amount of the claim of damages. In the same way a judge, in awarding damages to the plaintiff in his action against one concurrent tortfeasor, may make it clear that he has restricted his award to a part only of the full value of the claim."

Lord Clyde gave a speech to similar effect (see in particular at 483D-484C). Lord Lloyd of Berwick dissented.

67. In *David Yablon Minton v Kenburgh Investments (Northern) Ltd*, the liquidators of a company brought proceedings against its directors and against its parent company alleging that a transfer of an office property owned by the Company before it went into liquidation was a misfeasance and breach of fiduciary duty and a preference. Those proceedings were compromised by the payment of a sum of money by the directors and the parent company to the liquidators "in full and final settlement". The Company then sued the solicitors who had acted in the transfer of the property, alleging negligence in so acting. The judge held that the claim against the solicitors was not barred by the settlement agreement. The appeal to the Court of Appeal was dismissed.

68. In the course of his judgment, Robert Walker LJ (with whom Nourse and Latham LJJ agreed) discussed *Jameson v Central Electricity Generating Board*, but also the then recent decision of the Court of Appeal in *Heaton v AXA Equity & Law* [2001] Ch 173. That case concerned, not concurrent tortfeasors, but successive contract-breakers. The claimant sued a third party for breach of contract, and the claim was compromised. The claimant then sued the defendant in respect of a similar (but successive) breach of contract. The defendant argued (and the judge at first instance agreed) that the *Jameson* principle barred the action on the basis that all the losses which were claimed against the defendant had already been claimed against, and had been the subject of a settlement with, the third party. The Court of Appeal, however, reversed his decision. The House of Lords later affirmed the decision of the Court of Appeal, though of course that had not happened by the time Robert Walker LJ in *David Yablon Minton* considered that decision.

69. The leading judgment in the Court of Appeal in *Heaton* was given by Chadwick LJ (with whom Robert Walker LJ and Sir Roy Beldam agreed). He distinguished (at [45]) between two questions which might arise when a claimant (A) sues a defendant (B) alone, compromises that claim, and then sues a concurrent tortfeasor (C). The first question is whether in such a case A any longer has a claim against C, on the basis

that he has received full satisfaction for his claim from B, and there is no remaining loss to be recovered from C. The second question arises if A in fact continues to have a claim against C. This is whether it is consistent with the settlement between A and B to allow B to pursue the claim against C. For C may make a claim for contribution against B, despite the settlement between A and B.

70. In respect of the first of these two questions, Chadwick LJ said:

> "54. The importance of the decision of the House of Lords in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455, as it seems to me, is that it shows that A's claim against one concurrent tortfeasor, say C, may be extinguished not only by the satisfaction of a judgment obtained against another concurrent tortfeasor, say B, but also by the payment by B to A of an amount which A and B have agreed shall be accepted in full satisfaction of A's claim. The unliquidated claim which A has against B and C may be converted into a liquidated claim either by a judgment obtained against B or by an agreement with B as to a sum to be accepted in full satisfaction of the claim. In any given case, the question whether or not that is the effect of the agreement between A and B will turn on the common intention to be attributed to A and B when making that agreement. That is a question of construction. But if, on interpreting the agreement between A and B, the court is satisfied that they intended the sum to be accepted in full satisfaction of A's claim, then (on payment of that sum by B) the claim is extinguished as against C also, because there is no longer any loss upon which A can found that claim."

71. In the House of Lords, which unanimously affirmed the decision of the Court of Appeal, there were three substantive speeches: (1) Lord Bingham of Cornhill (with whom Lord Steyn and Lord Hope of Craighead agreed), (2) Lord Mackay of Clashfern (with whom Lord Bingham of Cornhill, Lord Steyn, and Lord Hope of Craighead agreed) and (3) Lord Rodger of Earlsferry (with whom Lord Hope of Craighead agreed). Lord Bingham of Cornhill gave an analysis of the situation which is substantively the same as that of Chadwick LJ, but somewhat expanded. Although this is not the formulation to which Robert Walker LJ could have regard in the *David Yablon Minton* case, it is the one to which, having regard to the doctrine of precedent, I must have regard in considering the facts of the present case, so I set it out here.

