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TIMING IS EVERYTHING

In *Carton-Kelly v Darty* [2022] EWHC 2873 (Ch) the High Court has handed down judgment in what observers have stated is the largest ever claim (by value) for a preferential payment made in breach of s239 of the Insolvency Act 1986. *Carton-Kelly v Darty* is also considered likely to become a leading authority on the desire to prefer and how balance sheet insolvency is to be determined.

A company gives a preference to a person if:

- That person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities.
- The company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
- The preference is made at a "relevant time" which is within 2 years of the onset of insolvency if the recipient is a connected person, or 6 months for an unconnected person.
- It is not a "relevant time" unless at the time of the preference the company is unable to pay its debts as defined in s 123 IA 1986 or becomes unable to do so as a consequence of the transaction.

In 2012 Comet Group Plc went into administration and exited into CVL the following year. Nine months prior to administration Comet had been sold by its parent company Kesa Electrics PLC to OpCapita LLP.



Comet then repaid £115.4 million of inter group debt to Kesa (now Darty Holdings) and the Liquidator made an application under s239 IA 86 in relation to that transaction.

The Court found that Comet was balance sheet insolvent as defined in s123(2) IA 1986 immediately before the disposal. The deferred tax assist (DTA) which had been included in Comet's 2011 accounts could not be taken into account. This was because the tax benefits in the form of carried forward losses and unclaimed capital allowances would only be of value if Comet was likely to make sufficient taxable profits in the future against which such DTA could be utilised. This was unlikely.

The repayment of £115.4m of inter company debt constituted a preference as had such payment not been made then Darty would have received less in a liquidation.

A desire to prefer was present at the time of the preference payments, the Court stating that persons "*involved in the key decision-making process on the Kesa side had a desire to ensure repayment...and had in contemplation the possibility of an insolvent liquidation by the Court*".

The Court did not agree with Darty that the circumstances were exceptional and would therefore justify the Court applying remedial discretion by refusing to make an order.

Editor's Comment

Permission to appeal has been granted. However, the Court stated that it is on the basis of a "tightening" of the grounds in respect of balance sheet insolvency and desire to prefer. Further judicial comment in this landmark case is awaited with interest.

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