Neutral Citation Number: [2024] EWHC 2694 (Ch)

Case No: BL-2023-MAN-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre.
1 Bridge Street West,
Manchester M60 9DJ

Date: Friday 1 November 2024

Before :

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

- -

Between :

Maxima Creditor Resolutions Limited — **Claimant**

- and -

(1) John Thomas Fealy
(2) Thomas Joseph Barrett — **Defendants**

- -
- -

Mr Max Cole (instructed by **Simons Muirhead Burton LLP**) for the **Claimant**
Mr Nathan Goldstein (instructed directly) for the **Defendants**

Hearing date: Thursday 26 September 2024
Date judgment circulated: Thursday 24 October 2024
Date judgment handed down: Friday 1 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 1 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE HODGE KC

Winding up – Directors – Restriction on re-use of company name –Prohibited name – Personal liability of directors for debts of second company – Whether assignee of debt could bring claim against directors – Whether requirements of third excepted case applied – Whether second company had not been dormant at any time in the whole of the period of 12 months ending with the day before the first company went into creditors' voluntary winding up – Insolvency Act 1986, ss. 216, 217; Insolvency (England and Wales) Rules 2016 (SI 2016/1024) rr. 22.1, 22.7; Companies Act 2006, ss. 386, 1169.

Limitation of Actions – Appropriate limitation period – Acknowledgment of debt – Company's statement of affairs made on creditors' voluntary winding up – Whether statement acknowledging company's indebtedness to creditors – Whether company's debt statute-barred – Limitation Act 1980, ss. 29, 30.

The following cases are referred to in the judgment:

ESS Production Limited (in administration) v Sully [2005] EWCA Civ 554, [2005] BCC 435
First Independent Factors & Finance Limited v Mountford [2008] EWHC 835 (Ch), [2008] BCC 598
Goldfarb (Liquidator of Eurocruit Europe Ltd) v Poppleton [2007] EWHC 1433 (Ch), [2008] Bus LR 146
Re Overmark Smith Warden Limited [1982] 1 WLR 1195
Penrose v Official Receiver [1996] 1 WLR 482
Ricketts v Ad Valorem Factors Limited [2003] EWCA Civ 1706, [2004] BCC 164

His Honour Judge Hodge KC:

Introduction

1. This reserved judgment considers, apparently for the first time, the true meaning and effect of the second of the two elements of the third excepted case from the general prohibition on the re-use of a prohibited name by a second company after the entry into insolvent liquidation of an earlier company that had used that name. Specifically, it raises the question of what is meant by the requirement that the second company should not have been dormant at any time in the whole of the period of 12 months ending with the day before the first company went into creditors' voluntary winding up. I shall refer to this as the *'non-dormancy requirement'*. There have been previous authorities which have considered the general scope of the third excepted case, and specifically (a) whether it applies if the second company is not a *'phoenix'*, and (b) whether the name of the second company was in fact a prohibited name. But there would appear to be no decided authority on the non-dormancy requirement itself.

Background

2. The claimant is a company whose business model is to take assignments of debts due to creditors from companies in insolvent situations. It is represented by Mr Max Cole (of counsel). Most of its claims arise pursuant to ss. 216 and 217 of the Insolvency Act 1986. This case represents one such claim. Since virtually all the relevant facts are common ground, I can take them quite shortly.

3. The defendants, Mr Fealy and Mr Barrett, are cousins who were the directors of two companies, McFee Interiors Limited ('**Interiors**') and McFee Limited ('**ML**'). They are represented by Mr Nathan Goldstein (also of counsel), who was instructed directly by the defendants.

4. Interiors was incorporated on 22 April 2009. It carried out works as an internal finishing company. ML was incorporated on 14 November 2012 to carry out external works and energy efficient upgrades to existing properties. Interiors entered into creditors' voluntary liquidation on 20 November 2013. It is the defendants' case that ML started trading immediately after its incorporation (having been preparing to do so even before incorporation) and thus had been trading for just over 12 months when Interiors entered into insolvent liquidation. ML itself only went into creditors' voluntary liquidation on 14 February 2017. The defendants admit the voluntary liquidations of both Interiors and ML and that they were directors of both companies at all relevant times. They accept that '*McFee'* was a prohibited name, and that they acted as directors of ML without seeking, or obtaining, the court's permission.

5. At the time of its liquidation, ML owed debts to a number of companies including Distributor Limited (in the total sum of £226,991.35), and Compton and Casburn Limited (in the total sum of £11,924.40). The amount of those debts is not disputed. Indeed, they were confirmed by Mr Barrett when he signed the statement of affairs in respect of ML on 14 December 2017. After giving credit for VAT reclaimed by the assignor companies, the total sum outstanding in respect of those debts is £191,143.31; and there is a claim for statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998. Those debts were all duly assigned to the claimant on 2 February and 9 November 2022. According to the relevant deeds of assignment, Distributor

Limited received £5,000, and Compton and Casburn Limited received £596.22, as consideration for those assignments. The assignors would appear to have no entitlement to share in any recoveries that may be made by the claimant.

6. The claim form was issued on 27 January 2023. A number of defences were originally pleaded which are no longer pursued. Thus, by the time skeleton arguments were served for the trial, which was listed on Thursday 26 September 2024, the validity of the original debts, their assignment to the claimant, and ML's use of a prohibited name were no longer live issues. The issues falling for determination by the court were confined to a defence of limitation, and whether the defendants were relieved from personal liability for the company's debts by the application of the third excepted case in r. 22.7 of the Insolvency Rules 2016.

7. By the start of the trial, these issues had narrowed still further because Mr Goldstein conceded the limitation issue, leaving the defendants' reliance on Insolvency Rule 22.7 as the only remaining issue live between the parties. It is now common ground that the defendants must fail in their defence to this claim unless they can satisfy the non-dormancy requirement. However, since I am entirely satisfied that Mr Goldstein was right to concede the limitation defence, it is appropriate for me to address that issue. But first I must consider the relevant law, both statutory and case law, governing the re-use of prohibited company names.

The re-use of prohibited company names: statutory provisions

8. Sections 216 and 217 of the Insolvency Act 1986 provide as follows:

***216 Restriction on re-use of company names**.*

(1) This section applies to a person where a company ('the liquidating company') has gone into insolvent liquidation on or after the appointed day and he was a director or shadow director of the company at any time in the period of 12 months ending with the day before it went into liquidation.

(2) For the purposes of this section, a name is a prohibited name in relation to such a person if —

(a) it is a name by which the liquidating company was known at any time in that period of 12 months, or

(b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that company.

(3) Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation —

(a) be a director of any other company that is known by a prohibited name, or

(b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or

(c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.

(4) If a person acts in contravention of this section, he is liable to imprisonment or a fine, or both.

(5) In subsection (3) 'the court' means any court having jurisdiction to wind up companies; and on an application for leave under that subsection, the Secretary of State or the official receiver may appear and call the attention of the court to any matters which seem to him to be relevant.

(6) References in this section, in relation to any time, to a name by which a company is known are to the name of the company at that time or to any name under which the company carries on business at that time.

(7) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(8) In this section 'company' includes a company which may be wound up under Part V of this Act.

217 Personal liability for debts, following contravention of s. 216.

(1) A person is personally responsible for all the relevant debts of a company if at any time —

(a) in contravention of section 216, he is involved in the management of the company, or

(b) as a person who is involved in the management of the company, he acts or is willing to act on instructions given (without the leave of the court) by a person whom he knows at that time to be in contravention in relation to the company of section 216.

(2) Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.

(3) For the purposes of this section the relevant debts of a company are —

(a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and

(b) in relation to a person who is personally responsible under paragraph (b) of that subsection, such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that paragraph.

(4) For the purposes of this section, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.

(5) For the purposes of this section a person who, as a person involved in the management of a company, has at any time acted on instructions given (without the leave of the court) by a person whom he knew at that time to be in contravention in relation to the company of section 216 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

(6) In this section 'company' includes a company which may be wound up under Part V.