72. Lord Bingham of Cornhill said:

> "3. A brings an action against B claiming damages for negligence in tort. The claim goes to trial, and judgment is given for A for £x. There is no appeal and the judgment sum is paid by B to A. £x will thereafter be taken, in the ordinary way, to represent the full value of A's claim against B. A cannot thereafter maintain an action for damages for negligence in tort against C as a concurrent tortfeasor liable in respect of the same damage for two reasons: first, such a claim will amount to a collateral attack on the judgment already given; and secondly, A will be unable to allege or prove any damage, and damage is a necessary ingredient for a cause of action based on tortious negligence. A cannot maintain an action against C in contract either, in respect of the same damage, for the first reason which bars his tortious claim. There is however no reason of principle, in either case, on the assumptions made in this example, why B should not recover a

contribution from C under the Civil Liability (Contribution) Act 1978 as a party liable with him for the same damage suffered by A.

4. In a second example the facts are varied. A brings an action against B claiming damages for negligence in tort. The action does not proceed to judgment because B compromises A's claim by an agreement providing that he will pay A damages of £x, which he duly does. If £x is agreed or taken to represent the full value of A's claim against B, A cannot thereafter maintain an action against C in tort in respect of the same damage for the second reason given in the last paragraph, and although he is not precluded from pursuing a claim against C in contract in respect of the same damage he cannot claim or recover more than nominal damages. There is again, in the ordinary way, no reason of principle in either case, on the assumptions made in this example, why B should not recover a contribution from C under the 1978 Act as a party liable with him for the damage suffered by A.

5. There is, however, an obvious difference between the action which culminates in judgment and the action which culminates in compromise: that whereas, save in an exceptional case (such as *Crawford v Springfield Steel Co Ltd* (unreported) 18 July 1958, Lord Cameron), a judgment will conclusively decide the full measure of damage for which B is liable to A, a sum agreed to be paid under a compromise may or may not represent the full measure of B's liability to A. Where a sum is agreed which makes a discount for the risk of failure or for a possible finding of contributory negligence or for any other hazard of litigation, the compromise sum may nevertheless be regarded as the full measure of B's liability. But A may agree to settle with B for £x not because either party regards that sum as the full measure of A's loss but for many other reasons: it may be known that B is uninsured and £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A. While it is just that A should be precluded from recovering substantial damages against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not.

6. The majority decision of the House in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455 appears to have been understood by some as laying down a rule of law that A, having accepted and received a sum from B in full and final settlement of his claims against B in tort, is thereafter precluded from pursuing against C any claim which formed part of his claim against B. I do not think that my noble and learned friend Lord Hope of Craighead, in giving the opinion of the majority of the House, is to be so understood."

(It will be noted that Lord Hope of Craighead, sitting in this case, expressly agreed with the speech of Lord Bingham of Cornhill.)

73. Returning then to the decision in the *David Yablon Minton* case, Robert Walker LJ compared the claim in the original proceedings which were compromised with the claims brought in the present proceedings. He noted that the original claim (so far as relevant to the transfer of the office property) had been one of misfeasance against the

directors for causing the Company to make a wrongful preference under section 239 of the Insolvency Act 1986. Such a claim does not increase the net assets of the Company in liquidation, but is simply a statutory mechanism for upholding the *pari passu* principle as between unsecured creditors. On the other hand, the claim against the solicitors for negligence was quite different, and, as Robert Walker LJ observed, it was

> "by no means obvious that the claim against the solicitors, if proved, might not exceed the pleaded claim in the section 212 proceedings" (at 657B).

