Neutral Citation Number: [2024] EWHC 2819 (Ch)

Case No: CR-2023-000422

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/11/2024

Before :

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between :

ASERTIS LIMITED **(2) MARK ELIGAH THOMAS BOWEN (in his capacity as Liquidator of Solstice (SW) Limited- in liquidation)**	**Applicants**
- and -	
SEAN ADRIAN MELHUISH **SHENA JOY MELHUISH** **LOUISE BOWMAN**	**Respondents**

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ANJA LANSBERGEN-MILLS (instructed by **Morgan Phelps Solicitors**) for the **Applicant**
SEAN ADRIAN MELHUISH not attending
SHEENA MELHUISH in person
LOUISE BOWMAN in person

Hearing date: 25 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 7 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. By an assignment dated 20 May 2022 Mark Bowen, in his capacity as Liquidator of Solstice (SW) Limited, assigned all claims, rights, titles, remedies, interests, benefits and/or actions he was capable of pursuing against the Respondents, to Asertis Limited.

2. The Liquidator now makes an application to ask the court to make declarations as to his entitlement to provide documentation obtained pursuant to his powers under section 236 of the Insolvency Act 1986 to the assignee and for the assignee to make use of the documents in pursuing the assigned cause of action (the "Application"). Louise Bowman, the daughter of Mr and Mrs Melhuish does not support the Application but neither does she resist. The trial of the assigned claim is set down for three days beginning 26 November 2024. Mr Melhuish is unwell and seeks an adjournment of the trial. Mrs Melhuish resists the Application and supports the application to adjourn.

3. The majority of time allotted for this hearing was concentrated on Mr Melhuish's adjournment application which was supported by an independent medical report produced by Professor Jason Payne-James, dated 6 September 2024. Following submissions I gave an extempore judgment and vacated the trial. I ordered a directions hearing to be held on the first day allocated for trial.

4. I gave short reasons for finding that the Liquidator was able to disclose documents obtained in the course of the liquidation to the assignee but stopped short of answering the second question about their use in subsequent litigation or whether permission of the court was required. What follows is my reasoning for answering these questions in the affirmative.

Background

5. The trade of Solstice Limited (the "Company") related to insurance surveying and repairs. It had contracts for large insurance companies. Mr Melhuish was a director from December 2013 to March 2014. There was some overlap with the appointment of Mrs Bowman who was appointed in December 2013. She resigned on 27 June 2019. Mrs Melhuish was appointed on the resignation of Mrs Bowman and continued until the Company entered liquidation at a creditors' meeting held on 2 January 2020.

6. Mark Bowen was appointed Liquidator at the creditors meeting and began to investigate, as he was bound to do, the Company's affairs. He identified an overdrawn employees' loan account, unjustified withdrawals of funds, and diversions of funds received from the Company's counter-parties to the personal accounts of Mr and or Mrs Melhuish.

7. On 5 January 2022 Mr Bowen caused his solicitors to write a letter before action. It was sent to solicitors instructed for the three Respondents. No 'substantive' response was received to the letter before action. On 10 March 2022 solicitors acting for the Liquidator wrote informing the Respondents that he would write to specialist litigation funders to sell the claims he had identified. He invited the Respondents to take part in the process and bid for the claims. The letter informed the Respondents that if they (or a litigation funder)

expressed interest in tendering, a non-disclosure agreement would be entered: "to preserve the confidential nature and legal privilege of the Claims, before releasing the same." The non-disclosure agreement included an undertaking that all information provided to the recipient be kept confidential.

8. Asertis issued an application notice dated 25 January 2023 seeking remedies against the Respondents, under the assigned causes of action. The application notice attached a pleaded points of claim. Deputy Judge Kyriakides made an order on 8 March 2023 requiring the Respondents to file and serve points of defence by 3 May 2023. A subsequent order extended the time for filing to 4pm on 7 August 2023 on unless terms. Mrs Melhuish and Mrs Bowman filed their defence but Mr Melhuish did not. He was accordingly de-barred from relying on any evidence in answer to the substantive application without first obtaining permission of the court. Judge Jones gave directions to trial on 28 September 2023. Mrs Melhuish failed to comply with several orders of Judge Jones. As a consequence she was de-barred in a similar way to Mr Melhuish.

9. At a hearing held on 2 September 2024 Judge Burton noted an objection to Asertis's use of personal bank statements obtained from the Secretary of State for Business, Innovation and Skills and Aviva Insurance Limited, by the Liquidator, pursuant to an order made by District Judge Rich on 19 March 2021. The Liquidator had made an application on 18 February 2021 for production by the Secretary of State and Aviva Insurance Limited of various documents including the bank statements pursuant to his powers provided by section 236 of the Insolvency Act 1986.

