IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2018] EWHC 4033 (Ch)

No. CR-2012-00538

Rolls Building
Fetter Lane
London
EC4A 1NL

Monday, 16 July 2018

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Re: **MSC CASH & CARRY PLC**

B E T W E E N :

DAVID INGRAM
(in his capacity as the Liquidator
of MSD Cash and Carry plc) — Applicant

- and -

(1) MOHINDER SINGH
(2) SURJIT SINGH DEOL
(3) KULDIP BASI
(4) BALJIT KUMAN
(5) DALE WHOLESALE LIMITED — Respondents

MR JOHN BRIGGS (instructed by Boyes Turner LLP) appeared on behalf of the Applicants.

MR JEREMY COUSINS QC and MR ANDREW BROWN (instructed by Rainer Hughes Solicitors) appeared on behalf of the Respondents.

J U D G M E N T

(Approved in Manchester on **2 October 2019** without reference to any papers)

JUDGE HODGE QC:

1 This is my extemporary judgment on the issues of interest, costs and consequential matters following the trial of the applicant liquidator's application for various heads of relief in the course of the insolvent liquidation of MSD Cash & Carry plc.

2 The trial took place over eight days in January and two days at the end of April and the beginning of May 2018. I delivered a substantive judgment on Friday 4 May which bears the neutral citation number [2018] EWHC 1325 (Ch). This extemporary judgment is a sequel to, and should be read in conjunction with, that judgment.

3 The application presently before me raises issues of principle as to the basis on which interest falls to be awarded in cases involving the giving of a preference and also the appropriate rate of interest to award in such cases. The applicant liquidator is represented, as he was at trial, by Mr John Briggs (of counsel). The respondents are represented, as they were at trial, by Mr Jeremy Cousins QC leading Mr Andrew Brown (also of counsel). Counsel had produced helpful written skeleton arguments on the issues arising which I had had the opportunity of pre-reading.

4 I turn first to the issue of interest. At the outset of his oral submissions, Mr Cousins accepted that the liquidator was *prima facie* entitled to interest on the claims on which he had succeeded. He accepted that interest should run from the date of the winding-up order in respect of MSD Cash & Carry plc, which was 16 January 2012. The only issue between the parties on the period of interest was as to whether interest should run from an earlier date in respect of the liquidator's successful preference claim. The liquidator was contending that interest should run, not from the date of liquidation, but from the earlier date of the relevant transaction (16 March 2010).

5 The other issue dividing the parties was as to the appropriate rate of interest. For the liquidator, Mr Briggs was contending for a rate of 8% per annum simple interest. Mr Cousins submitted that the appropriate rate of interest should be 1% over base rate although, in the course of his oral submissions, he accepted that he could not quibble with a rate of 2% over base rate, or possibly even 3% over base rate. However, he submitted that a rate of 8 per cent was effectively penal in nature. Thus, Mr Cousins submitted that the two points on interest dividing the parties were the date from which interest should run on the preference claim and the appropriate rate of interest.

6 Mr Briggs accepted that under s.35A of the Senior Courts Act 1981 interest could only run from the date of the winding-up order, namely 16 January 2012. Mr Briggs accepted that the cause of action arose on that date. However, he submitted that the award of interest was integral to the court's power to restore the position to what it would have been by requiring the person who had received a preference from the company to pay such sum to the office-holder as the court might direct.

7 He referred me first to s.239(3) of the Insolvency Act 1986, which provides that the court should, on an application for an order under s.239, make such order as it thinks fit for restoring the position to what it would have been if the company had not given the relevant preference. He also took me to s.241, relating to orders under s.238, and, in particular, to s.241(1)(d), which provides that an order under s.239 with respect to a preference given by a company might require any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court might direct.

8 Mr Briggs pointed out that the transaction in the present case had taken place on or around 16 March 2010, some twenty-two months prior to the liquidation. The company had been deprived of the sums represented by the preference for over eight years. This was not a case of an innocent preference. Mohinder had received the payment knowing that he was being preferred over other creditors, notably HMRC in respect of a 2005 assessment to tax. This was said to be akin to a misfeasance constituting a fraud on the Revenue. Mr Briggs submitted that what should have happened is that the relevant motor vehicles should have been sold in order to pay the unpaid value added tax assessed on the company; and the company should, if it had been able to do so, have sought to climb out of its financial difficulties.

9 Mr Briggs submitted that it was appropriate to choose the March 2010 date for the following reasons: First, that the preference was in the nature of a misfeasance and breach of trust by Mohinder at the time of the giving of the preference. Secondly, that Mohinder well knew that MSD was insolvent and had creditors, particularly HMRC, who would not be paid; in this regard, reliance can be placed on Mr Cousins's concessions (recorded at para.124 of my judgment) and also the conclusion to which I came at para.132 that the timing of the decision to transfer these motor vehicles over to Lionheart was influenced by the perceived likely insolvency and winding up of MSD. Third, that Mohinder's conduct in these circumstances was said to be deplorable; it was not a case like that of the bank in the case of *Re Matthews* of not knowing that monies were received improperly until the bank was sued by the liquidator. Fourth, in seeking to resist the presumption of preference, Mohinder and Mrs Kuman were said to have made up the cock-and-bull story of receiving tax advice which had been disbelieved by the court. Fifth, Mohinder had had the benefit of the cash sum of £45,000 and could have caused Lionheart to sell the vehicles and cherished registration numbers at the time he had acquired them and profited financially from these monies by investment, trading or otherwise. Sixth, given the failure by Mohinder and others to give information as to this matter, and as to other aspects of MSD's affairs, which had given rise to a need for proceedings under s.236 of the 1986 Act, and which had unnecessarily caused delay, it would be unfair for interest to accrue only from the later date of the winding-up, still less from the date of the instant proceedings. Seventh, and finally, it would not have been practicable in a case like the present for the liquidator to have issued proceedings on the preference claim in advance of other aspects involving Mohinder and the other respondents.