74. On this basis, Robert Walker LJ refused to accept the submission on behalf of the defendant solicitors that the directors and the solicitors were in a position closely analogous to concurrent tortfeasors liable for negligence and breach of statutory duty. Accordingly, the appeal was dismissed. But Robert Walker LJ went on to say (at 657C):

> "Although in *Jameson* Lord Hope seems to have been careful to restrict his observations to the case of concurrent tortfeasors liable for the same damage, I would not exclude the possibility of the principle being extended to closely analogous situations (although where the two actual or potential defendants are not liable in respect of precisely the same damage, abuse of process may be a safer foundation for the court to restrict further proceedings, as Laddie J seems to have thought in *Heaton*)."

75. I now return to the decision of Deputy Registrar Mullen in *Clark v Meerson* [2018] BPIR 661. As I have said, a company in liquidation claimed against its director for breaches of fiduciary and other duties in permitting certain payments to be made by the Company, including payments to the director's wife. The Company also made a claim against the wife as the recipient of the payments. The deputy registrar held that the Company's claim against the director had been compromised in correspondence. But that left the claim against the director's wife. It was argued that the *Jameson* principle applied to the settlement with the director so as to bar the claim against his wife. The deputy registrar, after considering *David Yablon Minton* held that it did not.

76. He said:

> "48. It seems to me that the real question is whether the settlement with Mr Meerson falls within the *Jameson v CEGB* principle so as to bar the claim against Mrs Meerson. I do not think that it does. It is not a case which is 'closely analogous' to the position of the concurrent tortfeasors in *Jameson*. The claim against Mr Meerson, as put in the correspondence leading to the settlement, was different from the claim as it is now put against Mrs Meerson. The claim against Mr Meerson was put on the basis that he caused or allowed the payments to be made in breach of his duties to the Company. It was essentially a claim that he account to compensate the Company for the loss said to have been caused. That against Mrs Meerson is for recovery of the allegedly void payments themselves. In such cases the restitutionary remedies may be proprietary. Those are separate causes of action potentially leading to different forms of relief. Nor did the Liquidator's offer of settlement to Mr Meerson purport to be in full satisfaction of his claims in relation to the Alleged Dividend Payments. It was expressed to be a

> settlement of the whole of the claim against Mr Meerson, not the separate claim against Mrs Meerson.
>
> 49. I do not see that the mere fact of a settlement of a claim against Mr Meerson as director for breach of duty in allowing allegedly void dispositions of company property to be made can have the effect of barring a claim to recover the property from its recipient."

77. As to the point made in paragraph 49 of the judgment, I am afraid that I respectfully disagree with this as a matter of principle. It must at least depend on the facts. For example, if the claim against the director were for a breach of duty in making a payment of £100,000 to a third party which was rendered void by section 127, and the director settled the claim by paying £100,000 to the Company, I do not see how (absent some special circumstances in which further losses were caused) the Company could then make a further claim against the third party. Any recovery from that third party would mean the Company recovering more than it had lost. Then, if instead the director compromised the claim by paying £90,000 to the Company, the liquidator being prepared to accept less than the nominal value because of (say) litigation risk, the question would arise as to whether the whole of the claim in respect of the void payment had gone or not. That would be a matter of intention, to be resolved by construction of the settlement agreement. If on its true construction the agreement is that the whole of the claim has gone, it seems to me that the same conclusion follows, in accordance with the principles set out by Lord Bingham of Cornhill in the *Heaton* case.

78. The other point is whether the situation in which a claim arises against a company director for breach of duty in making a disposition of the Company's property which is then rendered void by section 127 and the situation in which a claim arises against the recipient for the return of that property can be regarded as "closely analogous" (as the deputy registrar puts it, borrowing from the language of Robert Walker LJ in the *David Yablon Minton* case). The deputy registrar says that they cannot, as the two situations involve

> "separate causes of action potentially leading to different forms of relief".

79. For my part, I would not accept that this was a sufficient reason. In many cases the two claims are two sides of the same coin. The loss to the Company is caused by the disposition of its property. The director causes the disposition to take place. The recipient receives the property. Here there is in principle no difference between the value of the payment made to the recipient and the loss caused to the Company by the acts of the director. If a trustee were to dispose of trust property in breach of trust to a person not entitled, the situation in which the claim against the recipient for the return of the property (or its value) arose would in my judgment be "closely analogous" to the situation in which the claim against the trustee arose for having committed the breach of trust in disposing of the property in the first place. As Robert Walker LJ says, it is a question whether the *situations* of the claims are closely analogous, not the claims themselves.