10. Mr Bowan provided a witness statement in support of the application which stated that the relevant bank accounts had been operated by or linked to the Company. The Secretary of State was in possession of information about the linked bank accounts (held and Barclays Bank and Santander plc) as it had obtained possession of certain documents under a Court Production Order in the course of a criminal investigation. Further Aviva, being a customer of Company, was likely to have details of the destination of payments it made to the Company.

11. Judge Burton directed Asertis not to rely on the bank statements without making an application to court to determine its entitlement to do so. Asertis made an application on 11 October 2024 in accordance with the direction provided by Judge Burton. It was served on 21 October 2024.

The objection

12. The objection to use of the personal bank statements can be stated concisely. Mrs Melhuish says that she had been asked to provide her personal bank statements to the Liquidator and refused. She says she has never given her consent to their use in these proceedings. She says that the Respondents have been aware that the Liquidator held the bank statements and wrote to him in September 2024 asking how the statements had been "used". She also wrote to Aviva and the Insolvency Service.

13. In his statement dated 11 October 2024, Mr Bowen accepts that he provided the bank statements to Asertis under the assignment. He explains that the essence of the claim made

against the Respondents is a diversion of money "through non-Company bank accounts, which can only be evidenced by the Bank Statements". He says:

> "I have a statutory duty as Liquidator of the Company to investigate the Company's affairs, dealings and property and, where achievable, to realise assets for the benefit of creditors. I consider that there is a public interest in such function/ duty. In this particular case, I consider that such public interest was furthered by me providing the Section 236 Disclosure [to Asertis] … and that such public interest remains extant where there could be deferred consideration paid into the liquidation estate consequent upon the applicant being successful in the substantive application… To the extent that [Asertis] is prevented from using …any of the Section 236 Disclosure … I consider that there is a real risk that such proceedings will be unsuccessful."

Legal analysis

14. Section 235 of the Insolvency Act 1986 provides that the Respondents, who had been officers of the Company, were under an obligation to:

> "give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the [Company went into liquidation]."

15. Section 236 of the Insolvency Act 1986 provides a power to the court to require the Respondents to produce any books, papers or other records in their possession or under their control relating to the Company.

16. The Respondents refused to provide the relevant bank statements to the Liquidator on request. Mr Bowen has explained that he wanted the records for the purpose of the liquidation. The Respondents do not take issue with his statement. As the Respondents had not provided the bank statements the Liquidator was entitled to make an application to court to obtain them from:

> "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company".

17. The first, I think unequivocal proposition, is that once an office-holder obtains documents using the compulsion powers, the office-holder is subject to an implied duty of confidentiality: *Hamilton v Navided (Re Arrows Ltd No 4)* [1995] 2 AC 75. 102; *Marcel v. Commissioner of Police of the Metropolis* [1992] Ch. 225.

18. In *R. v Brady* [2004] EWCA Crim 1763 information obtained by the Official Receiver under compulsion was provided to the Inland Revenue in assistance of its criminal investigations. Tuckey LJ explained [23]:

> "Confidentiality is conceded, but it is necessary to examine why the material is confidential. It is not because the information provided is private, but because it has been obtained by compulsion in circumstances where the rule against self-incrimination cannot be invoked."

19. The second, unequivocal proposition concerns the extent of the duty of confidentiality.

20. In *Soden v Burns* [1996] 1 W.L.R 1512 Robert Walker J (as he was) usefully described the duty of confidence as [1522 G-H]: "a qualified duty". The qualification is referred to by Lord Browne-Wilkinson in *Re Arrows Limited* [103 F-G]:

> "The Liquidator cannot be under any duty of confidence which will prevent the performance of these statutory duties."

21. In *Re Arrows Limited* the director of the company had been examined by the Liquidator using the compulsion powers. The Serious Fraud Office served a notice under the Criminal Justice Act 1987 requiring the appointed liquidator to produce the transcripts of the examination. It is, in these circumstances, for the criminal court to decide whether admission of the transcripts would prejudice a fair trial. I should point out that in his judgment Lord Browne-Wilkinson distinguished between the compulsion powers exercised under section 235 and those exercised under section 236 of the IA 1986. He said [p102] that he was not deciding anything about section 235 IA 1986.

22. Lord Browne-Wilkinson explained that he would be prepared to regard the public interest in ensuring the free flow of informally obtained information under s.235 as much greater than it is in relation to transcripts of formal examinations under s.236. It is not immediately clear to me why the distinction was drawn or why a court should reach a different decision depending on which power of compulsion is used by a Liquidator.