10 For the respondents, Mr Cousins submitted that interest should only run from the date of the winding-up. The case had been expressly brought on the basis that interest on the preference claim was sought only under s.35A of the 1981 Act. That was the only pleaded statutory provision relied on. Mr Briggs had conceded that interest under that section could only run from the date of liquidation because that was when the cause of action had accrued. The preference claim had not been presented as one for misfeasance.

11 So far as the liquidator's reliance on s.241(1)(d) was concerned, that referred to benefits received by Mohinder from the company. Those benefits were the vehicles and cherished registration numbers and the cash assets, so that sub-section could not be used to justify any payment of interest.

12 Mr Cousins recognised that the question here was really whether the power under s.239(3) to make such order as the court thought fit for restoring the position to what it would have been if the company had not given that preference was wide enough to include a power to award interest independently of the provisions of s.35A of the 1981 Act. That section was said to direct attention to the return of the asset lost to the company and not to any ancillary

remedy of interest. That, Mr Cousins submitted, would go beyond mere restoration of the position to what it would have been if the company had not given the preference. That submission was supported by the terms of s.241(1)(d), which focused upon the benefits received by the offender from the company.

13 I prefer the submissions of Mr Cousins to those of Mr Briggs on this issue for the reasons that Mr Cousins gives. In my judgment, interest on a preference claim (and, as it seems to me, the same would apply for a claim for a transaction at an undervalue) falls to be awarded, if at all, under s.35A of the 1981 Act. It does not form part of the restoration of the company to the position it would have been in but for the offending conduct. An award of interest does not involve the payment of benefits received by the offender from the company. Section 35A, as it has been interpreted in the authorities, is the appropriate statutory foundation for the award of interest in cases of preference and transactions at an undervalue.

14 Reference has already been made to the case of *Re Matthews* [1982] Ch 257. There, interest was dealt with in a supplemental judgment reported at pp.265 to 267 of the report. In that case, interest was awarded from the date of the liquidation; but the case is no authority on the point presently before me because interest from the date of liquidation was all that the liquidator had been asking for. The issue there was whether interest should be awarded only from a date later than the date of liquidation.

15 The same applies to the other authority relied on, that of *Re Barton Manufacturing Company Limited* [1998] BCC 827, a decision of Harman J. That was a case not of preference but of a transaction at an undervalue. The issue of interest was dealt with shortly at p.833, at letters D to E. The claim was made for simple interest since the date of liquidation, but only because that date was chosen for convenience more than for anything else because to have computed interest separately from the date of each payment was said to involve enormously elaborate and detailed calculations which probably, in the end, would have given little advantage to the liquidator. Again, the case is no authority for the point which I have had to decide.

16 So, in this case, I hold that interest should run only from the date of the winding-up, namely 16 January 2012, and not from the earlier suggested date of 16 March 2010.

17 I turn then to the rate of interest. The liquidator had pleaded simple interest under s.35A of the 1981 Act. Mr Briggs submits that this should be 8% per annum. That is said to reflect both the current Judgment Act statutory rate and also the rate applicable to interest on debts in the winding-up.

18 I was referred to s.189(4) of the Insolvency Act 1986, which provides that the rate of interest payable under s.189 in respect of any debt (described as "the official rate") is whichever is the greater of (a) the rate specified in s.17 of the Judgments Act 1838 on the day on which the company went into liquidation, and (b) the rate applicable to that debt apart from the winding-up.

19 Mr Briggs points out that if Mohinder were entitled to interest at 8% on his provable debt in the liquidation, he ought to be repaying the sum by which he has been wrongly preferred at the same interest rate. He invites the court to bear in mind that the court has jurisdiction at common law to award compound interest as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort and in equity for breach of fiduciary duty. In this case, it is said that Dale has effectively been a party to breaches of

fiduciary duty by officers of MSD, and so it would not have been unjust to have ordered compound interest. In the circumstances, Mr Briggs submits that simple interest at 8% is justified.

20 Mr Briggs referred me to the decision in *Re Barton Manufacturing Company Limited* (previously cited) where a simple rate of interest of 8% was to be charged on all the relevant payments. I observe that in the case of *Re Barton*, there would have appear to have been no argument as to the appropriate rate of interest. *Re Barton* was decided in October 1997 at a time when the official bank rate was 7%. Thus, it is unlikely that there was any real dispute as to the proposed rate of 8% per annum. Likewise, in the case of *Re Matthews* it would not appear that there was any dispute as to the applicable rate of interest. Mr Briggs emphasised that this was not a case involving the simple payment of contract debts; rather the liquidator's recovery has been founded upon misfeasance on the part of the various respondents whom I have held liable.

21 Mr Briggs also prayed in aid the rate of 4.25%payable on sums credited to the Insolvency Services account. He referred me to para.36.131 of the Insolvency Services Technical Guidance (headed "Payment of Interest to Estate"). This guidance states that at any time after 1 April 2004, whenever there are monies standing to the credit of a company or the estate of a bankrupt in the Insolvency Service's account, the company or bankruptcy estate shall be entitled to interest on those monies, the rate of interest currently being 4.25% per annum. That rate might be varied by the Secretary of State by notice published in the *London Gazette*, but no such variation has been noted.

22 Mr Briggs also prayed in aid the default rate of interest payable on unpaid value added tax at the time of the original assessment made upon the company, 10 February 2005. The default interest rate applicable was 7.5%. That was said by Mr Briggs to justify awarding interest at 8% per annum.