80. At least where a payment is made without consideration I cannot see that the position in the case of a company and its director should be different. The mere fact that the claim against one may be proprietary (to obtain the return of that property) and

against the other may be personal (because the director or trustee does not have the property to return) in my judgment does not prevent the situations of the two claims from being "closely analogous". They arise from the same acts (payment by the Company) and repair the same loss. However, I accept that dispositions to the Company's own creditors amounting to preferences are different (as the Court of Appeal held in *David Yablon Minton*), because then no loss is caused to the Company by the disposition. The loss is to those creditors who are not preferred. In such a case, the situations of the claims against the director and against the recipient are not "closely analogous".

81. Where the disposition is to a recipient to pay a debt of, or to supply goods or services to, a third party, that is not a preference. From the Company's point of view, that is just a present of the Company's funds to the third party. But, although the Company's claim under section 127 is against the recipient rather than the third party, the liability of the recipient goes to repair the Company's loss. The situation of the claim against the director and the situation of the claim against the recipient may nevertheless be treated as closely analogous. But, as will be seen, on the facts of this case it is not necessary to decide the point.

82. It might be argued that the primary claim should lie against the recipient of the property of the Company, and the claim against the director for causing the Company to make the disposition should be secondary, dealing only with any loss to the Company which has not been compensated by the recovery of the property itself. But, on the facts of this case, the claim against the recipient is a personal claim, in unjust enrichment, rather than a proprietary claim. And in such cases, in equity, the rule is that the primary claim lies against the fiduciary who causes the action to occur which causes the loss, and the claim against the recipient is secondary, only to be made once the primary claim has been exhausted: see *Ministry of Health v Simpson* [1951] AC 251.

Application of law to facts

83. Firstly, I consider the particular submissions made by individual respondents. Regrettably, only three of the 16 respondents still pursued have chosen to make any kind of submission to the court in relation to the claims made against them. And all of these did this entirely casually, by simple email to court email addresses, sent close to (or even after) the times fixed for hearings. Moreover none of these three respondents then attended the hearings of which they were notified. Yet these were important proceedings, which could result in their being ordered to pay thousands of pounds in compensation and/or costs. The sooner the ordinary public realises that, if you are notified of a court hearing you really have to do something about it, *ie* to be represented (or at least take legal advice), to attend as stated, or at least to apply for the date to be changed to one when you can attend, the better it will be for everyone.

84. The 31st respondent, Monique Jayasuriya, sent a number of documents to the applicants' solicitors on 17 May 2018. These were very properly exhibited to the third witness statement of Mr Martindale dated 29th of May 2018. They included the signed offer of employment with Valentina Capital Holdings UK Ltd, dated 15 September 2016, an unsigned service agreement with Valentina Capital Holdings, and copies of employment tribunal claim forms issued by the 31st respondent against that company and Mr Anthony-Mike personally. The signed offer of employment dated 15

September 2016 provided for Ms Jayasuriya to start employment on 17 October 2016. She did not attend court on either 1 or 5 June 2018. She said that this was because her boss would not give her time off, by which I understand that he would not pay for her to attend her own legal proceedings. She sent two emails to the court. The first was dated 31 May 2018, timed at 1632, intended for a hearing the following day, 1 June 2018. The second was dated 5 June 2018, timed at 1034, intended for a hearing the same day, beginning at 1030.