23. The issue was not argued before me so I need trespass no further save to say that subsequent to this case the issue of immunity from action has been considered by the Court of Appeal, which was required to determine whether the immunity from suit applied to statements made by an examinee during a private examination conducted under s.236 of the IA 1986: *Al Jaber v Mitchell* [2022] Ch 212. Asplin LJ found [96-100, 103], that given the nature of the s.236 examination and that the judge and the liquidator enjoyed immunity, the examinee was entitled to immunity for statements made in the examination, whether orally or in writing.

24. The extent of the duty was drawn out by the House of Lords which unanimously found that the duty would provide no excuse to liquidators for their failure to comply with a notice to produce made under the Civil Justice Act 1987 as the duty cannot operate to prevent the person obtaining the information:

> "from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure."

25. Neither can the duty be so all encompassing as to prevent that it will prevent the performance of the duties imposed by statute [103 F-G].

26. The third proposition that must be considered is whether permission should be permitted if the duty of confidence is relaxed and the documents or information are to be used for the purposes for which the power was conferred. In *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708 the plaintiffs issued an application for permission to use documents in litigation, that were obtained under the equivalent of section 236 IA 1986. Millett J said: [p723 H):

> "to make use of material obtained by the use or under the threat of sec. 268 proceedings, then, save in exceptional circumstances, leave should be granted only if the use proposed to be made is within the purpose of the statutory procedure, that is to say, that the use proposed to be made of the material is to assist the beneficial winding-up of the company."

27. He went on to say, that although this is the position, if a liquidator sought permission, the same would apply if the material had been provided to another interested person, such as a member of the liquidation committee.

28. In *Re Arrows* case Lord Browne-Wilkinson thought that the words "to assist the beneficial winding-up of the company" were too wide and although agreeing that the primary purpose of a section 236 examination is to assist the beneficial winding up of the company, it is not its only purpose.

29. Lord Browne-Wilkson added: [p104 D-E].

> "The extraction of private and confidential information under compulsion from a witness otherwise than in the course of inter partes litigation is an exorbitant power. It is right that such information should not be generally available but should be used only for the purposes for which the power was conferred. Although, as will appear, in my view there are severe limitations on the way in which such discretion can be exercised where prosecuting authorities are involved, it is important that no doubt should be cast on the discretion of the court to decide who shall have access to such information."

30. In Palmer's Company Law the authors comment that (15.335):

> "The current law may be summed up as follows. Information and documents obtained as a result of a private examination should normally be used only for the purposes of the winding-up, but leave of the court may be obtained to allow their use for related

> purposes, such as the bringing of proceedings for fraudulent trading or to bring about the disqualification of directors under the Company Directors Disqualification Act 1986, or upon other justifying grounds concerned with the proper attainment of justice or the statutory regulatory process over companies and directors. The phrase "in relation to the winding up" is considerably broader than "in the winding up", and thus allows an applicant such as the Official Receiver, as well as the office holder, to make wider use of the information and documents than for the limited purposes of collection, realisation and distribution of assets."

31. All the cases I have cited concern prosecuting authorities. In this case the Liquidator are provided with a power to bring proceedings against a director for the purpose of restoring or compensating an insolvent company under the control of that director.

32. As a starting point it is necessary to consider the purposes of liquidation and to some extent the duties of a liquidator (for which power is conferred).

33. In re *Barlow Clowes Gilt Mangers Limite*d [1992] Ch 208 Millett J said [221C-G]:

> "The liquidation of an insolvent company can affect many thousands, even tens of thousands, of innocent people. In the case of a company like B.C.G.M. it can affect people's life savings. In the case of a major trading company it can affect its customers and suppliers and the livelihood of many thousands of persons employed by other companies whose viability is threatened by the collapse of the company in liquidation. An insolvent liquidation cannot be dismissed as "just a case about money." There is a major public interest in ensuring that the liquidation of an insolvent company is conducted by the court's officers in an efficient and expeditious manner. In order to enable Liquidators to discharge their functions, they need to have access to information about the company, its assets, liabilities, dealings and affairs from those capable of giving such information to them. These will include not merely the former directors, but others such as auditors, solicitors and bankers. Most of the witnesses in the present case fall into these categories. To this end Parliament has entrusted the Companies Court with extraordinary powers…the company's affairs, so that he may carry out the liquidation in all its various aspects."

34. In considering the nature of the powers to obtain information (and perhaps documents) Millett J said [221A]:

> "The process is an extraordinary and secret mode of obtaining information required for the proper conduct of the winding up. The section—earlier versions of which stretch back into the

> middle of the last century—has been described as conferring an extraordinary power of an inquisitorial nature and even compared—not, I think, favourably—to the Star Chamber: In re Greys Brewery Co. (1883) 25 Ch.D. 400, 408, per Chitty J."