23 Mr Briggs referred me to the decision of Mr Robert Hildyard QC (as he then was) in the case of *Pena v Coyne* [2004] BPIR 1286. That was a claim founded on a transaction at an undervalue pursuant to s.423 of the Insolvency Act 1986. The issue of the appropriate rate of interest was addressed at paras.30 to 34 of the Deputy Judge's supplemental judgment (at pp.1316 to 1317 of the report). At para.33, the Deputy Judge referred to a submission by counsel for the first defendant in support of a rate higher than the 4% or 5% contended for by the other parties. In that context, counsel had sought to pray in aid s.189 of the Insolvency Act 1986. The Deputy Judge observed that it seemed unlikely that that section, which was said only to apply in the event of surplus assets, actually would ever have become applicable in the case before him. The Deputy Judge ordered a blended rate which, balancing the various submissions and figures, he considered should be 5% over the relevant period.

24 Mr Briggs submitted that the fact that there might not be a surplus in the liquidation was no reason why the rate applicable under s.189 should not be taken into account in identifying the appropriate rate of interest. Mr Briggs submitted that, on the facts of the instant case, there might be a surplus here; but, in any event, Mr Cousins's proposed lower rate was said to underplay the rights of the company's creditors. This was an insolvent company which could not have borrowed the money it has had to pay out. Mr Briggs also pointed out that the commentary to the relevant paragraph of the current (2018) edition of *Civil Procedure*, at para.16A1.7 made it clear that base rate plus 1% was no longer the commonly accepted rate of interest; base rate plus 2% was to be preferred as the correct approach.

25 Mr Briggs referred me to the relevant paragraph (para.J14.1) of the *Commercial Court Guide*, to the effect that there was no longer a presumption that base rate plus 1% was the appropriate measure of a commercial rate of interest.

26 Finally, Mr Briggs took me to the recent decision of the Court of Appeal in the case of *Carrasco v Johnson* [2018] EWCA Civ 87. That appeal had involved a challenge to a decision by a District Judge holding that the appropriate rate of interest in the case before her should be 3%. The appellant contended for a higher rate of interest. Having referred to a great many authorities, identified at para.16 of his judgment, Hamblen LJ (with whom Kitchin LJ agreed) set out the guidance to be derived from the cases at para.17 of his judgment:

> "(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes but will not have regard to claimants' particular attributes or any special position in which they may have been.
>
> (3) In relation to commercial claimants, the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for smaller businesses than for first class borrowers.
>
> (4) In relation to personal injury claimants, the general presumption will be that the appropriate rate of interest is the investment rate.
>
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

27 In the event, the Court of Appeal, recognising that the lower court had had a broad discretion in awarding interest, did not consider that the award of 3% interest had involved any error in approach or was outside the wide boundaries of the legitimate exercise of the court's discretion. In those circumstances, the Court of Appeal concluded that no error of law in the judge's approach had been demonstrated and that that conclusion which she had reached as to the appropriate rate of interest to be awarded had fallen well within the general ambit of her discretion. The Court of Appeal accordingly dismissed the appeal.

28 Mr Briggs concluded by reiterating his point that in misfeasance claims, courts often award compound rather than simple interest.

29 Mr Cousins submitted that s.189 of the 1986 Act was directed to the rate of interest creditors should receive on proof of debts in the event of a surplus in the winding-up of a company. There was said to be no authority whatsoever for the proposition that s.189 should govern the rate of interest on monies recoverable by an insolvency office-holder, such as a liquidator. Mr Cousins pointed out that many of the authorities were from a much earlier era, when interest rates were very much higher than now, and when the Judgment Act rate

was not out of step with prevailing commercial interest rates. Mr Cousins accepted that he could not quarrel with the adoption of a rate of 2% over base rate. That, he said, would be a perfectly routine approach; but there was no reason which had been advanced as to why the liquidator needed to be compensated by an award of interest higher than in normal commercial cases. 8%, Mr Cousins submitted, was a penal rate.

30 The authority just cited of *Carrasco v Johnson* demonstrated that the court was perfectly entitled to adopt an interest rate of 3% per annum. The court should, Mr Cousins submitted, adopt an interest rate which was reflective of the current interest rate environment, which had been continuing over many years since the great financial crash.

31 Again, I prefer the submissions of Mr Cousins to those of Mr Briggs on the appropriate rate of interest. As recognised at para.17(2) of Hamblen LJ's judgment in the *Carrasco v Johnson* case, this is a question to be approached broadly. In a case where the liquidator is bringing a claim on behalf of an insolvent company, and the cause of the insolvency was the non-payment of value added tax, in my judgment, the fair rate to be applied is the default interest rate that is charged by Revenue & Customs on unpaid value added tax. Here, the rate, for virtually all of the period in question, is the rate of 3% per annum. This was introduced on 29 September 2009 and continued until 23 August 2016, when it was reduced to 2.75%, increasing again to 3% with effect from 21 November 2017. In my judgment, a rate of 3% per annum simple interest would reflect the justice of the present case.

32 As Mr Briggs had submitted, what should have happened is that the company should have realised, by sale, the motor vehicles and cherished registration numbers, paid the assessed VAT and then sought to have traded itself out of is financial difficulties if that was considered possible. This is not a case in which s.189 would have been applicable; nor is this a case where there would have been funds to invest, so the rate of interest payable on the Insolvency Services' account is, in my judgment, of no relevance. So, for those reasons, I would award interest at 3% from the date of the winding-up in respect of all heads of claim.