85. In the earlier email she said that she entered her employment on 17 October 2016. She believed that this was after the "winding up order" had already been served upon them. She said she was unaware of this at the time, and that if she had known she would not have accepted the job. Of course, the order was not made until 22 February 2017, some months later. I therefore take her to be referring to the presentation of the petition, rather than to the making of the order. But in any event the petition was in fact presented on 26 October 2016, so her point is a bad one. She says that her employment contract was with Valentina Capital Holdings UK Ltd, the holding company for the business interests of Cecil Anthony-Mike, but that she was "set up as an employee" with HMRC by Officeserve Developments Ltd, and actually paid by the Company. Her private health insurance was also set up by the Company. She says she did not know the structure of the group. In relation to the money paid to her by the Company, she said that this was in respect of her "wages and expenses". She then says that she has spent these on "day-to-day living costs". She also says that she was not paid for December 2016 and brought employment tribunal proceedings to claim what she was owed. She also claims to be owed three months' salary for the notice period. She claims to have been aware at the date of this email of these proceedings for two weeks but had not then had the chance to find a solicitor "or the funds to pay one". She then went on to say that she was "about to complete on a flat", although she gives no further details.

86. In the second email, sent at 10:34 AM on 5 June 2018, she said

> "Sadly I will not be able to attend, as I have several meetings that I cannot postpone".

She also explained that before losing her job she

> "had already booked 4 holidays of which I still had to go on and wanted to enjoy as I was suffering with depression from the stress of having no income, routine and stability.
>
> – December 23 – Cape Verde
>
> – Jan 12 Bali
>
> – Jan 20 Dubai
>
> – February 1 Dubai".

She also said that this was a

> "very unfair situation as I was employed by a company and was not to know the Company structure and that Mr Anthony-Mike was dealing with the situation incorrectly as I was oblivious to all the facts."

87. I have no reason to doubt Ms Jayasuriya's good faith, and proceed on the basis that in substance what she says is true. Nevertheless, in my judgment, Ms Jayasuriya is not entitled to rely on any defence that she gave value in good faith for the money she received. This is because, as I have already said, to admit that defence would be inconsistent with the policy of the insolvency legislation. The employees of a company in insolvent liquidation have certain, limited advantages in relation to claims for wages and salary. But Ms Jayasuriya was not an employee of the Company. She was an employee of Valentina Capital Holdings. The policy line has been drawn by Parliament between employees of the insolvent company and employees of persons other than the insolvent company, and unfortunately for her she falls on the wrong side of it.

88. Nor is she entitled to rely on any estoppel defence. On the evidence before me there was no representation made by the Company in making the payments to her. Even if there were, it could only be a representation that the money that she was being paid was owed to her by her employer, Valentina Capital Holdings. But, if so, that was true, and indeed it remains true now. There was nothing to amount to a representation *by the Company* that the Company owed anything to her. Even if there had been, she knew that Valentina Capital Holdings was her employer and had the obligation to pay her, not the Company. So she could not have been deceived. Yet even if there were such a representation, and she were deceived into thinking that *the Company* owed her money, that would not help either. Even if she *had* been entitled under a contract with the Company to the sums, a representation that she was entitled to those payments would be true, and would take her no further.

89. What she would need was a representation that the payment made was not a disposition liable to be avoided under section 127 of the 1986 Act. Yet such a representation could not be allowed to mature into an estoppel, because, just as the parties could not contract out of the effect of section 127, neither can an estoppel have that effect as between the liquidators and the recipient of the money: *cf Re Exchange Securities & Commodities Ltd (in liquidation)* [1988] Ch 46. For the same reason, even if it could be argued that the payment somehow could have operated as an implied representation that no winding up petition had been presented, the same point of public policy would still apply.

90. I turn to the question of change of position. In this case there is no evidence that Ms Jayasuriya changed her position. There is some allegation that she suffered financial loss as a result of losing her job. She refers to the holidays abroad which she had booked (and presumably paid for) before she lost her job. There is no evidence that these were booked and paid for on the faith of the payments made to her in October and November, or that there is otherwise a causal connection between the two events. As I have already said, the evidential burden lies on her. In accordance with the authorities, the mere fact that she spent the money that she was paid on ordinary living expenses could not in any event amount to a change of position.

91. The 26th respondent, Lawson Conner Ltd, sent an email to the court on 3 August 2018, attaching a very short witness statement by Jurgen Gebhard, managing director.