35. The purpose of an insolvent liquidation may be summarised as to investigate the causes of insolvency, collect-in the assets of the company, make distributions in accordance with the statutory scheme and file reports to the various authorities. Professor Keay in his work, McPherson & Keay's Law of Company Liquidation 5th Ed. provides a more elegant summary [1-005]:

> "The purposes of the liquidation of insolvent companies are often seen as: first, providing a procedure that allows for an equitable and fair distribution of the assets of the debtor company amongst its creditors. This means that one or more creditors are not discriminated against and one or some creditors do not profit at the expense of other creditors; secondly, in providing for the winding up of a company which is hopelessly insolvent, liquidation serves the community at large as it is not good for society that companies who are insolvent are able to continue to trade. In a sense this is a public interest factor; thirdly, liquidation is designed to allow for an investigation of the company's affairs by an independent and appropriately qualified person, with particular emphasis on the circumstances which precipitated the winding up. Such an investigation may reveal improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action. Further, the investigation may disclose the fact that there were unfair dispositions of property, which has reduced the ability of the company to pay its creditors. A purpose of the winding up of both solvent and insolvent companies is to prepare companies for the end of their existence by eventual dissolution."

36. The assets of an insolvent company are not limited to its physical assets and cash in the bank. The assets may include, for instance, intellectual property rights and choses in action. As part of his functions a liquidator will investigate the assets (and liabilities) and make commercial decisions about collection and distribution.

Discussion

37. A liquidator is empowered to bring proceedings to collect in the assets. A new power was introduced by the Small Business, Enterprise and Employment Act 2015, section 218. The section was included in Part 10 of the 2015 Act. The explanatory note for the Bill states:

> "The Insolvency Red Tape Challenge identified a number of measures to improve the efficiency of insolvency processes, which will reduce costs of administering insolvency proceedings leading to higher returns for creditors"

38. Ms Lansbergen-Mills draws my attention to an impact assessment produced by the insolvency service dated 14 June 2014:

> "Currently, a Liquidator may bring a civil claim for fraudulent or wrongful trading against the directors of an insolvent company. An administrator or Liquidator might do the same to recover property where there has been a preference given, a transaction at an undervalue, or an extortionate credit transaction. These actions can only be brought by the Liquidator in respect of fraudulent trading and wrongful trading and by the administrator or the Liquidator ("the officeholder") in respect of the other causes of action. They are not capable of assignment to a third party. However, not many of these actions have been taken forward in the past. Government intervention is required to ensure that all opportunities are given to officeholders, to recover monies from those individuals who cause loss to creditors (particularly the unsecured creditors) by taking advantage of the privilege of limited liability, where there has been misconduct. We wish to give the officeholder the maximum opportunity and flexibility to take forward any potential claims and to get the best value for creditors. The intended effect of the policy is to increase confidence in the insolvency and enforcement regime by using the current laws to increase the likelihood of miscreant directors being held accountable for their actions and being required to compensate creditors in cases where they have acted inappropriately."

39. When the Bill came before the Public Bill Committee on 4 November 2014 (the thirteenth sitting) Toby Perkins expressed the concern that the investigatory powers would remain with the office-holder but the assignee would need the information obtained under those powers:

> "Office holders are given the necessary powers because they can be relied on to pursue an investigation in the correct manner and a regulator is in place to ensure that they do so. The third party, in this case, would nevertheless require access to the necessary information to pursue the claim, and currently the only way of obtaining such information is through the office holder. On the assumption that there can be no suggestion of the office holder's powers being delegated to the assignee, it is difficult to see how the proposal could be implemented… Where does the balance of responsibility sit in the process of assigning a cause of action in terms of the confidential information that the office holder holds and can investigate?"

40. A prescient question. The response came from the minister, Jo Swinson. She said:

> "The hon. Gentleman rightly raised the issue of confidentiality. The IPs will still be bound by statutory limitations on disclosing information and the assignee will not have access to the statutory powers that exist for the insolvency practitioner. That is a particularly privileged position conferred on IPs, so that they can fulfil their statutory duties. It would not be right or appropriate to transfer those powers or, indeed, any information received under those powers. In making any assignment, the insolvency practitioner will need to consider carefully whether there are any legal restrictions—such as those in the Data Protection Act—on the information that they can pass on. It will be for the prospective purchaser who is considering taking on such an action to establish in the negotiation whether or not they can access sufficient information to bring the action and therefore whether it is sensible for them to take on the assignment."