33 There is a minor issue as to the scope of the inquiry which falls to be ordered under the terms of the draft order. Paragraph 8 of the draft provides that, for the purposes of the relevant inquiry, the liquidator is to apply by application notice to an Insolvency and Companies Court Judge for directions as to the conduct of the inquiry, including whether it should be heard by a High Court Judge. Mr Cousins, for the respondent, submits that a window should be established for the liquidator to make his application, with such application not to be made before a particular date set by the court so as to enable the liquidator first to make attempts to recover from Dale. It is only if such recovery fails that he is to have the fall-back of an inquiry, and recovery from Mohinder and/or Surjit. Mr Cousins submits that a cut-off date should also be set for the making of the application so that it does not indefinitely hang over the heads of Mohinder and Surjit. He suggests that the window should be available from, say, 1 March 2019 to 29 February 2020, although, in oral submissions, he recognised that more flexibility should perhaps be allowed.

34 The liquidator resists the time period for any inquiry. Mr Briggs submits that there is no need for the initial time limit. He says that the intention is to wind Dale up straightaway. This is said to be a fraudulent breach of trust claim as to which there is no applicable limitation period. Mohinder and Surjit are said only to have themselves to blame for the matters giving rise to the need for the inquiry. Any time limit, it is said, would give the respondents the opportunity to filibuster or to obstruct Dale's winding up. The answer to any delay would be to assert a defence of laches. Any cut-off date would, in Mr Briggs's submission, simply play into the hands of the respondents.

35 In his reply, Mr Briggs pointed out that it had taken three years into the liquidation before the liquidator had been able to compel any limited measure of co-operation from the respondents. He should not be precluded from doing whatever he conceived to be in the best interests of the company's creditors. The liquidator should be entitled also to apply to extend any period, if one were to be introduced at all, if the liquidator was so advised.

36 In my judgment, it is appropriate to impose, as a matter of case management, some temporal limitation on the period for making an application for directions as to the conduct of the inquiry under para.8. In my judgment, there should be a limited opportunity for Dale to pay up. If, however, it does not do so, then the liquidator should proceed to make his application. The very fact that, as Mr Briggs points out, there have been considerable delays in responding to requests from the liquidator for information and assistance in the past points in my judgment, as a matter of case management, to the need to circumscribe the period within which any application for directions as to the conduct of the inquiry should be made.

37 In my judgment, the appropriate course is to say that any application for directions is to be made after 1 October 2018, so as to give some limited opportunity for the matter to be resolved with Dale by agreement, and to impose a terminal cut-off date of two years from today, that is to say 16 July 2020. So, para.8 should provide for any application for directions to be made no earlier than 1 October 2018 and no later than 16 July 2020.

38 There is a further minor point taken by Mr Cousins as to the taking of the account which is the subject of paras.13 to 16 of the draft order. Mr Cousins submits that, in the light of para.43 of my judgment, it would be appropriate for the order to provide that the issue as to whether any consequential order for payment that may be sought on the taking of the account is statute-barred should be determined on the taking of the account.

39 Mr Briggs submits that this point appears on the face of my judgment at para.43 and that one does not need to spell it out. In my judgment, it is better for it to be spelled out. Paragraph 15 of the draft should include words along the lines of, "and on the taking of such account, the court shall determine whether any order for payment is statute-barred." As Mr Cousins submitted, the inclusion of such a form of words cannot do any harm.

40 I turn then to the issue of costs. Mr Briggs prefaces his submissions on costs by pointing out that the investigation of the company's affairs, and the pursuit of these proceedings, has been an expensive exercise. The liquidator and his team have had to investigate the company's affairs without the proper provision of reliable information and adequate documentation by and from its officers - effectively the individual respondents - and in breach of the statutory duty of co-operation of those officers. He goes so far as to submit that they have acted in contempt of court.

41 Mr Briggs submits, in summary, that the liquidator is clearly the overall winning party, and the appropriate costs order in this case is said to be as follows:

(1) Mohinder and Surjit should be jointly and severally liable to pay all the liquidator's costs on an indemnity basis given that their unreasonable conduct both before and during this litigation is away from the norm and warrants an indemnity basis of assessment.

(2) Dale should be jointly and severally liable with Mohinder and Surjit to pay all such liquidator's costs, save for the preference claim and the claim for an account; and its

unreasonable conduct, whether through Surjit, acting on its behalf ,or its director, his wife, Raminder, similarly warrants an indemnity basis of assessment.

(3) The liquidator should not be penalised for failing in respect of the three credit note claims, and one of the three cash payment claims in respect of £61,478.00-odd, since the liquidator's stance in respect of those claims was reasonable and/or such claims took little time before and at trial compared with the claims on which the liquidator has succeeded.

(4) Although the liquidator abandoned his claims at trial against Mrs Kuman, that was a claim for loss in respect of the three credit notes and the claim for an account, and also as against Mrs Basi only in respect of the claim for an account. There should (a) be no discount in respect of the liquidator's costs of these claims since they involve no real additional costs; and (b) as to the costs of Mrs Kuman and Mrs Basi, there should be no order as to their costs since (i) it is unlikely that they have incurred any costs or their costs must have been modest; and (ii) their conduct should disentitle them to costs.

(5) There should be an order that Mohinder and Surjit pay the liquidator 70% of his estimated costs on account. Rounding the figure, this is said to come down to £550,000 excluding both VAT and also an after the event insurance policy of £80,000. While such an order would be justified in respect of those costs which Dale is ordered to pay, Mr Briggs recognises that there would seem little point in making such an order given its likely financial position and the other liabilities arising out of this judgment.

42 At paras.44 and following of his written skeleton, Mr Briggs expands on the justification for those costs orders. In the course of his oral submissions, Mr Briggs submitted that it would be wrong to discount any of the liquidator's costs. He has had to fight off a fearsome case of obstruction on the part of the respondents. Although he has lost on two minor issues and against two minor players, this is said to have been complex litigation in which the liquidator has not acted unreasonably. No discount should be imposed on the liquidator's overall award of costs.

