INSOLVENCY BULLETIN

Volume 3, Issue 2 December 2021

AN INTERESTING DECISION ON A PREFERENCE CLAIM

When an individual is declared bankrupt, if he or she has preferred a creditor who is an "associate" of the bankrupt within two years prior to the presentation of a petition on which the bankruptcy order is made, the bankrupt's trustee may apply for an order for any such property to be vested in the trustee as part of the bankrupt's estate.

In *Bucknall & Anor v Wilson [2021] EWHC 2149 (Ch)* a trustee in bankruptcy appealed a decision of the Insolvency and Companies Court which had refused to grant relief to pay back a preference. The respondent was the stepdaughter of the bankrupt and had supplied professional accountancy services. She was owed £99,330 and received part payment of £47,651 on 4 September 2014, which was 48% of the monies owed to her. A bankruptcy petition was presented on 19 January 2016 and thus within the relevant time frame for a preference payment to an "associate".

The Insolvency and Companies Court judge considered that the respondent had acted in good faith, that the arrangement was commercial, that she was no longer in receipt of the proceeds and thus had changed her position and that it would be inequitable to make an order for repayment.

The appeal judge decided that the ICC judge was incorrect in determining that a change of position amounted to a defence under section 340(2) of the Insolvency Act 1986, but that there were other factors that should be taken into account in refusing the appeal stating:

"It is a striking feature of the case that the only reason Ms Wilson was vulnerable to the claim was because she happened to be an associate of the bankrupt…other creditors were paid in full.

Ms Wilson was only paid in part...put another way this is one of those very rare cases in which the fact that the elements of the preference were established does not mean that the strong policy imperative to restore payment for the benefit of the creditors as a whole is engaged".

Ms Wilson had acted in good faith in that she was unaware that the payment was a preference and *"in many cases participation by the preferee in the preferential act can be established or inferred. This is not such a case and means that one of the necessary conditions for refusing relief was present".*

The judge also described it as *"relevant"* that Ms Wilson no longer had the payment. As a consequence the effect on her (which would have been the sale of her house) would be "*wholly disproportionate to the benefit of the bankruptcy estate".*

Finally, this case was *"to all intents and purposes a single creditor bankruptcy...In short the present case is one of the very unusual ones in which it is appropriate to carry out the balancing exercise to which the* (ICC) *judge had regard…where the circumstances are sufficiently exceptional, justice may require no order to be made."*

Editor's Note

This judgment will be of interest to practitioners as many of the requisite elements for a successful claim would have appeared in place at the onset of the litigation. However there was no possibility of this decision *"opening the floodgates to wash away the importance of section 340".* In this particular matter to have reached a different conclusion would have been unjust.

Insolvency and Corporate Recovery Team
Jane Golledge Grant Rechnic
Mark Silvester (Editor) Arthur Fernandes
Michael Segen Georgina Kyriacou

SBP LAW SOLICITORS
Glade House, 52–54 Carter Lane, London EC4V 5EF
Tel: +44 (0)20 7332 2222 • Fax: +44 (0)20 7236 2112 • DX: 1030 LDE