41. The report to the House of Commons committee on 14 November 2014 repeated the exchange I have set out and added that in making any assignment, the IP would need to consider carefully whether there were any legal restrictions on the information that they could pass on, and it would be for the prospective purchaser to establish in the negotiation whether or not they could access sufficient information to bring the action.

42. It appears that no further discussion was had in respect of the assignment provision in Part 10 of the 2015 Act and clause 118 was inserted as Section 246ZD of IA 1986.

43. The usual approach to statutory interpretation in modern times is the purposive approach which emphasises the context of the legislation, designed to identify the purpose of a statute and to interpret its language, so far as possible, to give effect to that purpose. The purpose of section 246ZD IA 1986 is to provide office-holders of insolvent estates a third option to realise an asset in the insolvency. It cannot reasonably be said that its purpose is to enable confidential information to be provided to third parties.

44. The office-holder is provided with the freedom to choose whether to pursue a cause of action (whether in court or out of court), sell the cause of action (on agreed terms) or not to pursue the action.

45. Although the duty of confidence is qualified, as Robert Walker J said in *Soden v Burns* a liquidator is under a duty to obtain the best realisations for creditors as a whole, a liquidator is not obliged to sell a cause of action. It is merely an option provided by section 246ZD.

46. I do accept that it is consistent with commercial reality that any purchaser will require a liquidator to provide it with all documents necessary to substantiate the claim. This case is particularly reliant on the documents obtained under section 236 IA 1986. The discussion in Parliament in 2014 demonstrates it was alive to the issue of confidence and chose not to include an override provision.

47. There is a public interest in ensuring the free flow of information, particularly where the insolvent estate retains an interest in the outcome of any proceedings. The point taken by

Ms Lansbergen-Mills is that if the Liquidator could use documents obtained under section 236 IA 1986 in the substantive claim against the Respondents, then there is no reason why an assignee who steps into the shoes of the Liquidator should not.

48. The short answer to the submission is that the assignee does not step into the shoes of the assignor for all purposes and once the information or documents are cloaked in confidentiality they remain confidential unless there is a release from the person who benefits from the protection.

49. In my judgment it will not thwart the purpose of Parliament to ensure that confidentiality is retained where it needs to be retained. There are practical steps that may be taken to minimise risk and ensure compliance. Such steps need not be set down in stone as each case will depend on their own facts. The likely starting point is consent, and in the absence of consent a request to admit facts.

Application to the case

50. The confidentiality relates to documents including bank statements that are required to demonstrate a diversion of funds. As time for this hearing was short, I was not fully addressed on all aspects of the bank statements and whether there would have been a difference if they had been obtained using the Norwich Pharmacal procedure. The reason for the Second Respondent's objection, however, is that they do not want their private information made available to court reporters or persons able to inspect the court file.

51. In my judgment the material obtained from the Insolvency Service and Aviva should be made available to the assignee to enable the free-flow of information necessary for the purpose of satisfying the burden of proof at trial. This is consistent with the intention of Parliament to provide an office-holder with the ability to sell causes of action that would benefit the insolvent estate. To benefit the insolvent estate the office-holder will ordinarily wish to obtain the best price or retain an interest in the outcome.

52. The office-holder will be hampered in obtaining the best price if he can not disclose information material to the assessment of the cause of action. If there is a complete bar to the provision of material obtained under the compulsion powers the office-holder is likely to be handicapped when negotiating a price. He would be placed in a position where he would say to a purchaser, "I know something you don't know". Withholding material information or documents is likely to reduce the number of potential purchasers (perhaps to zero), the purchaser would be required to buy blind and in any event the price would be effected.

53. This case is not about transcripts of formal examinations and is not caught by the rule in *Al Jaber v Mitchell*.

54. If the claim is successful, there will be a greater potential benefit to creditors than the price received on sale, due to the profit sharing provisions in the assignment. Accordingly there is a public interest in ensuring the free flow of information between assignor and assignee. I say nothing about the strengths of the case.

55. To balance the rights of the Respondents the bank statements are to be redacted to hide personal information and disclose only the fact of the deposits into the account.

56. On the issue of permission, it is for the office-holder to decide whether to seek permission to provide confidential information to a prospective assignee or assignee. Similarly the assignee must decide if the permission of the court is required to use any confidential information. Ordinarily the office-holder and assignee will agree if and when an application for permission is to be made. In my judgment permission will be the usual course but each case will be fact sensitive. The Liquidator were right to seek permission in this case.

57. I would like to express my gratitude to Ms Lansbergen-Mills for her balanced approach and the extra research I asked her to do at short notice.

58. Order accordingly.