43 In support of that submission, reliance is placed on observations of Gloster J (as she then was) in the case of *HLB Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm) at paras.10 and 11. In particular, Gloster J recognised that there is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the case before her, any winning party was likely to fail on one or more issues in the case. The court could properly have regard to the fact that in almost every case even the winner was likely to fail on some issues. Citing observations of Clarke J in an earlier case, Gloster J said that if the successful claimant had lost out on a number of issues, it might be inappropriate to make separate orders for costs in respect of issues upon which he had failed unless the points were unreasonably taken. It was a fortunate litigant who won on every point.

44 In the present case, it was said by Mr Briggs to have been very difficult for the liquidator to know how he should put his case and what its merits were. That was because he was reliant on information from the respondents, who had done their utmost to obstruct him. Although Mrs Kuman and Mrs Basi may have won, they had acted unreasonably, both generally in the litigation and in relation to the specific claims directed to them.

45 Mr Briggs took me to a passage from the judgment of Arden LJ in the case of *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [2001] EWCA Civ 535.

Because of errors in the numbering of paragraphs, it is not possible to identify the specific paragraph of the judgment in question, but in the course of it, Arden LJ recognised that the judge might deprive a party of costs on an issue on which he had been successful if satisfied that that party had acted unreasonably in relation to that issue.

46 Mr Briggs submitted that Mrs Kuman's conduct had been entirely unreasonable, both in respect of the circumstances of the case generally and in relation to the claim as against her. Her evidence had lacked any credence because she had known nothing. She had been specifically disbelieved on her evidence in relation to the preference claim. Mr Briggs submitted that it would be entirely unjust for Mrs Kuman to be awarded any costs in this litigation. She should not have put in any witness statement, as she had, purporting to set out details of transactions as to which she had no personal or direct knowledge.

47 In relation to Mrs Basi, her witness statement was said to represent an entirely misleading approach. She had known nothing about relevant matters. It became clear in cross-examination that she had merely believed that what her sister had told her would be true. She should have said in her witness statement: "I do not know anything. I was not involved." Mr Briggs emphasised that the claim in respect of the three credit notes had been abandoned on day one and that that was because the true state of affairs had only come to light with Surjit's fourth witness statement of 14 December 2017. In relation to the three cash payments, the court had found that two of them, amounting to £75,000, had simply not been made at all.

48 Referring to Mr Cousins's suggested apportionment of costs, Mr Briggs submitted that this was difficult to follow and was unjustified. Mr Briggs queried whether Mrs Kuman and Mrs Basi had paid anything at all; and he submitted that, even if they had, any such payment should be modest. He criticised the form and content of the statement of costs produced by the respondents. He submitted that the exercise of apportioning costs set out in Mr Cousins's skeleton argument was entirely speculative as to what costs should be allocated to Mrs Kuman and Mrs Basi. Such apportionment was said to be entirely unsatisfactory and inappropriate. There was said to be no foundation for the proposition that they had assumed any liability to pay costs; and it was highly unlikely that Mrs Basi or Mrs Kuman had assumed any such responsibility. On a detailed assessment, the first thing that a costs judge would want to see would be any relevant engagement letter. Mr Briggs did not accept that there were any common costs. Mrs Kuman and Mrs Basi had known nothing, and they should have said so. Their witness statements, the costs of which Mr Briggs took no issue with, had covered matters that they had known nothing about. Mr Cousins's exercise was said to work backwards. The majority of the time spent had been spent in relation to the undated credit note and Surjit's position as *de facto* director. Another substantial chunk of costs had related to the preference claim. The costs attributable to the other claims were said to be pretty small and less than 10%. The court should attach no significance to Mr Cousins's computations; it was simply ridiculous to suggest that about a third of the costs of the case should be attributed to two ladies who had had little knowledge and little involvement in the matter and who had hardly been mentioned during the course of the trial.

49 Mr Briggs did not accept Mr Cousins's criticisms in relation to the late amendments, or in relation to the time Mr Briggs had taken in presenting the case and cross-examining the respondents. Mr Briggs pointed out that Mr Cousins had lost on the amendments and he simply should not have opposed them. In relation to the amendments, and generally, it was the liquidator who was the winning party. It had been wholly unmeritorious for the respondents to have opposed the amendments. The amendments to paras.1 and 8 had merely been sought to reflect what Mohinder himself had said, whereas para.10 was mere

tinkering with the terms of the account and inquiry. Mr Briggs pointed out that both Surjit and Mrs Kuman had been, and had been found to be, difficult and evasive witnesses.

50 Mr Briggs also submitted that this was clearly an indemnity costs case. He relied on the matters set out at paras.45 through to 47 of his written skeleton, identifying relevant conduct before and during the proceedings, and during the course of the trial. Mr Briggs submitted that this was a classic case of what he described as "phoenixism". He took me to a discussion document issued by HMRC on tax abuse and insolvency, published on 11 April 2018. He referred me to the definition of "phoenixing" or "phoenixism" at para.2.11 as terms used to describe the practice of carrying on the same business or trade successively through a series of limited liability entities where each became insolvent in turn. Each time that happened, the insolvent entity's business, but not its debts, was transferred to a new phoenix entity. Mr Briggs submitted that that had been the case here. He also referred me to the terms of para.2.9 of the discussion document. That recognised that an office-holder did have a number of legal actions available to him to claw back assets from a director or shareholder and/or to impose personal liability on them for the company's debts pursuant to the Insolvency Act 1986. However, the paper recognised that pursuit of such proceedings was (a) expensive, (b) reliant on the provision of information to the office-holder and/or HMRC, (c) subject to litigation risk and (d) dependent on the office-holder's appetite for such litigation. As a result, the discussion paper recognised that even if proceedings were instigated, they often ended up in a commercial or discounted settlement being reached.