9. The circumstances prescribed for the purposes of s. 216(3) of the Insolvency Act 1986 are now to be found in Part 22 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024). This part is headed: *'Permission to act as director etc of Company with a prohibited name (section 216)'*. Insolvency Rule 22.1 provides;

Preliminary

22.1. — (1) The rules in this Part —

(a) relate to permission required under section 216 (restriction on re-use of name of company in insolvent liquidation) for a person to act as mentioned in section 216(3) in relation to a company with a prohibited name;

(b) prescribe the cases excepted from that provision, that is to say, in which a person to whom the section applies may so act without that permission; and

(c) apply to all windings up to which section 216 applies.

10. Insolvency Rule 22.7 goes on to provide:

Third excepted case

22.7. The court's permission under section 216(3) is not required where the company there referred to though known by a prohibited name within the meaning of the section —

(a) has been known by that name for the whole of the period of 12 months ending with the day before the liquidating company went into liquidation; and

(b) has not at any time in those 12 months been dormant within the meaning of section 1169(1), (2) and (3)(a) of the Companies Act.

Insolvency Rule 22.7 was previously rule 4.230 of the 1986 Insolvency Rules.

11. Section 1169 of the Companies Act 2006 provides:

1169 Dormant companies

(1) For the purposes of the Companies Acts a company is 'dormant' during any period in which it has no significant accounting transaction.

(2) A 'significant accounting transaction' means a transaction that is required by section 386 to be entered in the company's accounting records.

(3) In determining whether or when a company is dormant, there shall be disregarded —

(a) any transaction arising from the taking of shares in the company by a subscriber to the memorandum as a result of an undertaking of his in connection with the formation of the company;

(b) any transaction consisting of the payment of —

(i) a fee to the registrar on a change of the company's name,

(ii) a fee to the registrar on the re-registration of the company,

(iii) a penalty under section 453 (penalty for failure to file accounts), or

(iv) a fee to the registrar for the registration of a confirmation statement.

(4) Any reference in the Companies Acts to a body corporate other than a company being dormant has a corresponding meaning.

12. Section 386 of the Companies Act 2006 provides:

386 Duty to keep accounting records

(1) Every company must keep adequate accounting records.

(2) Adequate accounting records means records that are sufficient —

(a) to show and explain the company's transactions,

(b) to disclose with reasonable accuracy, at any time, the financial position of the company at that time, and

(c) to enable the directors to ensure that any accounts required to be prepared comply with the requirements of this Act ....

(3) Accounting records must, in particular, contain —

(a) entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, and

(b) a record of the assets and liabilities of the company.

(4) If the company's business involves dealing in goods, the accounting records must contain —

(a) statements of stock held by the company at the end of each financial year of the company,

(b) all statements of stocktakings from which any statement of stock as is mentioned in paragraph (a) has been or is to be prepared, and

(c) except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable all these to be identified.

(5) A parent company that has a subsidiary undertaking in relation to which the above requirements do not apply must take reasonable steps to secure that the undertaking keeps such accounting records as to enable the directors of the parent company to ensure that any accounts required to be prepared under this Part comply with the requirements of this Act …

The re-use of prohibited company names: case law

13. The first of the reported cases on the re-use of prohibited company names is *Ricketts v Ad Valorem Factors Limited* [2003] EWCA Civ 1706, [2004] BCC 164, a decision of the Court of Appeal (Simon Brown and Mummery LJJ). The essential issue in that case was whether the relevant name was a prohibited name within s. 216(2)(b). But the case also establishes that a prohibited name which falls within the natural and ordinary meaning of the language of that subsection is caught by the restrictions on the re-use of prohibited company names even if the case is not a '*phoenix syndrome*' case, and even if the sanctions of criminal liability seem to be harsh. Mummery LJ recognised (at [1] and [2]), that ss. 216 and 217

… affect the directors of a company which has gone into insolvent liquidation. The directors are subject to liabilities if they act in relation to other companies known by a name, which is either the same as, or is similar to, that of the insolvent company. Contravention of the specified restrictions renders directors (and similarly placed persons), who act without the leave of the court, guilty of a criminal offence and personally liable for the debts and other liabilities of the successor company.

The provisions are another example of a limited, though significant, departure from the general principles of corporate law that a company is a legal entity separate and distinct from its directors and members, so that only the company is liable for its debts and the creditors of the company do not have a right of recourse to the assets of the directors and members for payment of the company's debts. It is surprising to learn that the sections have been very rarely used over the last 15 years in order to fasten directors with personal liability … As the arguments on this appeal have demonstrated, the provisions extend beyond the particular abuses of the privilege of limited liability at which they were directed.

14. At [15] Mummery LJ explained that:

It is common ground that the sections were enacted to curb the 'phoenix syndrome', a vivid expression coined to cover those cases in which the privileges of limited liability are exploited by those 'who set up companies with vestigial capital; immediately run up debts, often taking deposits from consumers for goods and services which are never delivered; transfer the assets of the first company at an undervalue to a second company; allow the first company to cease trading, with its creditors confined to that company's inadequate assets; and then begin the process all over again with the second (or third or fourth) company.' (Introduction to Company Law, Professor Paul Davies (supra) at pp. 99–100.)

15. However, whilst recognising the relevance of a purposive interpretation, the Court of Appeal held that the legal position is that if a name is prohibited within the natural and ordinary meaning of the language of s. 216(2), the case is caught by the restrictions, even if it is not a *'phoenix syndrome'* case, and even if the sanctions of criminal liability might seem to be harsh. At [20], Mummery LJ referred to

    "... the not uncommon case of a group of associated companies which, for understandable reasons, are known by names so similar to one another as to suggest an association with each other. The directors of the associated companies would be placed in a difficult situation if one company in the group went into insolvent liquidation and directors of the liquidating company in the group remained directors of one or more of the other companies in the group, which continued to use prohibited names. That would not be a case of the serial succession of phoenix companies sinking into insolvency and yet it would be caught by s. 216(2) if the interpretation adopted by the district judge were upheld. In my judgment, the solution is not to be found in distortion of the clear language of the statutory provisions by unacceptable methods of judicial interpretation. In many cases of groups of associated companies the terms of the exception in r. 4.230 [the predecessor to the present IR 22.7]*, which plainly contemplate that the situation under discussion could be caught by the restrictions, would apply. The present case does not fall within that exception, as Air Equipment was not known by a prohibited name for the whole of the 12 months before Air Component went into liquidation."*

16. Simon Brown LJ delivered a short concurring judgment of his own *"... because of the surprisingly long reach of this legislation and the obvious importance of the point at issue"*. At [28], he confessed that:

    At one point in the argument I wondered whether s. 216(2)(b) applied in the case of companies within the same group of companies as opposed to the case of a phoenix company as that concept is ordinarily understood: the use of a new successor company, often trading under the same or similar name, using the old company's assets, often acquired at an undervalue, and exploiting its goodwill and business opportunities. It became plain, however, that the provision is no less applicable in the case of group companies than phoenix companies. Indeed, certain of the exceptions provided for by the Rules ... necessarily imply it.

17. At [30], Simon Brown LJ issued the following warning:

    In construing this provision it is important to bear in mind the draconian consequences, both criminal and civil, which can all too easily flow from finding a company's name to be a prohibited name. As stated in s. 271 of Bennion on Statutory Interpretation *(4th ed., Butterworths) at p. 705, the court should strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear.*

18. The next authority is *ESS Production Limited (in administration) v Sully* [2005] EWCA Civ 554, [2005] BCC 435. The leading judgment was delivered by Arden LJ. Chadwick LJ delivered a concurring judgment; and Auld LJ agreed with both judgments. This appeal raised the question whether a company could bring itself within the third excepted case in what is now Insolvency Rule 22.7 if it had traded under more than one name during the period of 12 months ending with the day before the first company had

entered into liquidation (referred to in the judgment of Arden LJ as *'the qualifying period'*). The appeal also involved consideration of the use of an acronym of a prohibited name. The Court of Appeal held that an acronym might be a prohibited name; that it need not be the only name under which the second company had carried on business during the qualifying period; and that it need not be the name which the company used in connection with all of its business functions.