He states that its invoice number 2458 dated 11 November 2016 to its client "ValCap Ventures LLP" was paid by the Company from its bank account. Just as with Ms Jayasuriya, the fact that payment was made to the respondent does not involve any representation useful to it to found an estoppel against the Company. The respondent knew its own client owed the debt, and not the Company. Nor can there be any change of position defence.

92. The 25th respondent, Mr James Pimental Pinto, sent an email to the court dated 3 June 2018 at 2255, although the body of the email was in fact dated 1 June 2018. This was apparently intended for the hearing on 1 June 2018. It was exhibited to the witness statement of Ed Husband dated 4 June 2018. In this email Mr Pinto said that he worked for IDEASE LLP, another company run by Mr Anthony-Mike, rather than for the Company, but was paid as a consultant (rather than as an employee) for his work by the Company itself. He was personally unaware of any insolvency proceedings at the time.

93. Again, the mere fact that payment was made to Mr Pinto does not have the effect of any useful representation to found an estoppel. Nor, for the same or similar reasons, can he benefit from a change of position defence. He was a consultant (self-employed) rather than an employee. But although he was paid by the Company, he worked for IDEASE LLP. Mr Pinto however also raised the question whether the settlement with Mr Anthony-Mike and the other directors barred the claim against the recipients.

94. So let me deal now with the question whether the settlement agreement reached with Mr Anthony-Mike and the other directors of the Company prevents a claim being made now against the recipients of the payments made void by section 127. In accordance with the earlier discussion, so far as the claims arise out of payments to settle debts or purchase goods or services for *the Company*, those situations are *not* closely analogous to the situations in which the claims against the directors arise (because the loss caused is that of the other creditors and not of the Company), and the settlement agreement does not bar such claims. According to the evidence, that will cover the cases of the second respondent (at least in relation to the sum of £789.60), the 12th respondent and the 41st respondent.

95. So far as the claims arise out of payments which were simply presents out of the Company's property (therefore not being preferences), they would be closely analogous to the situations in which the claims against the directors arise, and it would be a question of construction whether the agreement extinguished the whole claim so that there was nothing left to claim from the recipient. There do not appear to be any such examples in the present case, however.

96. If there were, in my judgment, it is clear from the terms of the settlement agreement, and in particular from the terms of clause 5.2 (specifically providing that this application against the recipients of payments by the Company would continue), that the intention of the parties entering into that agreement was *not* to extinguish the claim against the recipients in law. On the contrary, care was taken to preserve it. Accordingly, I would hold that that agreement did not bar the claim against those recipients.

97. Where the payment to the recipient was to settle debts of third parties (as in the cases of the 26th respondent, the 29th respondent and the 31st respondent), this too might be treated as closely analogous to the situation of the directors' liability. Then it would be a question of construction whether the agreement barred the claim. But the reasoning in the previous paragraph applies equally here. The agreement does not help the recipients in such cases, as they were expressly contemplated by it. Those claims are not therefore barred.

98. In relation to the remaining cases, the evidence before the court does not show whether the payment was to settle the Company's debts or buy goods or services for the Company, or to settle the debts of others or buy goods or services for others. If the settlement agreement is to be a defence to the claims, it must be shown to be so by the relevant defendants, who have the burden of proof in this respect. They have not shown that the payments arose out of debts of or purchase of goods or services for the Company, and accordingly the agreement is irrelevant. But even if it were relevant, clause 5.2 shows that the parties' intention in entering into it was not to extinguish the claims against the recipients, and so on its true construction it does not bar the applicants' claims against them.

Conclusion

99. In my judgment, none of the respondents, and in particular none of Mr Pinto, Lawson Conner Ltd and Ms Jayasuriya, has the benefit of any valid defence to this claim. Accordingly, in my judgment the claims as they are pleaded succeed against each of the respondents concerned. I will consider consequential matters, and the form of order needed to give effect to this judgment, at 2 pm tomorrow.