51 In this case, Mr Briggs accepted that the respondents had tried to lie their way out, making no settlement proposals. He submitted that the only just conclusion on the facts of the instant case was that the court should make an indemnity order for costs. The liquidator's entire costs should be imposed upon Mohinder and Surjit on a joint and several basis; that limb should extend to the costs of the preference claim, even though Surjit had not been a respondent to it.

52 Mr Briggs referred me to para.163 of my judgment where I had found that it had been clear that Surjit was the man responsible for the business of ,and the affairs and dealings between, MSD and Dale. MSD's other former officers had known very little by comparison and they were certainly not subordinate to Surjit. I had found that it was clear from this evidence that he was someone with a governing position and influence at MSD, as well as Dale. I had found that he was, at the very least, one of the nerve centres from which the activities of MSD had radiated at the relevant time, and that he had assumed a role in MSD sufficient to impose upon him a fiduciary duty to MSD, and to make him responsible for any misuse of that company's assets. Mr Briggs submitted that that must extend to the dealings of MSD in respect of its company cars.

53 In his written skeleton argument, Mr Briggs had submitted that, although no evidence had been given by Surjit on the preference claim, we know that it was he would have arranged for the vehicles to be valued. It was said to be hardly likely that Surjit, who had driven the Bentley motor car registration number SOG 1, owned by MSD, had not been involved in the preference aspect of the case when, at the same time, in March 2010, he had clearly been involved with the transfer of the business and stock and employees to Dale, with the Devon Cider petition, and with the continued under-bond trading on a cash basis. Mr Briggs submitted that it would have been in Surjit's interests to have ensured that the prestigious vehicles and registrations had not fallen into the clutches of HMRC. At the very least, as an active and knowledgeable *de facto* director of MSD, Surjit should have intervened to prevent the preference.

54 Mr Briggs also made the point that it was clear from her evidence that, although she had been put forward as the witness dealing with the preference claim, as with other matters, Mrs Kuman had in fact had little or no contemporaneous knowledge of what had occurred.

55 Because he had not attended the trial, the court did not have direct evidence of Mohinder's involvement in the preference transaction. It was pointed out that he had been disinclined to continue in the company's business, which had been continued by Surjit and his wife. Mr Briggs submitted that Surjit should have intervened to do something about the conduct which had given rise to the preference. Both should be held responsible and made liable on an indemnity basis for all claims, including the preference claim.

56 Mr Cousins had begun his skeleton argument, at para.3, by addressing the various claims made by the liquidator. First, the preference claim. This was said to have concerned Mohinder only. The liquidator had completely succeeded on his amended claim, the amendments only being intimated in the course of the trial.

57 Secondly, the claim for the undated credit note. That had concerned Mohinder, Surjit, Mrs Kuman and Dale. The liquidator had completely failed against Mrs Kuman, abandoning his claim only at the closing submissions stage. As against Mohinder and Surjit, to date, the liquidator had established only that he might be entitled to recovery in principle; but the extent of that recovery, if any, would depend entirely upon the outcome of the inquiry yet to be undertaken and on whether Dale was itself able to satisfy the liability, if any, which was established against it. Mr Cousins accepted that the liquidator's claim against Dale had been established.

58 Thirdly, as for the three credit notes, this claim had concerned Mohinder, Surjit, Mrs Kuman and Dale. The respondents had been completely successful, although the liquidator had only abandoned this claim in the course of his oral opening submissions.

59 Fourthly, as to the three cash payments, they had concerned Dale and Mohinder. The claim as to £61,478.00-odd had failed completely against Mohinder and Dale. The other two claims, totalling £75,000, had succeeded against Dale, but had failed completely against Mohinder. That claim had been amended to include a misfeasance claim against Mohinder but, in the event, this was said to have taken matters nowhere, simply serving to increase the costs of the case.

60 Fifthly and finally, in relation to the claim for an account, this had concerned Mohinder, Surjit, Mrs Basi and Mrs Kuman. The amended claim had succeeded only against Mohinder and Surjit. It had failed entirely against Mrs Basi and Mrs Kuman, being abandoned at the stage of closing submissions.

61 Mr Cousins accepted unreservedly that, as between the liquidator on the one hand and Mohinder, Surjit and Dale on the other, there was no doubt that the liquidator had been the successful party, although this success had not been entirely unqualified. As between the liquidator on the one hand and Mrs Basi and Mrs Kuman on the other, however, it was they who had been the unqualifiedly successful parties. The liquidator pointed out that this was a ten-day trial, excluding judgment, or an eleven-day trial if one included judgment. It had originally been suggested by the liquidator that this was a six-day trial plus a pre-reading day. In the course of oral submissions, Mr Briggs had said that his understanding was that the time estimate had been increased to a seven-day trial.

62 Mr Cousins made a number of observations concerning the profile of the respondents' costs. At para.6 of his skeleton, he submitted that notwithstanding the liquidator's success against

Mohinder, Surjit and Dale, the liquidator should be deprived of a significant proportion of his costs against them, as well as being ordered to pay all of the costs incurred by Mrs Basi and Mrs Kuman. He proceeded to identify the factors upon which the respondents relied. Much of the trial had been taken up with the liquidator's applications for permission to amend in relation to the preference, the three cash payments and the account claim, all of which had been found by the court to have been made inexcusably late. Had it not been for such lateness, they would not have occupied the time of the court at all because the objections to them, both limitation and procedural, would not have been available had the amendments been sought a few months earlier, at, for example, the pre-trial review. Mr Cousins sought to suggest that some 13 to 14% of the court time had been wasted by the liquidator's inexcusable conduct in relation to the amendments.