19. The appeal was not directly concerned with the non-dormancy requirement in r. 22.7(b), as Arden LJ made clear at [83] when she observed that it was not in issue that the second (prohibited name) company was not dormant for the purposes of paragraph (b) of the rule. However, the judgments contain some useful observations about the background to this set of statutory provisions, and the purpose of the third excepted case.

20. At [3] and [4], Arden LJ explained that:

Sections 216 and 217 were measures designed to deal with the problem of 'phoenix' trading. The nature of the 'phoenix' problem was described thus by the Steering Group of the Department of Trade's independent Company Law Review, of which I was a member, in its <u>*Modern Company Law for a Competitive Economy – Final Report*</u> *in 2001:*

'15.55 The 'phoenix' problem results from the continuance of the activities of a failed company by those responsible for the failure, using the vehicle of a new company. The new company, often trading under the same or a similar name, uses the old company's assets, often acquired at an undervalue, and exploits its goodwill and business opportunities. Meanwhile, the creditors of the old company are left to prove their debts against a valueless shell and the management conceal their previous failure from the public.'

The Company Law Review Steering Group went on to point out that not all phoenix situations were bad. 'At the worst', some phoenix situations resulted from unscrupulous activities of the directors. However, others resulted from the failure of businesses 'though misfortune or naive good faith'. The only proper course, if a company could not trade out of its difficulties, was for it to enter liquidation. Moreover, 'the only way [for the controllers] to continue an otherwise viable business and their own and their employees' ability to earn their livelihood may be for them to do so in a new vehicle using the assets and trading style of the original company.' (para. 15.56). The Company Law Review Steering Group recognised that good and bad phoenix situations shared many characteristics and accordingly it was difficult to target bad phoenix situations alone. This may help explain why, as we shall see from the relevant Insolvency Rules, the exclusions in the Insolvency Rules from the wide net drawn by ss. 216 and 217 do not proceed on the basis of distinguishing honest from unscrupulous traders. They are drawn in much more limited terms. In <u>*Thorne v Silverleaf*</u> *[1994] BCC 109, Peter Gibson LJ observed that it was clear that ss. 216 and 217 apply to a wider set of circumstances than the case of a person attempting to exploit the goodwill of a previous insolvent company.*

21. At [8] Arden LJ said that:

The purpose of the third excepted case is to exclude the operation of ss. 216 and 217 where the prohibited name company was not a 'phoenix' company.

She pointed out that those points had been made by Chadwick J (as he then was) in *Penrose v Official Receiver* [1996] 1 WLR 482 at p. 489. Amongst the passages from his judgment cited by Arden LJ was the following:

The third excepted case in r. 4.230 [now 22.7] *shows that the mischief is not thought to exist in a case where the company having a prohibited name has been established and trading under that name for a period of not less than 12 months before the liquidating company went into liquidation. The former director of the liquidating company can join, or can remain a member of, the board of such a company without restriction. That must be because the mischief is not perceived to exist when the company having a prohibited name is not a 'phoenix'.*

22. At [10], Arden LJ said this:

Under r. 4.230 [now r. 22.7]*, a company is not a phoenix company if either it traded under the prohibited name or that name was its registered name and it was not in the qualifying period a dormant company for the purposes of s. 252 (5) of the Companies Act 1985 (see r. 4.230(a) and (b)). The requirement in r. 4.230(b) was clearly to avoid the device of a company being kept 'on the shelf' with a prohibited name, ready to be used when the liquidating company went into liquidation.*

23. Arden LJ also referred to what (at [78]) she termed *'the principle against doubtful penalisation'*. That principle was to be *"applied to the imposition of a civil liability as well as to the imposition of criminal liability"*. Earlier, at [71], Arden LJ had emphasised that:

It is an important principle of statutory construction that a person should not be penalised except under clear law.

She went on to refer to the reliance placed upon this principle by Simon Brown LJ in the *Ricketts* case, citing from his judgment at [30]. Earlier still, at [61], Arden LJ added these general observations:

Since the liability imposed by s. 216 is criminal, and in addition since s. 217 imposes what may be a significant personal liability on a director for the debts of a company incorporated with limited liability, neither section should be construed to include transactions which are not within those sections on their fair interpretation. In addition, the opening clause of s. 216(3) mandates that ss. 216 and 217 should be read together with rr. 4.227–4.230 [now rr. 22.1-22.7]. *The aim of any interpretation of all these provisions should thus be to create a coherent and rational scheme. In my judgment, in the absence of clear wording to the contrary, the court may fairly assume that Parliament intended the scheme of criminal and personal liability under these provisions to be coherent and rational.*

24. In his concurring judgment (at [91]), Chadwick LJ observed that it was important

... to keep in mind that the mischief to which s. 216 of the 1986 Act is directed is the potential for confusion (or deception) in a case where a phoenix company arises from the ashes of an insolvent liquidation ... There is no mischief where an active company which, prior to the liquidation of the liquidating company, is already known by a name suggestive of association with the liquidating company – for example a company within

the same group – continues to carry on business. As I sought to point out in Penrose v Official Receiver [1996] BCC 311 at p. 318A; [1996] 1 WLR 482 at p. 490A–B, the third excepted case has been included in the statutory scheme in order to avoid the result that s. 216 of the Act will have application in a case where the mischief does not exist. That was, I think, accepted by this court in Ricketts v Ad Valorem Factors Ltd [2004] BCC 164; [2003] EWCA Civ 1706 at para.20.

25. In *First Independent Factors & Finance Limited v Mountford* [2008] EWHC 835 (Ch), [2008] BCC 598, a decision of Lewison J, it was common ground that the second company had been dormant within the 12 months preceding the entry into liquidation of the first company. It did not therefore fall within the description contained in what is now r. 22.7: see [27]. However, the case is of assistance for three reasons.

26. First, counsel for the director had taken the preliminary objection that

… a claim made by a company such as the claimant, which has simply bought the debts of two creditors, and has never traded with the failed company, is outside the mischief against which ss. 216 and 217 are directed. He submits that it is an abuse of process for an assignee of a debt who has never traded with the defunct company, and who has taken his assignment of the debt after the entry into liquidation of the defunct company, to sue a former director under s. 217. He says that the court should dismiss the claim as being an abuse of process.

Lewison J had no hesitation in rejecting this submission (at [2]):

Debt factoring is a perfectly legitimate business decision for any creditor. I cannot see that it makes any difference whether the debt was acquired before or after the defunct company went into liquidation. The creditor is, in my judgment, entitled to salvage what he can out of a bad trade debt. If the only way of salvaging anything is to sell the debt to a debt factor, that is entirely within his right. The assignee of the debt will stand in the shoes of the assignor. If the assignor could have made the claim, so can the assignee.

27. Second, Lewison J addressed the *'phoenix syndrome'* (at [17]) in these terms:

The 'phoenix' problem results from the continuance of the activities of a failed company by those responsible for the failure, using the vehicle of a new company. The new company, often trading under the same or a similar name, uses the old company's assets, often acquired at an undervalue, and exploits its goodwill and business opportunities. Meanwhile, the creditors of the old company are left to prove their debts against a valueless shell and the management conceal their previous failure from the public. The phoenix company rises out of the ashes of the defunct company. However, although the 'phoenix syndrome' is the principal target of the sections, the words of the sections encompass factual situations that cannot be described in those terms. The court should not adopt a strained interpretation of the words of the statute simply in order to confine its operation to true cases of phoenix syndrome: Ricketts v Ad Valorem Factors Ltd [2003] EWCA Civ 1706; [2004] BCC 164. As Mummery LJ made clear in that case (at [18]), Ad Valorem Factors Ltd v Ricketts itself was not a phoenix case, yet the director was liable. Moreover, it is difficult to distinguish between good and bad phoenix situations and between honest and unscrupulous traders; and the sections do not attempt to do so: Thorne v Silverleaf [1994] BCC 109; ESS Production Ltd (in admin.)

v Sully [2005] EWCA Civ 554; [2005] BCC 435. However, neither section should be construed to include transactions which are not within those sections on their fair interpretation. Moreover, since s. 216(3) refers expressly to 'such circumstances as may be prescribed' the sections should be construed together with the rules so as to produce a rational and coherent scheme: ESS Production Ltd v Sully.

