
INSOLVENCY BULLETIN

Volume 4, Issue 2

December 2022

AN UNSUCCESSFUL CHALLENGE TO A LIQUIDATOR'S DECISION

Section 168(5) of the Insolvency Act 1986 states “*If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just.*”

In *Re Edengate Homes (Butley Hall) Ltd [2022] EWCA Civ 626* a director who had failed at first instance in an application brought under s168 (5) asked the Court of Appeal to set aside a liquidator's decision to assign certain claims to a third party as she had not been given the opportunity to purchase them.

Edengate Homes (Butley Hall) Limited (“the Company”) was formed in 2012 to develop a site in Cheshire. The Company was in dispute with the main contractor for the building works and in November 2015 entered into CVL. In the Schedule of Creditors, the director was listed as being owed £2,094,512 with the contractor being owed £158,814.

The contractor petitioned for the winding up of the Company, and a winding up order was made in March 2016. In the course of his investigations the liquidator concluded that he had substantial claims for misfeasance, preferences and transactions at an undervalue (“the Claims”) against the director and her family. The director contended that she had discussed the possibility of purchasing the Claims with the liquidator, although this was disputed. It was accepted that the director had notice of the potential assignment via a letter sent by the liquidator to her parents. The contractor had been approached but did not want to purchase the Claims and gaining insurance cover was problematic for the liquidator. Manolete Partners purchased the Claims in September 2019.

In a 2021 judgment the lower court applied the “two-stage test” as developed in *Re Edenote 1996 EWCA Civ 1349* and concluded that the application failed both criteria. The Court of Appeal upheld that decision.

Standing

An individual must have a legitimate interest in the relief sought. It was submitted that the director had “*dual capacity*” as a substantial creditor and also as a defendant to the Claims. However the lower court had held that it was “*fanciful*” to suggest that the director was acting on behalf of the interests of the creditors. Instead her interest as a defendant was to dispose of the claim as cheaply as possible. The Court of Appeal agreed and concluded that the director's application was not aligned with the interests of the creditors as a whole.

Perversity

In *Re Edenote* it was stated that “*the Court will only interfere with the act of a liquidator if it has done something so utterly unreasonable and absurd that no reasonable man would have done it.*” The Court concluded that whether a decision is perverse is an objective question and the liquidator had “no reason at all” to conclude that the director, or her parents, could have made a better offer than that of Manolete.

Editor's Note

This judgment is helpful in clarifying the criteria required to challenge a commercial decision of a liquidator. It shows the reluctance of judges to interfere unless there is both standing and perversity.



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