63 As for his conduct at the trial, the case had been opened for the liquidator over two very full court days, in contrast to the respondents' opening of about one hour. The pre-trial indication had been that only half a day would be required to open. Mr Cousins submitted that the manner of opening unnecessarily prolonged the trial by an entire day. He also suggested that some 25% of the time taken at trial had been taken up in dealing with respondents against whom the liquidator's case had totally failed. The cross-examination of both Surjit and Mrs Kuman had overrun in a way which was said not to be justified.

64 Mr Cousins submitted that the liquidator had failed, either by late concessions or by the terms of the judgment, on the following issues:

(1) All issues raised against Mrs Basi and Mrs Kuman, a combination of seven distinct allegations against them, six against Mrs Kuman and one against Mrs Basi. These had been conceded in the written closing.

(2) The three credit notes abandoned in the first day's submissions.

(3) One of the three cash payments against Dale and all as against Mohinder, decided only by the terms of the judgment.

65 Mr Cousins submitted that the respondents should recover their costs on the issues on which they had been successful, save that in Mohinder's case that could be dealt with by adjusting his liabilities to the liquidator. In the course of his oral submissions, Mr Cousins made it clear that he was not seeking any issue-based costs order, rather the court should award a percentage of costs to the applicant, taking into account the liquidator's relative success and failure on particular issues. There was said to be no warrant for Surjit and Mohinder being held responsible for costs in relation to matters with which they had not been involved. In the case of Surjit, he should not be responsible for the preference claims; and Mrs Kuman and Mrs Basi should not be held responsible for any costs at all.

66 Mr Cousins sought to distinguish the *Kidson* case. That was said to be very different, concerning a single claim against underwriters. Several issues had been raised in that single claim. There had been a single overall result in relation to a single claim. Here, by contrast, there were multiple claims against multiple parties. The present case was concerned with defeat on whole aspects of individual claims. That was a very different situation from that in the *Kidson* case, so that case did not provide any assistance.

67 The liquidator was said to have relied on much common background against all of the respondents. He had failed to demonstrate what individual respondents had done wrong in relation to particular issues such as the undated credit note. The same was said to apply to

the three individual credit notes. As a result, it was said to have been necessary for each of the respondents to have taken the claim seriously and to have addressed the whole of the case directed to them. Mr Cousins submitted that about a third of the total work could be attributed to common issues.

68 It had been necessary for Mrs Basi and Mrs Kuman to have trawled through all of the evidence in relation to them. Mr Cousins submitted that he had fairly apportioned the figures and costs in his written skeleton argument. He submitted that the court was in a good position to form a view as to the extent of the liquidator's failure. He reminded the court of the doubling-up effect when a party fails as to part of his case because the other party should be entitled to a corresponding award of costs that he or she had incurred.

69 In relation to the claim for indemnity costs, Mr Cousins recognised that we had now the court's findings, as set out in its judgment. He recognised that this had been a case which had not been decided on a narrow balance as between the competing parties. He recognised also that there had been serious criticisms of all of the respondents' witness evidence. He proceeded to say no more about the issue of indemnity costs.

70 Mr Cousins recognised that the liquidator was plainly entitled to a payment on account of that part of his costs which he was awarded; but he submitted that the total costs were very high indeed, and any payment on account should not be more than £350,000.

71 In his brief reply, Mr Briggs submitted that the *Kidsons* case should not be looked at so narrowly as Mr Cousins submitted. Here, there had been two major claims, on both of which the liquidator had succeeded, and a number of smaller claims. As a result of the respondents' intransigent opposition and obstructionism, Mr Briggs asserted that the liquidator's solicitor just about lost the will to live during the course of the claim. A lot of the liquidator's costs had been the direct result of the respondents' obstructionism and failure to engage. Those were the submissions on costs.

72 From the judgment of Gloster J in the *Kidsons* case, I derive the following principles applicable to costs:

(1) The court's discretion as to costs is a wide one. The aim is always to make an order that reflects the overall justice of the case.

(2) The general rule remains that costs should follow the event, that is to say that the unsuccessful party will be ordered to pay the costs of the successful party.

(3) The question of who is the successful party for the purposes of the general rule must be determined by reference to the litigation as a whole.

(4) The court may depart from the general rule, but it remains appropriate to give real weight to the overall success of the winning party.

(5) It is important to identify at the outset who is the successful party. Only then is the court likely to approach costs from the right perspective.

(6) The question of who is the successful party is a matter for the exercise of common sense.

(7) Success for the purposes of the CPR is not a technical term, but a result in real life. The matter must be looked at in a realistic and commercially sensible way.

I recognise also:

(8) that there is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues.

73 In complex litigation, any winning party is likely to fail on one or more issues in the case; and the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues.

74 In the present case, as Mr Cousins recognises, as between the liquidator on the one hand and Mohinder, Surjit and Dale on the other, the successful party is undoubtedly the liquidator. In relation to Mrs Kuman and Mrs Basi, they have been successful; but I am entirely satisfied that they have brought this litigation on themselves by their own conduct. In the case of Mrs Kuman, I am entirely satisfied that it would be a manifest injustice if she were to recover any part of any costs she may have incurred from the liquidator. In her written witness evidence, Mrs Kuman professed to have a knowledge of the affairs of MSD Cash & Carry which, in the event, she did not. Both in her original written evidence, and in her further written evidence submitted during the course of the trial, Mrs Kuman gave evidence in relation to the preference to Mohinder which I have entirely rejected.

75 In the course of her written evidence, Mrs Kuman supported and expounded upon the evidence of Surjit in relation to the undated credit note, and also in relation to the three other credit notes and the three cash payments. She also gave evidence as to the company's trading between June 2010 and November 2011. In his original witness evidence, Surjit had relied on Mrs Kuman's evidence in relation to the undated credit note. That, again, is evidence that I have rejected.