28. Third, Lewison J considered the scope of the third excluded case at [28]:

The exception in r. 4.230 [now r. 22.7] *is aimed at a situation where there is a previously established and active business trading with limited liability. Customers and suppliers who deal with such a business will know that they are dealing with an entity with limited liability, just as they always have done.*

29. In none of these three authorities did the court have to address the points of construction on the non-dormancy requirement with which this court now has to grapple.

30. From this trilogy of authorities, I derive the following propositions (so far as relevant to the determination of the present case):

(1) The principal target of the statutory restrictions on the re-use of prohibited company names is the *'phoenix'* problem.

(2) The *'phoenix'* problem results from the continuance of the activities of a failed company by those responsible for that failure, using the vehicle of a new company. The new company, often trading under the same or a similar name, uses the old company's assets, often acquired at an undervalue, and exploits its goodwill and business opportunities. Meanwhile, the creditors of the old company are left to prove their debts against a valueless shell, and the management conceal their previous failure from the public. The phoenix company rises out of the ashes of the defunct company.

(3) Although the *'phoenix syndrome'* is the principal target of the statutory provisions, however, the wording of the provisions encompasses factual situations that cannot be described in those terms. The court should not strive to strain the clear language of the statutory provisions by unacceptable methods of judicial interpretation, or seek to adopt a strained interpretation of the words of the statute simply in order to confine its operation to true cases of the phoenix syndrome. Moreover, it is difficult to distinguish between good and bad phoenix situations, and between honest and unscrupulous traders; and the court needs to recognise that the statutory provisions do not attempt to do so.

(4) Nevertheless, the statutory provisions should not be construed so as to include transactions which do not fall within their scope on a fair interpretation.

(5) Further, since s. 216(3) refers expressly to '*such circumstances as may be prescribed'*, the sections should be construed together with the rules so as to produce a rational and coherent scheme.

(6) The *'principle against doubtful penalisation'* is an important principle of statutory construction which mandates that a person should not be penalised except under clear law. That principle is to be applied to the imposition of civil, as well as criminal, liability. The court should therefore strive to avoid adopting a construction which

penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear.

(7) The purpose of the third excepted case is to exclude the operation of ss. 216 and 217 where the second company is not a *'phoenix'* company. The mischief is not perceived to exist where the company having a prohibited name has been established and trading under that name for a period of not less than 12 months before the earlier company went into liquidation. The former director of that company can join, or can remain a member of, the board of the second company without restriction. The exception in r. 22.7 is aimed at a situation where there is a previously established and active business, trading with limited liability. Customers and suppliers who deal with such a business will know that they are dealing with an entity with limited liability, just as they always have done. The non-dormancy requirement in r. 22.7 (b) is clearly there to avoid the device of a company being kept *'on the shelf'* with a prohibited name, ready to be used when an earlier company enters into liquidation.

31. These propositions would seem to me to point to the need to ensure that the boundaries between the permissible, and the impermissible, use of a prohibited name by a second company are readily ascertainable, and capable of understanding, by all those who may be affected by them: directors, creditors, judges, and juries. To my mind, it is unfortunate, in terms of lack of transparency and clarity, that the requirement of non-dormancy takes one to a definition section in another Act (s. 1169 of the Companies Act 2006), which itself refers to transactions which are required by a yet further statutory provision (s. 386 of the 2006 Act) to be entered in the company's accounting records.

32. Against that statutory background, I digress to consider the now abandoned defence of limitation.

Limitation

33. Since Mr Goldstein abandoned the defence of limitation in his opening, my observations on this topic are entirely obiter. In the case of the issue of the relevant limitation period, they are doubly so because, as will appear, I am satisfied that any current applicable limitation period started running again when Mr Barrett acknowledged the relevant debts in Interiors' statement of affairs. However, since the limitation defence was addressed in both parties' skeleton arguments, and because I have formed a clear view on the issue (albeit without the benefit of adverse oral argument), it is appropriate that I should set out my reasoned conclusions on the issue, albeit more briefly than might otherwise have been appropriate had the defence remained a live issue between the parties.

34. The underlying facts are not in issue. For the claimant, Mr Cole accepts that this is a claim to recover debts founded upon simple contracts. As such, by s. 5 of the Limitation Act 1980, the primary limitation period expired six years from the dates on which each of the several causes of action in debt accrued. Mr Cole accepts that the several debts were all incurred no later than November 2016, and so the primary limitation period expired no later than November 2022. Since the claim form was not issued until 27 January 2023, subject to any later acknowledgment of the debt, the claim is therefore statute-barred.

35. In his skeleton argument, Mr Goldstein points out that there is no express provision within the Insolvency Act 1986 that imposes any time limit upon a claim brought by virtue of s. 217 of the Insolvency Act 1986. Nor does there appear to be any decided case in which this issue has specifically been raised. It is therefore necessary to look towards the Limitation Act 1980 for an answer. Mr Goldstein spent some time anticipating, and addressing, a potential argument that this is a claim to recover sums recoverable by statute, and thus governed by s. 9 of the Limitation Act 1980, as to which time only starts to run from the date on which the cause of action accrued. Mr Goldstein submits that a claim brought by virtue of s. 217 is analogous to a claim for misfeasance brought under s. 212 of the 1986 Act. As held by Blackburne J in *Goldfarb (Liquidator of Eurocruit Europe Ltd) v Poppleton* [2007] EWHC 1433 (Ch), [2008] Bus LR 146 at [24] and [27], a claim under s. 212 is entirely procedural in nature, and has a limitation period equivalent to that applicable to the underlying claim. Mr Goldstein submits that s. 217 simply provides a statutory procedural mechanism, enabling a claim to be brought by a creditor to recover relevant debts owed by the company from a director which were incurred during the period when it was using a prohibited company name. As such, the limitation period starts when the cause of action accrues, which is when the debt was incurred by the new company.

36. I accept Mr Goldstein's submissions as to when the cause of action accrues (although I would not describe s. 217 as *'procedural'* since it creates a personal liability on the part of a company's directors which did not previously exist). In my judgment, the applicable period of limitation starts to run when the debt becomes payable by the company. That is so whether a claim under s. 217 is treated for limitation purposes as a claim to recover a debt (governed by s. 5 of the Limitation Act 1980) or a claim to recover sums recoverable by statute (governed by s.9). In my judgment, it makes no difference to the determination of this case which section applies because the date of accrual of the cause of action is the same. Section 217(1) renders the director personally responsible for all the relevant debts of the company incurred in contravention of s. 216. Section 217(2) makes it clear that the director is jointly and severally liable for those debts with the company and any other person so liable, whether under s. 217 or otherwise. It cannot have been intended that different limitation periods should apply to claims against the company and against its responsible directors. The date of insolvent liquidation, whether of the original or the new company, does not affect, or re-set, the limitation period applicable to the underlying claim against the company. Subject to any later acknowledgment of the debts, the entirety of this claim is therefore statute-barred.

37. By way of answer to the defence of limitation, the claimant relies upon s. 29(5)(a) of the Limitation Act 1980. So far as material, this provides that

… where any right of action has accrued to recover —

(a) any debt or other liquidated pecuniary claim

…

and the person liable or accountable for the claim acknowledges the claim … the right shall be treated as having accrued on and not before the date of the acknowledgment …

38. By s. 30 of the Limitation Act 1980, the acknowledgment must be in writing and signed by the person making it; it may be made by the agent of the person liable; and it must be made to the person whose claim is being acknowledged.

39. By s. 99 of the Insolvency Act 1986, the directors of a company entering into creditors' voluntary liquidation are required to make, and to send to the company's creditors, within the prescribed period, a statement of the affairs of the company, including particulars of the company's debts. The statement of affairs must be verified by a statement of truth.

40. In *Re Overmark Smith Warden Limited* [1982] 1 WLR 1195 at 1206C, Slade J was content to assume, but without finally deciding, that a statement of affairs produced on a company liquidation, albeit in compliance with a statutory obligation, was capable of constituting an effective acknowledgment of debt for the purposes of the Limitation Act 1939, which included (at ss. 23(4) and 24), provisions equivalent to those now to be found in ss. 29(5) and 30 of the 1980 Act. In doing so, Slade J followed earlier Court of Appeal authority holding that a company's balance sheet, signed by the company's accountants as its agents and by two of its directors, might constitute an effective acknowledgment of a company's debt for the purposes of the Limitation Act.

41. The reasons for Slade J's caution are to be found at pp. 1205G – 1206B of his judgment, where he said this (omitting citation of case law authority):

> *I prefer to express no concluded view on this point because I do not find it necessary to do so. I should, however, refer in passing to one or two points which have been ventilated in the course of argument and may still conceivably render a statement of affairs distinguishable from a balance sheet for the relevant purposes, even under the post-1939 law. First, it may be said that a statement of affairs is by its nature not a document by which the debtor or his agent admits to any personal liability on the part of the debtor to pay the debt in question, but that it is merely a statement that the creditor is entitled to be paid out of a particular fund ... Secondly, it may be said that a statement of affairs cannot be an acknowledgment because it is made under compulsion of law ... , though if this point has any force, it would apply prima facie to a company's balance sheet. Thirdly, it may be said that a statement of affairs cannot constitute an acknowledgment on the ground that it is not addressed to the creditor or his agent. On this ground it has been held that the inclusion of a debt by a personal representative in an affidavit sworn for probate purposes is not a sufficient acknowledgment ...*

42. In my judgment, none of these points should lead the court to decline to hold, consistently with the assumption made by Slade J, that a company's statement of affairs, signed by one of its directors following the company's liquidation, albeit in compliance with a statutory obligation, is capable of constituting an effective acknowledgment of debt for the purposes of s.29 of the Limitation Act 1980. The first point seems to me hark back to the former requirement (no longer relevant since the Limitation Act 1939) that an acknowledgment must imply a promise to pay the debt in question: see the discussion at p. 1203 B – F of the report. In any event, if a person is entitled to be paid out of the company's assets, that can only be because he is a creditor of the company. As Slade J acknowledged, the second point cannot stand with the authorities that hold that a company's balance sheet, duly signed by the directors, is capable of constituting a valid acknowledgment of debt. The third point would seem to me to be answered by the statutory requirement to send the company's statement of affairs to the company's

creditors. I am strengthened in this conclusion by the fact that, whilst not conceding the point, counsel for the defendant (the Department of Employment), instructed by the Treasury Solicitor, had accepted that as the law then stood, there were substantial difficulties in contending that a statement of affairs on a bankruptcy or liquidation could never be an effective acknowledgment of indebtedness. That counsel was Mr John Mummery (later Mummery LJ).

43. I am satisfied that a fresh cause of action to recover the relevant debts accrued, and the six year limitation period started running again, when, on 14 February 2017, Mr Barrett complied with his statutory obligations under s. 99 of the Insolvency Act 1986 by verifying a statement of affairs in respect of ML, which included the debts owed to Distributor Limited and Compton and Casburn Limited (which were subsequently assigned to the claimant), and this was sent out to them as creditors of the company. This document (which appears at pp. 707-711 of the claimant's hearing bundle) is in writing and was signed by Mr Barrett in his capacity as one of the company's directors (and thus as its agent); it particularises the debts owed to the relevant creditors; and was sent (and thereby made) to them. The claim was therefore not time-barred when the claim form was issued less than six years later, on 27 January 2023.

44. In his written skeleton argument, Mr Goldstein submits (without elaboration) that as this is a claim falling under s. 9 of the Limitation Act 1980, the provisions of s. 29, concerning acknowledgment of debt, do not apply. As such, there is said to be no relevant provision within the Limitation Act 1980 to extend the starting point of the limitation clock. I cannot accept this submission. Even if – and it is unnecessary to decide – this claim were properly to be characterised as an action to recover a sum by virtue of s. 217 of the Insolvency Act (and governed by s. 9), rather than a straightforward claim in debt (governed by s. 5), it is still an action to recover *"any debt or other liquidated pecuniary claim"* and thus falls within the scope of s. 29(5)(a).

45. I therefore return to consider the single remaining live issue in this case: whether the dormancy requirement is satisfied. I reiterate that it is now common ground that unless they can satisfy this requirement, the defendants must fail in their defence to this claim.

The non-dormancy requirement: evidence

46. Since there is no dispute as to the facts relied upon by the claimant in support of its claim, it was not necessary for the claimant to call any live evidence at the trial, which was completed within the course of one court day, on Thursday 26 September 2024.

47. The defendants rely upon a single joint witness statement - their first - dated 23 October 2023. They maintain that the third excepted case applies because ML was trading for 53 weeks and one day before Interiors was placed into creditors' voluntary liquidation. At paragraphs 11 to 18 of their witness statement, the defendants explain that they have been severely hampered in their search for information to prove that ML was non-dormant in the 53 weeks and one day prior to Interiors' entry into liquidation. They point out that this claim was only first intimated on 9 June 2022, which was over nine and a half years after ML was incorporated (on 14 November 2012). The defendants have found it extremely difficult to search for information regarding the qualifying period because relevant documentation was destroyed in accordance with government guidelines, which only require company records to be retained for six years from the company's last financial year. The defendants have attempted unsuccessfully to obtain

relevant documents and information from ML's liquidator, the company's former accountants, and its bank. They have, however, been able to recover some records from an estimator and quantity surveyor who had worked for ML on a self-employed basis.

48. In their joint witness statement, the defendants explain that Interiors was an **internal** finishing company. They decided to set up an **external** works company early in October 2012, to carry out external works, as well as registering to become a Green Deal External Render Installer, providing energy efficient upgrades to existing properties. In their statement, the defendants relate how ML was contracted on projects introduced by Murphy Construction (according to the documents, J Murphy & Sons Limited) for the whole of the period from 16 November 2012 until 17 December 2013, which exceeds the qualifying non-dormancy period of 52 weeks. The defendants explain that the tender for ML's first project, at 9 Morson Road, Enfield, was drafted during the week commencing 22 October 2012, and was submitted to Murphy Construction on 29 October 2012, before ML was even incorporated. Murphy Construction confirmed to the defendants that they had been awarded the contract during the week commencing 5 November 2012. Immediately thereafter, the defendants contacted their accountants, Mirza and Co, who arranged for ML to be incorporated on 14 November 2012. The health and safety paperwork for the Morson Road project was issued on 9 November 2012, in preparation for work to start on site the following week, commencing on Friday 16 November 2012. ML worked on the Morson Road project continuously from that date until 21 June 2013. The defendants refer to work on another project at 86-88 Delancey Street, Camden Town, where a tender was drafted between 24 April 2013 and its submission to Murphy Construction on 7 May 2013. Work on that project started on 3 June 2013 and was completed on 9 December 2013. The defendants produce timelines and supporting documentation for all of this activity. They assert that all this information and documentation demonstrate that ML was non-dormant for longer than the qualifying period of 12 months ending on 19 November 2013.