76 Mrs Kuman was much more than a respondent to the specific claims directed to her. Her evidence addressed all of the issues in the case. It was as a result of that that she was subjected to extensive cross-examination, being in the witness box for some 7½ hours, only some two hours less than Surjit himself. Her involvement in the case was, as I have said, much more than as a respondent to the claims which have failed against her; and the reason why those claims were abandoned against her at a late stage was because it became apparent that she simply had neither the knowledge nor the involvement that she had professed in her witness evidence.

77 In those circumstances, whilst I recognise that she should not have to bear any part of the liquidator's costs, in the exercise of my discretion as to costs I have no doubt that it would be manifestly unjust for her to recover any costs whatsoever from the liquidator. Had I taken a different view, then I would have accepted Mr Briggs's submissions by way of criticism of Mr Cousins's approach to the costs and his apportionment of them, which seems to me to be wholly unrealistic and unrelated to the way the case progressed at trial.

78 The position of Mrs Basi is less clear cut and emphatic. I have, however, concluded that she too should not recover any of her costs from the liquidator because to allow her to do so would also be unjust. Mr Briggs has not taken issue with the sum of £460 said to be the cost of preparing her witness evidence; but one should look at the terms of that witness evidence and contrast those terms with the way in which, at paras.81 to 83 of my judgment, I set out my findings in relation to Mrs Basi.

79 I recorded her acceptance that, in pre-proceedings documents, she had mistakenly described herself as the managing director of MSD. I recorded her evidence that her appointment as a director at all material times had merely been a statutory requirement and that she had undertaken no duties as a director other than of a purely formal kind. I recorded that she had said that she had known nothing about the financial state of MSD and that she had only signed the 2008 accounts of that company in the absence of her father in India. I recorded that she said that she had had no involvement in matters the subject of or relevant to this litigation. She said that she had not been aware of the transfer of assets to Dale or the transfer of the motor vehicles to Lionheart; she had simply been a nominal director of MSD. I recorded that she had told the court that she had resigned on 9 March 2011 because she had been informed by the company's accountant that MSD no longer required or needed her as a director. I recorded that I accepted all of that evidence. I recorded Mr Briggs's acknowledgment in closing that Mrs Basi had been the most straightforward of the respondents' three live witnesses. I also recorded that Mr Briggs had pointed out that, whilst professing to have been a nominal director, she had still been willing, if the need arose, to sign MSD's annual accounts. I also recorded that Mrs Basi had said in evidence that she had had no information regarding certain matters and that she had just believed that what her sister had said would be correct.

80 My overall view was that I could derive no support for the respondents' case from Mrs Basi's evidence. Had all of that appeared in Mrs Basi's witness statement, and had, nevertheless, the liquidator proceeded to pursue a claim against her, then Mrs Basi would have been entitled to submit that she should be entitled to the costs of her successful response to the claim. But that was not the way in which Mrs Basi's witness evidence had been crafted and presented to the court.

81 In those circumstances, as with Mrs Kuman, although less clearly, it would, in my judgment, be unjust, despite her success, for Mrs Kuman to recover any part of her costs from the liquidator. While she should not bear any part of the liquidator's costs, she should not recover any of her costs from him. Had I taken a different view, then what I would have done would have simply been to say that the applicant liquidator should bear any additional costs exclusively and directly referable to Mrs Basi's joinder as a co-respondent. I anticipate that those costs, if a letter of engagement and proof of payment demonstrated that she personally had incurred any such costs, would have been entirely modest in amount. I entirely reject Mr Cousins's approach to the apportionment of costs. The costs that Mrs Basi must reasonably and properly have incurred would have been very limited. But, in any event, those costs were attributable to her failure properly to represent her state of ignorance of the company's affairs and her lack of involvement in its activities and in the subject matter of this litigation.

82 So, I would make no order in relation to the costs of Mrs Kuman and Mrs Basi, leaving them to lie where they fall. In my judgment, the costs of these proceedings should fall upon Mohinder, Surjit and Dale. I do not accept Mr Briggs's submission that Surjit, or indeed Dale, should bear any part of the costs of the preference claim. The preference claim was not directed to him and it was not, so far as I can recall, put to him in evidence that he had had any direct involvement in it himself.

83 Looking at the case as a whole, and bearing in mind not only the other claims but also the issue as to Surjit's role as a *de facto* director of the company, it seems to me that the proportion of costs properly to be attributable to the preference claim is some 25%. So, in relation to the costs of the case, Mohinder should bear 100% of the costs and Surjit and Dale 75% of the costs.

84 As to the basis of assessment, for the reasons that Mr Briggs had advanced, both orally and in writing, it does seem to me that this is an appropriate case for an award of indemnity costs. In so finding, I bear in mind and accept Mr Briggs's submission that this is a case in which the conduct of the relevant respondents, both before and during the proceedings, has been so far outside the norm of commercial litigation in general that it is appropriate that the costs should be assessed on the indemnity basis. I specifically bear in mind the consequences of that: that although the court will not allow costs which have been unreasonably incurred or are unreasonable in amount, any doubt will fall, as a result of my indemnity costs order, to be resolved in favour of the liquidator as receiving party rather than, as would be the case with a standard basis assessment, in favour of the respondents as the paying parties. I bear also in mind that the effect of an indemnity costs order will be that costs will be allowed even if they are disproportionate in amount, albeit they were reasonably or necessarily incurred.

85 Turning to the amount of any payment on account of the liquidator's costs, Mr Cousins rightly accepted that a payment on account ought to be ordered. It would be unjust not to do so. It seems to me that the appropriate amount to order by way of payment on account in the present case should be £400,000, although, since Surjit and Dale are to be responsible only for 75% of the costs, it seems to me that, as against them, the amount should be £300,000.

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