49. The company's first abbreviated accounts were approved by the board on 12 September 2014, and were signed on their behalf by Mr Fealy. They are for the year ending 30 November 2013. They include a note that for that year, ML was entitled to audit exemption under s. 477 of the Companies Act 2006, relating to small companies. Mr Goldstein relies upon these accounts as showing that the company had traded during that year, and had stock, cash, debtors and creditors. Mr Cole rightly placed no reliance upon the fact that these accounts are not for the year ending 14 November 2013 (the anniversary of the date of incorporation), or 16 November 2013 (the anniversary of the date the defendants say that ML began trading) but ran to 30 November 2013. Section 390 (1) and (2) of the Companies Act 2006 provide that a company's first financial year (a) begins with the first day of its first accounting reference period, and (b) ends with the last day of that period or such other date, not more than seven days before or after the end of that period, as the directors may determine. By s. 391(4), ML's '*accounting reference date*' was the last day of the month in which the anniversary of its incorporation falls. In the case of ML, that was 30 November 2012. By s. 391(5), ML's first accounting reference period was the period ending on that date. ML's first accounts were therefore properly drawn to 30 November 2013.

50. Both defendants gave oral evidence before me. Mr Fealy gave evidence for about an hour. After a short break, Mr Barrett gave evidence for about 20 minutes. I find that

both men were honest and careful witnesses, who were genuinely trying to assist the court. I accept their evidence as truthful and reliable.

51. Mr Cole's cross-examination of Mr Fealy focussed on the early part of the 12 months qualifying period ending with day before Interiors went into creditors' voluntary winding up and thus starting on 19 November 2012. It was not suggested to Mr Fealy that ML had ceased trading at any time during the qualifying 12 months period once trading had actually started.

52. Despite a searching cross-examination by Mr Cole, I am satisfied that Mr Fealy was not shaken in his evidence that ML had taken all the necessary preliminary steps to enable it to start work on the Morson Road project on Friday 16 November. An estimate, dated 29 October 2012, had been submitted, initially only for labour for plastering works, although expressly contemplating an additional mark-up of 15% to the invoice cost of any materials supplied for daywork items. A method statement, dated 9 November 2012, had been produced. Workplace risk assessments, dated 9 November 2012, had been drawn up, including one involving the use of a mobile tower for plastering which, in re-examination, Mr Fealy said ML would have had to pay for, and put in place, prior to work starting on 16 November 2012. HMRC allocated ML a unique taxpayer reference number on 16 November 2012. Most notably (at pp. 456-9 of the claimant's trial bundle), there is the first application to John Murphy & Sons for payment for labour and materials supplied to the Morson Road site for the week ended 23 December 2012. This is supported by three daywork sheets for each of the weeks ending Sunday 18 and 25 November and 2 December 2012, recording the hours worked by the same two named plasterers each week in carrying out external patching works to the building. The first of those daywork sheets refers to 9 hours worked by each of the two plasterers on Friday 16 November 2012. Mr Fealy's evidence was that ML had submitted these daywork sheets, which were verified by Murphy's site agent, and signed off by the main contractor; and that ML would have needed to have the people, the materials, and the equipment to have mobilised and carried out these works. He commented that the plasterers were not working for free. To the extent that any of these items had not been paid for at the time, I am satisfied that they represented a financial liability on ML's part. ML was required to enter all such payments and liabilities in its accounting records.

53. At the end of Mr Fealy's cross-examination I inquired whether it was sheer co-incidence that Interiors had entered into insolvent liquidation only a matter of a few days after the first anniversary of ML starting to trade, or whether the date of Interior's entry into liquidation had been deliberately selected with the provisions of the third excepted case in mind. Mr Fealy's answer to the latter part of this question was *"Absolutely not"*. I see no reason to disbelieve this answer; although I would observe that it would seem to me to make no difference to the application of the non-dormancy requirement even if the precise timing of Interiors' insolvent liquidation had in fact been contrived with this requirement in mind. The application of the statutory provisions concerning the re-use of a prohibited company name should not be distorted by the individual motivations of the company's directors.

54. I accept Mr Barrett's evidence in cross-examination that he was in error by one working day when, as its chairman, he had reported to the statutory meeting of ML's creditors that the company had commenced trading on 19 November 2012 – a Monday: see p. 714 of the claimant's bundle. I am satisfied, by reference to reliable contemporaneous

documentary evidence, that ML had in fact started work on the Morson road project on the previous Friday, 16 November 2012. I accept Mr Barrett's evidence that he had made a genuine (albeit minor) error because he had not had the relevant documents to hand at the time he had completed his report.

The non-dormancy requirement: submissions

55. The claimant's case is that the defendants must show that ML undertook transactions that were required by s. 386 of the Companies Act 2006 to be included in ML's accounting records throughout the whole of the qualifying period of 12 months ending on 19 November 2013. For the whole of this period to be covered, those transactions must, as a minimum, have started before 20 November 2012. Mr Cole's central submission is that there is no sufficient evidence of any qualifying transactions before 20 November 2012. Therefore ML was not non-dormant for the whole of the qualifying period, and the third excepted case does not apply. According to Mr Cole, it is not sufficient for the defendants simply to demonstrate trading at some point in time during the 12 months qualifying period. Nor is it enough that ML had engaged in some activity, such as tendering, or providing services, or in preparing to transact business. There must be evidence of actual transactions, involving the receipt or expenditure of money, or affecting ML's balance sheet. Mr Cole submits that on the available evidence, there were no such transactions.

56. Mr Goldstein submits that the one remaining plank of his clients' defence is not only *"beguilingly straightforward but also compelling"*. The defendants' primary case is that it is sufficient for them to demonstrate that ML was non-dormant at some time during the 12 months qualifying period. But, in any event, Mr Goldstein submits that the evidence demonstrates that ML *"hit the ground running"*, even before it was incorporated. ML was trading, and thus non-dormant, throughout the period from its incorporation on 14 November 2012, with physical work starting on site at 9 Morson Road on Friday 16 November, and with activity continuing at all times thereafter, both during, and after, the 12 months qualifying period ending on 19 November 2013.

57. Given the dearth of judicial authority on the concept of non-dormancy, Mr Goldstein places reliance on a statement at paragraph CAF[13.33] of *Butterworths Corporate Law Service*, in a section dealing with audit exemption for dormant companies. The text explains that a company that is dormant, as defined in company law, is usually entitled to exemption from an annual audit. That exemption relates only to the annual audit requirement – a dormant company must still prepare annual accounts in accordance with the accounting provisions of company law; and must deliver a copy of those accounts to the registrar within the normal period set for the filing of accounts. The text explains that a company is dormant for any accounting period during which it does not have any *"significant accounting transaction"*. The text then cites the statutory definition in s. 1169(2) and (3). The paragraph concludes:

A company that is dormant ceases to be so as soon as a significant accounting transaction occurs.

In reliance on this statement, Mr Goldstein submits that once a company has made a significant accounting transaction, it then ceases to be dormant.

58. Mr Goldstein submits that a company is dormant during a particular financial year if there were no significant financial transactions at any point during that year. His primary submission is that s. 1169 is referrable to *"any period"* – as distinct from *"any time"* - in which the relevant company has no significant accounting transaction. In this case, that means the whole period covering the company's first financial year. It is sufficient for the defendants simply to prove that ML had engaged in some trading (involving the significant financial transactions required by s. 1169) during that 12 months period in order to qualify as a non-dormant company. Mr Goldstein argues that the commentary in *Butterworths Corporate Law Service* (cited above) supports this submission, which represents sound common sense. In short, it is not necessary for the defendant directors to establish that at all times during the 12 months qualifying period ML had been engaged in trading without reference to the relevant *'period'* (i.e. the financial year in question). If a company is clearly non-dormant at some point during a relevant financial year, the proper inference is that it not dormant at all during that financial year, and it becomes otiose to scrutinise the position further. Dormancy is demonstrated, and is therefore to be determined, by reference to a company's accounts.

59. Mr Goldstein submits that it is simply unnecessary for the defendants to prove that ML actually traded every day during the 12 months qualifying period prior to Interiors' liquidation. Indeed, he suggests that this would be practically impossible for any company to demonstrate, and would tend to make the third exception impossible to satisfy in practice. It would be taking matters too far to require the defendants to prove that ML was trading 24 hours a day, seven days a week, for the entire 12 months qualifying period. Once trading has commenced, a company can no longer be considered dormant for that financial year without making a declaration to that effect.

60. It is Mr Goldstein's primary submission that in order to be able to rely upon the third excepted case, all that the defendants need to establish is that at some point during the qualifying period encompassed by ML's financial year ending 30 November 2013 (but with reference to the period of 12 months ending on 19 November 2013) the company was trading. It is unnecessary for the defendants to prove that ML traded every day during this period. Since ML filed non-dormant accounts for the financial year ending 30 November 2013, it follows that ML was non-dormant for the purposes of the third excepted case; and the defendants can rely upon that exception.

61. Should the court reject his primary submission, Mr Goldstein's fallback submission is that ML in fact traded from incorporation (or at least from and including 16 November 2012) up to and beyond 19 November 2013, and thus for the full 12 months qualifying period. Mr Goldstein emphasises the difficulties the defendants have experienced in recovering supporting documentation evidencing ML's trading from the company's accountants and liquidators after this interval of time. He reminds the court that a claim was first raised only as (relatively) recently as 9 June 2022. However, despite these evidential difficulties, which are no fault of the defendants, Mr Goldstein submits that the defendants' oral evidence, which is supported by such documentary evidence as is available, establishes that ML traded throughout the full 12 months qualifying period. Therefore the claim should be dismissed.

62. Mr Goldstein emphasises that this is not the classic case of a phoenix company trading under a prohibited name. ML was not left *'on the shelf'*, waiting to be activated. It had been actively tendering for work even before it was incorporated. The evidence is clear that ML sprang into life immediately on 16 November 2012. There is no suggestion

that any of the documents produced by the defendants are unreliable. The defendants' oral account of events can be corroborated by just a few documents, showing that ML had been undertaking the preparatory steps required to start work on 16 November 2012. There is a claim for payment for labour and materials during the week ending 18 November, which shows that work started on the previous Friday, 16 November. Even though payment was not made until later, what matters is the necessary underlying purchases of materials and the provision of labour, all of which had to be paid for, and thus recorded as significant accounting transactions in ML's books and records.

63. In his oral submissions to the court, Mr Cole submitted that it was not necessary to grapple with the meaning of *"any period"* in s. 1169(2). The relevant period for the purposes of the third excepted case is that expressly identified in r. 22.7(a): *"... the whole of the period of 12 months ending with the day before the liquidating company went into liquidation"*. In the present case that is the 12 months ending on 19 November 2013. Essentially it is a jury question: was there any time in that 12 months period when there was no significant accounting transaction? Mr Cole submits that significant accounting transactions must start immediately prior to that 12 months period, and continue thereafter, so as to encompass the whole of that 12 months period. He contends that Mr Goldstein's submission that some trading during the 12 months qualifying period will suffice is wrong. It is contrary to the wording of r. 22.7. It is contrary to Chadwick J's statement in *Penrose v Official Receiver* [1996] 1 WLR. 482 at 490 A-B that:

The third excepted case in r. 4.230 shows that the mischief is not thought to exist in a case where the company having a prohibited name has been established and trading under that name for a period of not less than 12 months before the liquidating company went into liquidation. The former director of the liquidating company can join, or can remain a member of, the board of such a company without restriction. That must be because the mischief is not perceived to exist when the company having a prohibited name is not a 'phoenix'.

Nor does it address the mischief of the Phoenix syndrome: that of a shelf company that is brought to life bearing a prohibited name.

64. Mr Cole submits that Mr Goldstein's error lies in treating r. 22.7 in the same way as the auditing and accounting rules for companies. Dormancy is treated differently in the Insolvency Act and Rules and in the Companies Acts. For the purposes of the third excepted case in r. 22.7, the question is whether the company is non-dormant **throughout** the qualifying period. For the purposes of the accounting provisions of the Companies Acts, the question is whether the company is dormant **at any time during** the relevant period. The quotation from *Butterworths Corporate Law Service* (cited above) is entirely apposite when a dormant company ceases to be so for accounting purposes: as soon as a company ceases to be dormant, it loses the exemption from the requirement for an annual audit for that financial period. But it has no direct application when one is considering the third excepted case because that exception only applies when a company is non-dormant **throughout the whole** of the 12 months qualifying period. The passage cited cannot be translated from an accounting to an insolvency scenario.

65. On the evidence, Mr Cole submits that there is no sufficient documentary evidence of transactions of the relevant, significant accounting kind before 20 November 2012.

Trading, or preparing to trade, are not enough. There must be significant accounting transactions. Mr Cole points out that during the course of his evidence, Mr Fealy has fleshed out the defendants' case on ML's trading between its incorporation on 14 November, and 20 November 2012. He says that the defendants have effectively advanced a new case, asserting that transactions took place before work actually started on the Morson Road project. Given the importance of that evidence to the defendants' case, Mr Cole comments that it is surprising that none of this has appeared in evidence previously. He invites the court to treat this self-serving evidence with caution. He points out that there is still no evidence about when the two plasterers were actually paid. He invites the court to find that the interval between 14 and 20 November 2012 has not been sufficiently addressed in the evidence. The defendants have therefore not discharged the evidential burden of bringing themselves within the third excepted case.

66. In his reply, Mr Goldstein reminded the court that any contravention of s. 216 involves criminal, as well as civil, sanctions. He emphasised the principle against doubtful penalisation when the court comes to consider the true ambit of the third excepted case.

67. Those were the submissions. I therefore turn to my conclusions, and my reasons for them.

Conclusion and reasons

68. In my judgment, this claim falls to be dismissed. I reject Mr Goldstein's submission that it is sufficient for the defendants to demonstrate that ML was non-dormant **at some time** during the 12 months qualifying period. I prefer Mr Cole's submission that the defendants must show that ML undertook transactions that were required by s. 386 of the Companies Act 2006 to be included in ML's accounting records **throughout the whole** of the qualifying period of 12 months ending on 19 November 2013, and thus starting before 20 November 2012. However, I reject Mr Cole's further submission that there is no sufficient evidence of any qualifying transactions before 20 November 2012. On the evidence, I find, consistently with Mr Goldstein's case, that the evidence demonstrates that ML *"hit the ground running"*, even before it was incorporated; and that ML was engaged in significant accounting transactions, and thus non-dormant, throughout the period from its incorporation on 14 November 2012, with physical work starting on site at 9 Morson Road on Friday 16 November, and with such transactions continuing at all times thereafter, both during, and after, the 12 months qualifying period ending on 19 November 2013.

69. I have already set out the seven propositions that I derive from the reported case law authorities on the third excepted case at paragraph 30 of this judgment. Of particular resonance in the present case are proposition (4) – when read in in conjunction with proposition (3) – and propositions (6) and (7). For ease of reference, I set them out again:

(3) Although the 'phoenix syndrome' is the principal target of the statutory provisions, however, the wording of the provisions encompasses factual situations that cannot be described in those terms. The court should not strive to strain the clear language of the statutory provisions by unacceptable methods of judicial interpretation, or seek to adopt a strained interpretation of the words of the statute simply in order to confine its operation to true cases of the phoenix syndrome. Moreover, it is difficult to distinguish between good and bad phoenix situations, and between honest and unscrupulous

traders; and the court needs to recognise that the statutory provisions do not attempt to do so.

(4) Nevertheless, the statutory provisions should not be construed so as to include transactions which do not fall within their scope on a fair interpretation.

…

(6) The 'principle against doubtful penalisation' is an important principle of statutory construction which mandates that a person should not be penalised except under clear law. That principle is to be applied to the imposition of civil, as well as criminal, liability. The court should therefore strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear.

(7) The purpose of the third excepted case is to exclude the operation of ss. 216 and 217 where the second company is not a 'phoenix' company. The mischief is not perceived to exist where the company having a prohibited name has been established and trading under that name for a period of not less than 12 months before the earlier company went into liquidation. The former director of that company can join, or can remain a member of, the board of the second company without restriction. The exception in r. 22.7 is aimed at a situation where there is a previously established and active business, trading with limited liability. Customers and suppliers who deal with such a business will know that they are dealing with an entity with limited liability, just as they always have done. The non-dormancy requirement in r. 22.7 (b) is clearly there to avoid the device of a company being kept 'on the shelf' with a prohibited name, ready to be used when an earlier company enters into liquidation.

I have also expressed my disquiet at the opacity, and the tortuous drafting, of the non-dormancy requirement at paragraph 31 of this judgment. Whilst I am sure that a Crown Court Judge (or magistrates) could craft a suitable, and comprehensible, direction to a jury (or to themselves), explaining the necessary elements of the offence of re-using a prohibited company name, I do not envy them the task of doing so.

70. Mr Goldstein's submission that it is sufficient for the defendants to demonstrate that ML was non-dormant **at some time** during the 12 months qualifying period runs counter to the clear wording of r. 22.7. When the requirement in paragraph (b) that the second company *"has not at any time in those 12 months been dormant"* is construed in conjunction with the reference in paragraph (a) to *"the whole of the period of 12 months ending with the day before the liquidating company went into liquidation"*, it is clear that Mr Cole's construction is correct. The defendants must show that ML undertook transactions that were required by s. 386 of the Companies Act 2006 to be included in ML's accounting records **throughout the whole** of the qualifying period of 12 months ending on 19 November 2013, and thus starting before 20 November 2012. It is not sufficient for the defendants simply to demonstrate trading at some point in time during the 12 months qualifying period.

71. I agree with Mr Cole that the fallacy underlying Mr Goldstein's suggested construction lies in conflating the requirement of non-dormancy in the third excepted case provided for by r. 22.7 with the auditing and accounting rules for companies. I accept that dormancy is treated differently in the Insolvency Act and Rules and in the Companies

Acts. For the purposes of the third excepted case in r. 22.7, the question is whether the company is non-dormant **throughout** the qualifying period. For the purposes of the accounting provisions of the Companies Acts, the question is whether the company is dormant **at any time** during the relevant period. The quotation from *Butterworths Corporate Law Service* (cited at paragraph 57 above) that *"a company that is dormant ceases to be so as soon as a significant accounting transaction occurs"* is entirely apposite when a dormant company ceases to be so for accounting purposes: as soon as a company ceases to be dormant, it loses the exemption from the requirement for an annual audit for that financial period. But it has no direct application when one is considering the third excepted case because that exception only applies when a company is non-dormant throughout the whole of the 12 months qualifying period. The passage cited cannot be translated from an accounting to an insolvency scenario.

72. That construction is clearly entirely consistent with Chadwick J's understanding of how the previous iteration of the third excepted case was intended to operate when, in the passage from his judgment in *Penrose v Official Receiver* [1996] 1 WLR. 482 at 490 A-B (cited at paragraph 63 above), he observed that:

The third excepted case in r. 4.230 shows that the mischief is not thought to exist in a case where the company having a prohibited name has been established and trading under that name for a period of not less than 12 months before the liquidating company went into liquidation.

That construction also appropriately addresses the mischief of the Phoenix syndrome: that of a shelf company that is brought to life bearing a prohibited name.

73. In my judgment, that construction does not mean that the defendants bear the burden of proving that ML was actually undertaking significant accounting transactions **every day** during the 12 months qualifying period prior to Interiors' liquidation. I agree with Mr Goldstein that it would be taking matters too far to require the defendants to prove that ML was undertaking significant accounting transactions 24 hours a day, seven days a week, for the entire 12 months qualifying period. Once a company has commenced undertaking significant accounting transactions, it is to be considered as non-dormant unless and until it ceases trading. Mr Cole implicitly recognised this by: (1) focussing his cross-examination of Mr Fealy on the early part of the 12 months qualifying period starting on 19 November 2012; and (2) refraining from any suggestion that ML had ceased to trade at any time during the qualifying 12 months period once trading had actually started.

74. I also accept Mr Cole's further submission that it is not enough to invoke the third excepted case for the defendants to show that ML had engaged in some business activity, such as tendering, or providing services, or in preparing to transact business. There must be evidence of at least one significant accounting transaction at the very start of the 12 months qualifying period that is required to be entered in the second company's financial records, and of such transactions continuing thereafter throughout that 12 months period. I reject Mr Goldstein's primary submission that all that the defendants need to demonstrate, in order to bring themselves within the third excepted case, is that ML was trading at some point during the qualifying period encompassed by ML's financial year ending 30 November 2013 (but with reference to the period of 12 months ending on 19 November 2013). ML's filing of non-dormant accounts for the

financial year ending 30 November 2013 is not sufficient to establish non-dormancy for the purposes of the third excepted case.

75. However, I accept Mr Goldstein's fallback position that ML had in fact entered into significant accounting transactions from (at the latest) 16 November 2012 up to and beyond 19 November 2013, and thus for the full 12 months qualifying period. It is clear on the evidence – and I so find – that whether or not it had actually paid for them, from and including 16 November 2012 ML had incurred liability to make payment for the materials and equipment (such as the mobile tower) required by the plasterers, and to pay for their labour; and that ML was entitled to look to Murphy Construction to reimburse the cost of such materials (with appropriate agreed mark-up) and labour. I am satisfied that such matters were significant accounting transactions that were required to be entered in ML's accounting records. It follows – and I also find as a fact – that ML was non-dormant during the whole of the 12 months qualifying period; and that the defendants are therefore entitled to rely upon the third excepted case by way of defence to the present claim.

Disposal

76. For the reasons I have given, this claim is dismissed on the sole remaining ground of defence, that the defendants have brought themselves within the third excepted case in r. 22.7.

77. I invite the parties to seek to agree a substantive order to give effect to this judgment. This should include provision for the costs of this claim. At the end of the hearing, Mr Cole indicated that should the claimant lose this case, he would wish to contend that costs should not follow the event in the usual way. He pointed out that of the five issues that were in dispute between the parties at the time this trial was originally listed (for three days), commencing on 8 April 2024, only one still remained live at the start of this trial. Even then, the limitation issue had only formally been conceded during Mr Goldstein's opening. I appreciate that; but the fact remains this was an opportunistic claim, purchased from the original creditors at a massive discount to its face value, and pursued as part of the claimant's business model. Further, the defendants only needed to succeed on the non-dormancy issue (as they have) to secure the dismissal of the claim. Those factors will also need to be factored into the equation when the court comes to address the issue of costs.

78. If the parties cannot agree on a suitable form of order, they should provide a draft composite order, together with brief written submissions on any outstanding consequential matters (including costs). These should be no longer than strictly necessary, and, in any event, no more than five pages in length. They should be submitted within 14 days after the formal hand-down of the court's judgment (i.e. by 4.00 pm on Friday 15 November 2024). Unless I direct otherwise, I will proceed to determine any outstanding matters on paper, in furtherance of the overriding objective of saving costs, avoiding unnecessary delay, dealing with the matter proportionately, and having due regard to the efficient and effective use of the court's scarce resources.

79. I propose formally to hand down this judgment remotely at 10.00 am on Friday 1 November 2024. No attendance is required. I will extend the time for appealing to 42 days after formal hand down (i.e. to 4.00 pm on Friday 13 December 2024). I direct that written submissions in support of any application for permission to appeal, with

concise draft grounds of appeal, are to be filed and served within 14 days after formal hand down (i.e. by 4.00 pm on Friday 15 November 2024). Unless I direct otherwise, I will determine any such application on paper.

80. That concludes this reserved judgment.